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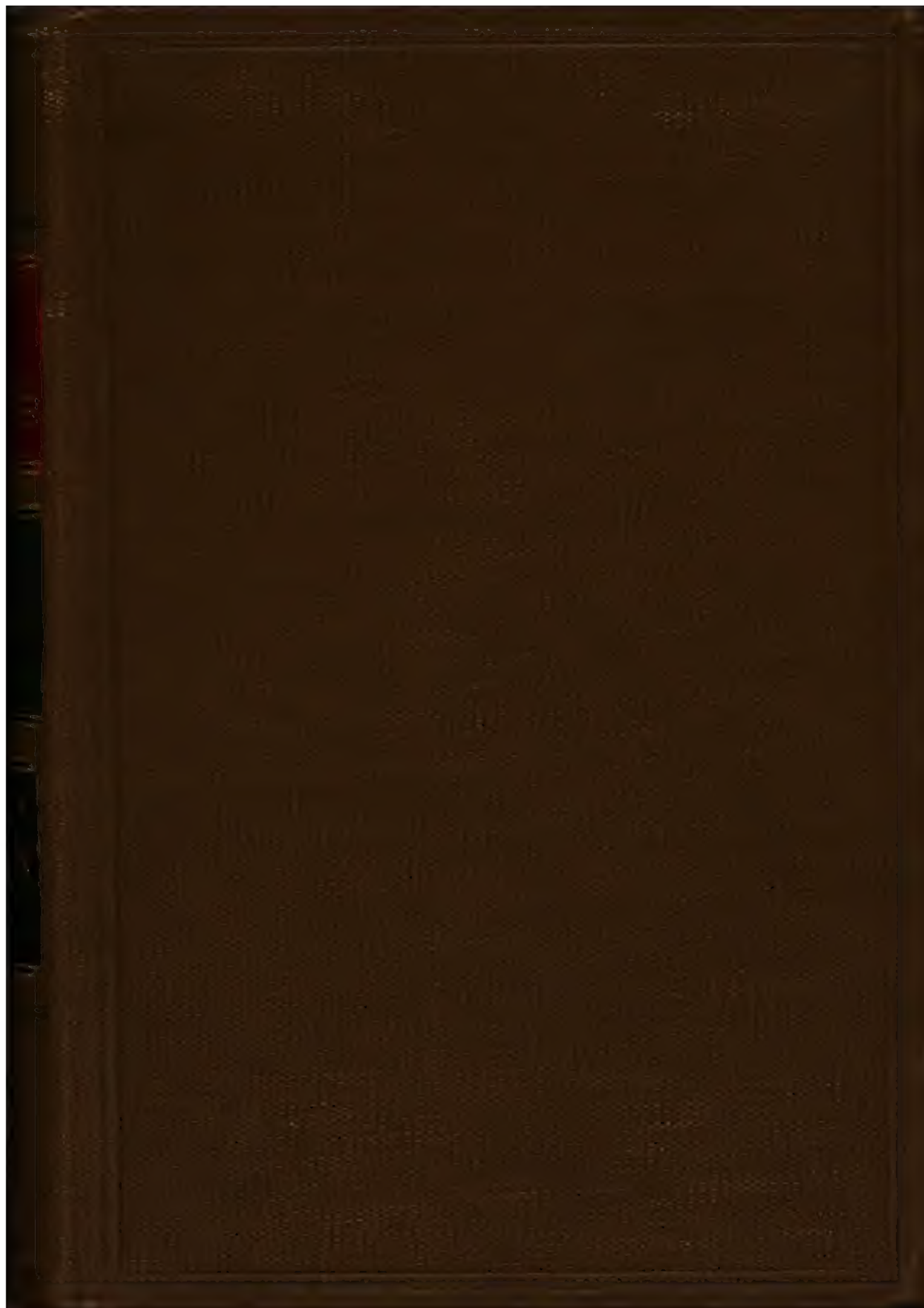
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The Law of Contracts

By

WILLIAM HERBERT PAGE

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of Wisconsin; Author of Page on Wills;
Page and Jones on Taxation
by Assessments

SECOND EDITION

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WITH FORMS

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Page on Contracts

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teet the rights of the subcontractors, materialmen, artisans and laborers.”³

These statutes usually provide for filing of plans and specifications as well as for filing the contract itself.⁴ If, however, the contract is so drawn that it embodies all the necessary specifications, it is not necessary to file specifications apart from such contract.⁵ Under the original provision of the California statute, the omission to file such contract rendered it “wholly void” and no recovery could be had thereon by either party thereto.⁶ By the express provisions of this statute, no action could be brought upon such a contract by either party thereto, if such contract was not filed in compliance with the terms of the statute.⁷ The object of such statute, however, as has been said, was to impose a penalty upon the parties so as to force them to file the contract for the protection of the subcontractors, materialmen, and the like.⁸ It was not intended to enrich either party at the expense of the other. On the one hand, the owner could not have such a contract canceled unless he had paid the contractor a reasonable compensation for work, labor and materials furnished under such contract.⁹ On the other hand, the contractor might recover reasonable compensation for work, labor and materials furnished under such contract, but his claim for compensation could not exceed the contract rate. The contract was “not the basis of his recovery, but the measure and test of his right to recover.”¹⁰ If the owner overpaid the contractor by mistake, the fact that the contract was not recorded did not prevent the owner from recovering such overpayment.¹¹

³ *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113.

⁴ *Pierce v. Birkholm*, 115 Cal. 657, 47 Pac. 681; *Keupler v. Reeve*, 79 N. J. Eq. 480 [sub nomine, *Keupler v. Eisele*, 83 Atl. 999].

⁵ *Keupler v. Reeve*, 79 N. J. Eq. 480 [sub nomine, *Keupler v. Eisele*, 83 Atl. 999].

⁶ California Code of Civil Procedure, § 1183, as enacted in 1885, California statutes, 1885, page 143.

⁷ *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113.

⁸ *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113.

⁹ *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767.

¹⁰ *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391. See to the same effect, *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113; *Mannix v. R. L. Radke Co.*, 166 Cal. 333, 136 Pac. 52.

¹¹ *Atchison, Topeka & Santa Fe Ry. Co. v. West*, 176 Cal. 148, 147 Pac. 868.

2453 CONTRACTS WHICH MUST BE IN WRITING § 1433

While the statutes of some states provide for recording contracts for the sale of realty, such provisions are made for the purpose of giving constructive notice to the world at large of such contract of sale and they are not intended to render the contract invalid as between the parties in case of failure to file such a contract for record in compliance with the terms of the statute.¹²

¹² *McPheeter's v. Ronning*, 95 Minn. 164, 103 N. W. 889. Possession under the contract is such notice thereof as to make recording unnecessary in most jurisdictions. *Strauss v. White*, 66 Ark. 167, 51 S. W. 64; *Bilansky v. Hogan*, 190 Mich. 463, 157 N. W. 13.

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CHAPTER XLII

CONTRACTS WHICH MUST BE IN WRITING, FILED FOR RECORD, ETC.

§ 1429. Contracts required by statute to be in writing—Contracts of specific classes of parties.

§ 1430. Contracts required by statute to be in writing—Special classes of subject-matter.

§ 1431. Contracts required by law-merchant to be in writing.

§ 1432. Contractual provisions requiring writing.

§ 1433. Necessity of filing contract for record.

§ 1429. Contracts required by statute to be in writing—Contracts of specific classes of parties. In considering the contracts which must be in writing as distinguished from those which merely must be proved by writing and which were considered in the preceding chapter,¹ and as distinguished from those which have been reduced to writing by the parties, although they need not be in writing and need not be proved by writing,² it must be noted that the contracts which must be in writing are of two general classes. One class consists of those contracts which are required by statute to be in writing. Of this class, one subdivision consists of contracts of persons of abnormal status, including, in some states, contracts of married women; in others certain contracts of private corporations; and in many states certain contracts of public corporations, of public quasi-corporations of the state and also of the United States. Since these contracts are closely connected with questions of status, further discussion is deferred until the subject of parties has been considered.³

§ 1430. Contracts required by statute to be in writing—Special classes of subject-matter. The other subdivision of contracts which are required by statute to be in writing consists of a miscellaneous group of contracts, some of them contracts without consideration

¹ See ch. XLI.

² See ch. XL.

³ See chs. XLVI et seq.

provision is made for excluding their operation,⁸ and the fact that trade usages and customs are regarded as a part of a contract which is made in the course of the business to which such usages and customs relate,⁹ have been explained on the theory that each of these terms is an implied contract between the parties. In the same way the duty of one who sells goods without any express promise as to the title thereof or to the quality thereof, to deliver goods to which he can pass good title and which are of the quality required by law, is explained on the theory that there is an implied promise on his part to furnish such goods.¹⁰

§ 1436. Genuine implied contracts. After eliminating the so-called implied contracts which are really provisions of express contracts deduced by construction from the express provisions thereof, and the incidents which the law adds to express contracts, unless the parties make specific provisions against such incidents, we still have two entirely distinct classes of ideas grouped under the general heading of implied contracts. As has been said before,¹ the term "contract" as used at common law included all rights which could be enforced by one of the actions *ex contractu*. By the common-law classification every contract was either express or implied, as these two classes exhausted the entire general class of contracts. If from all the rights of action which at common law could be enforced by actions *ex contractu* we subtract the rights arising out of express contract we have left a miscellaneous group of rights which the common law in its later and classic form grouped under the head of implied contracts. With the abolition of common-law forms of action in many jurisdictions, and their reconstruction on a rational basis in others, the necessity of defining such legal ideas as contract and tort without reference to the rigid form of action by which only it once was enforceable, has become apparent. Substantive law has been arranged and classified as the main division of the law, to which, in theory at least, the adjective law of pleading, practice, evidence, remedies, and procedure, is supplemental, whereas under the common-law ideas

Missouri. *Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 988.

Ohio. *Gillette v. Tucker*, 67 O. S. 106, 65 N. E. 865.

Tennessee. *Memphis Consolidated Gas & Electric Co. v. Simpson*, 118 Tenn. 532, 103 S. W. 788.

Wisconsin. *Malone v. Gerth*, 100 Wis. 166, 75 N. W. 972; *Marchand v. Bellin*, 158 Wis. 184, 147 N. W. 1033.

⁸ See § 2048.

⁹ See § 2056.

¹⁰ See § 392.

¹ See §§ 34 et seq.

substantive law was in reality a mere appendix and supplement to the law of procedure.

The modern law, as has been said before,² has treated the term "contract" as including all agreements which are enforceable at law.

When we analyze the common-law classification of implied contracts as used in this limited sense, and when we then apply to such classification the modern test of what a contract is, we find that the common-law class of implied contracts in this limited sense is made up of two distinct classes of rights.³ One of these classes consists of genuine agreements which are enforceable at law and which are therefore just as truly contracts under the modern-law test as express contracts are, and which differ from express contracts only in the fact that in express contracts the parties arrive at their agreement by words either oral or written and either under seal or not under seal; while in implied contracts of this type the parties arrive at their agreement by their acts and not by their words.⁴ A contract of this sort is a genuine contract,⁵ and it differs from the express contract only by the evidence by which

² See §§ 32 and 46 et seq.

³ *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

⁴ *Alabama*. *McFarland v. Dawson*, 125 Ala. 428, 29 So. 327.

Delaware. *Jones v. Tucker*, 26 Del. (3 Boyce.) 422, 84 Atl. 1012.

Georgia. *Maynard v. Maynard*, 147 Ga. 178, L. R. A. 1918A, 81, 93 S. E. 289.

Illinois. *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934.

Indiana. *Yawger v. Joseph*, 184 Ind. 228, 108 N. E. 774.

Kansas. *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

Kentucky. *Evans' Adm'r v. McVey*, 172 Ky. 1, 188 S. W. 1075.

Maine. *Ladd v. Bean (Me.)*, 104 Atl. 814.

Massachusetts. *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801.

Minnesota. *Chicago, Milwaukee & St. Paul Railway Co. v. Greenberg*, 139 Minn. 428, L. R. A. 1918D, 158, Ann. Cas. 1918E, 456, 166 N. W. 1073.

New Hampshire. *Sceva v. True*, 53 N. H. 627.

New Jersey. *Gannon v. Brady Brass Co.*, 82 N. J. L. 411, Ann. Cas. 1913C, 1308, 81 Atl. 727.

New York. *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

Oregon. *Stamm v. Wood*, 86 Or. 174, 168 Pac. 69.

South Carolina. *Dowling v. Charleston & W. C. Ry. Co. (S. Car.)*, 81 S. E. 313.

Vermont. *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865; *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

Washington. *Prince v. Prince*, 64 Wash. 552, 64 Wash. 696, 117 Pac. 255, 260.

⁵ *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235; *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801; *Underhill*

the agreement of the parties is to be proved.⁶ Such a contract is sometimes spoken of as a genuine implied contract, a contract implied as of fact,⁷ or as an implied contract without further qualification. Whatever quasi-contractual liability may exist, no genuine contract either express or implied can exist according to modern-law notions if it is the evident intention of the party against whom such liability is enforced, not to enter into a contract.⁸

§ 1437. Illustrations of genuine implied contracts. The question of the existence of a genuine implied contract is primarily one of fact, including the question of the inferences of fact which may be drawn from the facts which are conceded or established by the evidence. A contract can be implied in fact only when a genuine agreement between the parties is shown to exist.¹ Conduct which arouses a hope or expectation of a gratuitous benefit is not sufficient to amount to an implied contract.² The fact that a lessor has been in the habit of making repairs upon the leased property does not establish the fact that there was an implied contract on his part to make such repairs.³ The fact that a municipal

v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017; *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068.

"The courts recognize by the language of their opinions two classes of implied contracts. The one class consists of those contracts which are evidenced by the acts of the parties and not by their verbal or written words—true contracts which rest upon an implied promise in fact. The second class consists of contracts implied by the law where none in fact exist—quasi or constructive contracts created by law and not by the intentions of the parties. A contract can not be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged; or where there is an express contract covering the subject-matter involved; or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent

of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred, he has not contracted." *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

⁶ *Lombard v. Rahilly*, 127 Minn. 449, 149 N. W. 950.

⁷ *Wisconsin Steel Co. v. Maryland Steel Co.*, 203 Fed. 403, 121 C. C. A. 507; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017; *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068.

⁸ *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Remarkis v. Reid* (Okla.), 166 Pac. 728.

¹ *Brown v. Dwight Mfg. Co.*, — Ala. —, L. R. A. 1917F, 997, 76 So. 292.

² *Brown v. Dwight Mfg. Co.*, — Ala. —, L. R. A. 1917F, 997, 76 So. 292.

³ *Brown v. Dwight Mfg. Co.*, — Ala. —, L. R. A. 1917F, 997, 76 So. 292.

corporation has accepted a water supply from a water company for general fire purposes and has paid for such water, is not enough to show a contract on the part of the water company to furnish water so as to make it liable to the municipal corporation if property is destroyed by fire for want of an adequate water supply.⁴ On the other hand, it has been said that the fact that a municipal corporation supplies its inhabitants with water for a specified rate, amounts to an implied agreement to furnish an adequate supply,⁵ and that a municipal corporation is liable to the owner of a residence for failure to furnish an adequate supply of water.⁶ The fact that husband and wife executed wills which were alike in form, leaving property to their children, is said to show the existence of a contract between them for making such wills.⁷

§ 1438. Express contract as excluding implied contract. It is frequently said that an express contract excludes an implied contract and that where an express contract is found no implied contract can exist.¹ In certain of its applications this statement is true. If the parties have entered into an express contract it is

⁴ *Ukiah City v. Ukiah W. & I. Co.*, 142 Cal. 173, 64 L. R. A. 231, 75 Pac. 773.

⁵ *Woodward v. Livermore Falls Water District*, 116 Me. 86, L. R. A. 1917D, 678, 100 Atl. 317.

⁶ *Woodward v. Livermore Falls Water District*, 116 Me. 86, L. R. A. 1917D, 678, 100 Atl. 317.

⁷ *Prince v. Prince*, 64 Wash. 552, 64 Wash. 696, 117 Pac. 255, 260.

¹ *England. Cutter v. Powell*, 6 T. R. 320.

United States. Perkins v. Hart, 24 U. S. (11 Wheat.) 237, 6 L. ed. 463; *Lord v. United States*, 217 U. S. 340, 54 L. ed. 790.

Alabama. Loyal v. Wolf, 179 Ala. 505, 60 So. 298; *Robinson Lumber Co. v. Sager*, — Ala. —, 75 So. 309.

Illinois. Benner v. Dove, 283 Ill. 318, 119 N. E. 349.

Kansas. Ray v. Missouri K. & T. Ry. Co., 90 Kan. 244, 133 Pac. 847.

Maine. Ladd v. Bean, 117 Me. 445, 104 Atl. 814.

Michigan. Cashin v. Pliter, 168 Mich. 386, Ann. Cas. 1913C, 697, 134 N. W. 482.

New York. Watson v. Gugino, 204 N. Y. 535, 39 L. R. A. (N.S.) 1090, Ann. Cas. 1913D, 215, 98 N. E. 18; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

North Carolina. Morganton Mfg. & Trading Co. v. Andrews, 165 N. Car. 285, Ann. Cas. 1916A, 763, 81 S. E. 418.

Ohio. Abbott v. Inskip, 29 O. S. 59; *Kachelmacher v. Laird*, 92 O. S. 324, Ann. Cas. 1917E, 1117, 110 N. E. 933.

Pennsylvania. Powers v. Curtis, 147 Pa. St. 340, 23 Atl. 450.

Rhode Island. Beggs v. James Hanley Brewing Co., 27 R. I. 385, 114 Am. St. Rep. 44, 62 Atl. 373.

Vermont. Brightlook Hospital Association v. Garfield, — Vt. —, 104 Atl. 99.

Wisconsin. Tietz v. Tietz, 90 Wis. 66, 62 N. W. 939; *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44.

evident that they did not intend to make a genuine implied contract upon the same subject-matter at the same time. An express contract measures the rights of the parties, to the exclusion of any implied liability that might have arisen but for such express contract.² If A agrees to perform services for B, for which A is to be paid only in case certain other and further facts occur, A can not be heard to claim that he rendered such services under a genuine implied contract.³ This principle is also frequently invoked to prevent a party who has performed an express contract in part and who has then broken such contract from recovering in quasi-contract for the value of his performance up to the time of such breach.⁴

There is, however, no arbitrary rule of law which prevents the parties to an express contract from entering into an implied contract with reference to an analogous subject-matter.⁵ If A and B enter into an express contract by which A is to lease a room to B at a specified rent, such express contract does not exclude an implied contract under which B can be held to pay reasonable rental value for another room which he uses with A's consent in connection with the room for which he made such express contract.⁶ In like manner the parties to an express contract may subsequently enter into a genuine implied contract for the performance of extra work or for furnishing extra material in connection with the performance of the express contract.⁷

The rule that an express contract excludes an implied contract has no application to cases in which the express contract is void or voidable at its inception or has been discharged by facts which arise after its formation, and in which one party seeks to recover the value of the consideration which he has furnished under such contract.⁸ If A, who does business as a corporation in which he is the only person interested, obtains money by fraud from B, B may

² Benner v. Dove, 283 Ill. 318, 119 N. E. 349; Ladd v. Bean, 117 Me. 445, 104 Atl. 814; Brightlook Hospital Association v. Garfield, — Vt. —, 104 Atl. 99.

³ Lord v. United States, 217 U. S. 340, 54 L. ed. 790; Druiding v. Lyon, 7 Mo. App. 109; Powers v. Curtis, 147 Pa. St. 340, 23 Atl. 450.

⁴ See ch. LXXXVIII.

⁵ Efron v. Stees, 113 Minn. 242, 129 N. W. 374.

⁶ Efron v. Stees, 113 Minn. 242, 129 N. W. 374.

⁷ See §§ 1459 et seq.

⁸ See §§ 278, 342, 372, 435, 477, 504, 1071, 1530 et seq., 1622, 1637 et seq., 1652, 1683, 1792, 1802, 1811, 1816, 1821, 1827, 1860, 1876, 1958, 2002, and ch. LXXXVIII.

recover such money from A, although B has assumed to deal with such corporation.⁹

§ 1439. Work done under contract with one, enuring to benefit of another. If B renders services or furnishes property or money to C under an express contract with C, B can not claim thereafter that such services, property, and the like, were furnished under an implied contract with A, even if B made use of such services or property in performing his contract with A, and even if A ultimately got the benefit of such services or property by reason of B's performance of such contract.¹ If A lends money to B, and B lends such money to C, A can not maintain an action against C for money had and received if B was not C's agent.² In the absence of an express previous request it is necessary that the person for whom the work is done should know that it is being done and further that it is being done for his benefit and also upon his liability. If A employs B to do certain work, and B employs C to aid him therein, no implied contract between A and C exists, even if A knows that C is doing the work and that A will ultimately receive the benefit thereof, since A is liable over to B on his contract for the work thus done.³ Thus where a railroad lets a contract for grading to B, and B employs C to work thereon, these facts do not give C a right of action against the railroad.⁴ If B employs C to do work on A's property which is in B's possession, C can not recover from A.⁵ If B agrees to construct a building for A, and B employs C to work for B in the performance of

⁹ *Donovan v. Purtell*, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334.

¹ *England*. In re English & Colonial Produce Co. [1906], 2 Ch. 435.

Alabama. *Alexander v. Alabama Western Ry.*, 179 Ala. 480, 60 So. 395.

Arizona. *Brutinel v. Nygren*, 17 Ariz. 491, L. R. A. 1918F, 713, 154 Pac. 1042.

Massachusetts. *Steinert & Sons Co. v. Jackson*, 190 Mass. 428, 76 N. E. 905.

Mississippi. *Miller v. Fisher*, 116 Miss. 350, 77 So. 151.

New Jersey. *Fidelity Trust Co. v. Federal Trust Co.*, 87 N. J. Eq. 550, 100 Atl. 615.

Vermont. *Conti v. Johnson*, 91 Vt. 467, 100 Atl. 874.

West Virginia. *Virginia Supply Co. v. Calfee*, 71 W. Va. 300, 76 S. E. 669.

² *Fidelity Trust Co. v. Federal Trust Co.*, 87 N. J. Eq. 550, 100 Atl. 615.

³ *Brutinel v. Nygren*, 17 Ariz. 491, L. R. A. 1918F, 713, 154 Pac. 1042; *Petterson v. Ry.*, 134 Cal. 244, 66 Pac. 304; *Conti v. Johnson*, 91 Vt. 467, 100 Atl. 874.

⁴ *Petterson v. Ry.*, 134 Cal. 244, 66 Pac. 304.

⁵ *Miller v. Fisher*, 116 Miss. 350, 77 So. 151.

such contract, C can not recover from A in the absence of statute, on the theory of implied contract.⁶ Hence, the fact that C believed that A was employing him is immaterial as affecting A's liability if A did not know of such belief and did not so act as to justify such belief.⁷

§ 1440. Classification of genuine implied contracts. Any division of genuine implied contracts into classes is arbitrary. No exhaustive classification can be made. To divide them into groups is to divide the indivisible. Any grouping must be made upon a basis of outward fact rather than of essential principle. Most of the more common classes of genuine implied contracts were recognized at common law by the law of pleading as separate classes; and the different forms of common counts in general assumpsit, such as the count for money had and received, money paid, quantum meruit, quantum valebat, the account stated and according to some authorities the counts for fidelity and skill and implied warranties, were used for these different classes of contracts. There was a strong tendency in many jurisdictions to reduce the common counts to the indebitatus assumpsit counts, such as the counts for land sold, goods sold, work and labor, board and lodging, and the like. No classification of this sort, however, can be exhaustive or complete; and any classification which is undertaken is merely a matter of convenience.

The principles which control the right to maintain an action for money had, or for goods sold, and the like, are illustrated by cases of genuine contract and also by cases of quasi-contract. A complete separation of the cases of genuine contract from the cases of quasi-contract is impossible, therefore, unless we are willing to repeat much of the principles which they have in common.

II

WORK AND LABOR

§ 1441. Work and labor done at request—Express contract. Whether a request for the rendition of services without any express promise to pay therefor, implies such a promise or not, probably depends upon the general understanding in that community which attaches to such words with reference to such subject-matter. If

⁶Conti v. Johnson, 91 Vt. 467, 100 Atl. 874.

⁷Petterson v. Ry., 134 Cal. 244, 68 Pac. 304.

A requests B to perform services for A, and it is customary in such locality to pay for services of the kind for which A asks, A's request will be regarded as equivalent to a promise to pay a reasonable price therefor.¹ If the services are of such a sort that it is not usual or customary to pay therefor, a request for such services or property is not equivalent to a promise to pay therefor. If one person performs work and labor for another of a sort for which compensation is customary, intending to charge therefor, and the person for whom the work is done either has requested, expressly or impliedly, before the doing of such work, that it should be done, or after it was done, has voluntarily accepted the benefits arising therefrom, the person for whom the work is done, is liable to the person who does it.²

If such work and labor is done under an express contract the rights of the parties are measured by such express contract;³ and

¹ **Arkansas.** *Blake v. Scott*, 92 Ark. 46, 121 S. W. 1054, 123 S. W. 1181.

Connecticut. *Rowell v. Ross*, 87 Conn. 157, 87 Atl. 365; *Seward v. M. Seward & Son Co.*, 91 Conn. 190, 99 Atl. 887.

Iowa. *Rea v. Flathers*, 31 Ia. 545.
New Jersey. *Conklin v. Kruger*, 79 N. J. L. 326, 75 Atl. 436.

Virginia. *Briggs v. Barnett*, 108 Va. 404, 61 S. E. 797.

Wisconsin. *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068.

As to services between members of the same family, see §§ 1447 et seq.

² **Alabama.** *Lafayette Ry. Co. v. Tucker*, 124 Ala. 514, 27 So. 447; *Tyson v. Thompson*, 195 Ala. 230, 70 S. W. 649.

Connecticut. *Casey v. McFarlane Bros. Co.*, 83 Conn. 442, 76 Atl. 515.

Delaware. *Nichols v. Vinson*, 9 Houst. (Del.) 274, 32 Atl. 225.

Indiana. *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975.

Kansas. *Manny v. Cowley County National Bank*, 92 Kan. 129, Ann. Cas. 1916B, 195, 139 Pac. 1021.

Kentucky. *Baxter v. Knox (Ky.)*, 44 S. W. 972.

Maine. *Wadleigh v. Katahdin Pulp & Paper Co.*, 116 Me. 107, 100 Atl. 150.

Massachusetts. *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347.

Michigan. *Eggleston v. Boardman*, 37 Mich. 14; *Vandecar v. Nowland's Estate*, 188 Mich. 429, 154 N. W. 137.

Mississippi. *Gulf & S. I. R. Co. v. Magee Warehouse Co.*, 109 Miss. 9, 67 So. 648.

Nebraska. *Courier, etc., Co. v. Wilson (Neb.)*, 90 N. W. 1120.

New Hampshire. *Hill v. Carr*, — N. H. —, 101 Atl. 525.

New Jersey. *Colloty v. Schuman*, 75 N. J. L. 97, 66 Atl. 933; *Gnichtel v. Jewell*, 59 N. J. Eq. 651, 44 Atl. 1099 [affirming, 41 Atl. 227].

New York. *Bonynge v. Field*, 81 N. Y. 159.

Oregon. *Ingram v. Basye*, 67 Or. 257, 135 Pac. 883.

Vermont. *Jones v. Campbell*, — Vt. —, 102 Atl. 102.

Wisconsin. *Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551; *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068.

³ *Becker v. Churdan*, 175 Ia. 159, 157 N. W. 221; *Hollister v. Kinyon's Es-*

if such express contract is still in force neither party can ignore such express contract and treat the transaction as an implied contract.⁴ If an express offer has been accepted by the performance of an act and such contract is still in effect, no recovery can be had on quantum meruit for reasonable compensation.⁵

If such work and labor is not performed under an express contract, but it is performed under a genuine understanding between the parties that compensation is to be made therefor, a genuine implied contract exists.⁶

§ 1442. Work and labor done at request—Implied contract.

If services are rendered at the request of the person for whom they are rendered, or if the benefits thereof are accepted voluntarily by such person, there is an implied promise on his part to make reasonable compensation therefor if no express contract has been made, if the services are such as are ordinarily paid for and if the party who rendered them was not bound to render them without compensation.¹

tate, 195 Mich. 261, 161 N. W. 962; Eureka Manufacturing Co. v. Wimberly, 113 Miss. 90, 73 So. 871; Coos Bay Times Pub. Co. v. Coos County, 81 Or. 626, 160 Pac. 532.

⁴Becker v. Churdan, 175 Ia. 159, 157 N. W. 221; Eureka Manufacturing Co. v. Wimberly, 113 Miss. 90, 73 So. 871. See § 1438.

⁵Hollister v. Kinyon's Estate, 195 Mich. 261, 161 N. W. 962.

⁶"Where, in the absence of an express contract, valuable services are rendered by one person to another which are knowingly accepted, the law will imply a promise to pay a fair and reasonable compensation for such services." McFarland v. Dawson, 125 Ala. 428, 432, 29 So. 327 [citing, Wood v. Brewer, 66 Ala. 570; Hood v. League, 102 Ala. 228, 14 So. 572].

¹Arkansas. Spearman v. Texarkana, 58 Ark. 348, 22 L. R. A. 855, 24 S. W. 883.

Connecticut. Clark v. Clark, 46 Conn. 586.

Delaware. Claringbold v. Newark Garage & Electric Co., 29 Del. (6 Boyce) 129, 97 Atl. 386.

Indiana. Lockwood v. Robbins, 125 Ind. 398, 25 N. E. 455.

Iowa. Wadleigh v. McDowell, 102 Ia. 480, 71 N. W. 336.

Kentucky. Coleman v. Simpson, 32 Ky. (2 Dana) 166.

Maine. Wadleigh v. Katahdin Pulp & Paper Co., 116 Me. 107, 100 Atl. 150.

Massachusetts. Blaisdell v. Gladwin, 58 Mass. (4 Cush.) 373.

Michigan. Ten Eyck v. R. R., 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378, 41 N. W. 905.

Missouri. Ryans v. Haspes, 167 Mo. 342, 67 S. W. 285.

Nebraska. Emery v. Cobbe, 27 Neb. 621, 43 N. W. 410.

Pennsylvania. Mastersón v. Master-son, 121 Pa. St. 605, 15 Atl. 652.

Wisconsin. Miller v. Tracy, 86 Wis. 330, 56 N. W. 866.

A previous request made by A to B, to perform services for A makes A liable therefor, even though he does not make an express promise to pay B therefor.² Thus where a managing editor is requested by the editor-in-chief to do the work of the latter, a promise on the part of the editor-in-chief to pay him is implied.³ In jurisdictions in which a married woman may bind herself by contract, a married woman is liable for legal services rendered to her at her request in securing a divorce,⁴ even if the court makes an allowance in such divorce proceeding for her attorney fees.⁵ It will not be presumed in such cases that the attorney necessarily agreed to look for his compensation solely to the amount awarded by the court. In the absence of an express agreement a married woman can not recover for board furnished at her house. The implied contract is between the husband and the person to whom such board is furnished.⁶ If A performs separate services for B and C, A can not recover without showing to which of them credit for such services was extended or without showing a promise to pay for all such services which is a sufficient compliance with the Statute of Frauds.⁷ If A, who owns an automobile, sends his car to B's garage for repairs, and because of a fire at such garage B sends such car to the manufacturer, A is liable on an implied promise to pay for the repairs for which he originally sent the car to the garage, but not for those due to such fire.⁸ If A employs B as an attorney at an annual salary and B defends an action brought

² Canada. *Weeks v. North Sidney*, 26 N. S. 396.

Arkansas. *Spearman v. Texarkana*, 58 Ark. 348, 22 L. R. A. 855, 24 S. W. 883.

California. *Sonoma County v. Santa Rosa*, 102 Cal. 426, 36 Pac. 810.

Massachusetts. *Blaisdell v. Gladwin*, 58 Mass. (4 Cush.) 373.

Michigan. *Ten Eyck v. R. R.*, 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378, 41 N. W. 905.

Minnesota. *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71.

New Jersey. *Pangborn v. Phelps*, 63 N. J. L. 346, 43 Atl. 977.

Rhode Island. *Fuller v. Mowry*, 18 R. I. 424, 28 Atl. 606.

Texas. *Bonner v. Bradley*, 14 Tex. Civ. App. 234, 36 S. W. 1014.

Washington. *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

³ *Pangborn v. Phelps*, 63 N. J. L. 346, 43 Atl. 977.

⁴ *Wolcott v. Patterson*, 100 Mich. 227, 43 Am. St. Rep. 456, 24 L. R. A. 629, 58 N. W. 1006; *Tyler v. Winder*, 89 Neb. 409, 34 L. R. A. (N.S.) 1080, 131 N. W. 592.

⁵ *Culley v. Badgley*, 196 Mich. 414, L. R. A. 1917F, 359, 163 N. W. 33; *State v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

⁶ *Stevenson v. Akarman*, 83 N. J. L. 458, 46 L. R. A. (N.S.) 238, 85 Atl. 166.

⁷ *Anderson v. Fruitvale Transp. Co.*, 195 Mich. 734, 162 N. W. 273.

⁸ *Helber v. Schaible*, 183 Mich. 379, 150 N. W. 145.

against A and X for a judgment in solido, A can not recover from X for the value of B's services in the absence of a contract other than that implied by X's acceptance of B's services.⁹

§ 1443. Compensation fixed by law—Public officers, etc. Reasons of public policy make the case of the public officer an exception to the general rule that a request for the rendition of services implies a promise to pay therefor. If the law fixes a specified compensation for certain services to be rendered by a public officer, he can not recover extra compensation for such services, even if they are reasonably worth it.¹ So after having performed the services he has no right of action for additional compensation on the ground that the compensation was less than the services were worth.² If the law makes no provision for compensation for any or all of the official duties of a public officer he can make no charge therefor.³ He can not recover reasonable compensation for new duties which are imposed upon him by statute without provision for additional compensation.⁴ If he is not willing to perform such

⁹ Louisiana & N. W. R. Co. v. Athens Lumber Co., 134 La. 788, L. R. A. 1915B, 856, 64 So. 714.

¹ United States. Brown v. United States, 50 U. S. (9 How.) 487, 13 L. ed. 228.

Georgia. Twiggs v. Wingfield, 147 Ga. 790, L. R. A. 1918E, 757, 95 S. E. 711.

Illinois. Kreitz v. Behrensmeyer, 149 Ill. 496, 24 L. R. A. 59, 36 N. E. 983.

Iowa. Moore v. Independent District, 55 Ia. 634, 8 N. W. 631.

Massachusetts. Rogers v. Simmons, 155 Mass. 259, 29 N. E. 580.

Nebraska. State v. Meserve, 58 Neb. 451, 78 N. W. 721; O'Shea v. Kavanaugh, 65 Neb. 639, 91 N. W. 578.

Ohio. Clark v. Lucas County, 58 O. S. 107, 50 N. E. 356.

² United States. Mullett v. United States, 150 U. S. 566, 37 L. ed. 1184.

California. Irwin v. Yuba County, 119 Cal. 686, 52 Pac. 35.

Indiana. Ex parte Harrison, 112 Ind. 329, 14 N. E. 225.

Iowa. Hamil v. Carroll County, 106 Ia. 523, 69 N. W. 1122, 71 N. W. 425.

Michigan. Gardner v. Newaygo County, 110 Mich. 94, 67 N. W. 1091.

³ Alabama. Torbert v. Hale County, 131 Ala. 143, 30 So. 453.

Illinois. Rickert v. Suddard, 184 Ill. 149, 56 N. E. 344.

Indiana. Tippecanoe County v. Barnes, 123 Ind. 403, 24 N. E. 137; Marshall County v. Johnson, 127 Ind. 238, 26 N. E. 821; Rochester v. Campbell, 184 Ind. 421, 111 N. E. 420.

Iowa. Twinam v. Lucas County, 104 Ia. 231, 73 N. W. 473.

Missouri. State v. Brown, 146 Mo. 401, 47 S. W. 504.

North Carolina. Borden v. Goldsboro, 173 N. Car. 661, 92 S. E. 694.

Oklahoma. Shelton v. State, — Okla. —, 162 Pac. 224.

Wisconsin. Crocker v. Brown County, 35 Wis. 284; Outagamie County v. Zuehlke, 165 Wis. 32, 161 N. W. 6.

⁴ Georgia. Twiggs v. Wingfield, 147 Ga. 790, L. R. A. 1918E, 757, 95 S. E. 711.

work for nothing, he should resign. If he collects compensation from the municipality for which he acts, which is not authorized by law, he may be compelled to refund.⁵ Thus a statute authorized the appointment of a commissioner to revise the statutes, but made no provision for his compensation. He has no right of action for the reasonable value of his services.⁶ However, it has been held that an attorney is not a public officer in this sense. Hence, if the statute authorizes the county to employ an attorney in disbarment proceedings and does not provide for compensation, he may, nevertheless, recover a reasonable compensation.⁷ If a public officer performs services which are entirely outside of his official duties a different principle applies, and, in the absence of a statute, to the contrary,⁸ he may recover reasonable compensation for such services if his office is not one which is to occupy his entire time.⁹ If a board of health directs one of its members to inspect a case of diphtheria, and such services are not within the official duty of the member of such board, the person rendering such services may recover a reasonable compensation therefor.¹⁰ If the office is to occupy the entire time of the officer, the same principle applies as in the case of private employees,¹¹ and no recovery can be had for extra compensation, even for services entirely outside of official duties.¹²

If the amount of compensation is fixed by statute, no greater amount can be recovered on the theory of reasonable compensation, even in cases other than those of public officers.¹³ If a statute fixes the compensation for publishing a delinquent tax list, a news-

Illinois. Jones v. O'Connell, 266 Ill. 443, 107 N. E. 731.

Massachusetts. Brophy v. Marble, 118 Mass. 548.

Michigan. Kearney v. Board of Auditors, 189 Mich. 666, 155 N. W. 510.

New York. People v. Mitchell, 220 N. Y. 86, 115 N. E. 271.

⁵ St. Croix County v. Webster, 111 Wis. 270, 87 N. W. 302.

⁶ Harris v. State, 9 S. D. 433, 69 N. W. 825.

⁷ Hyatt v. Hamilton County, 121 Ia. 292, 63 L. R. A. 614, 96 N. W. 855.

⁸ Evans v. United States, 226 U. S. 567, 57 L. ed. 353; Lewis v. United

States, 244 U. S. 134, 61 L. ed. 1039. See §§ 1459 et seq.

⁹ United States v. Brindle, 110 U. S. 688, 28 L. ed. 286; Spearman v. Texarkana, 58 Ark. 348, 22 L. R. A. 855, 24 S. W. 883; Slayton v. Rogers, 128 Ky. 106, 107 S. W. 696; Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

¹⁰ Spearman v. Texarkana, 58 Ark. 348, 22 L. R. A. 855, 24 S. W. 883.

¹¹ See § 465.

¹² McBrien v. Nation, 78 Kan. 665, 97 Pac. 798.

¹³ Coos Bay Times-Pub. Co. v. Coos County, 81 Or. 626, 160 Pac. 532.

paper can not recover compensation in excess of the statutory amount on the theory of quantum meruit.¹⁴

§ 1444. Elements of implied request. If the person for whom services of a kind usually made the subject of charge are rendered knows of their rendition, he is liable therefor though he has made no express request, in the absence of special circumstances negating his liability.¹ If the person for whom the work is done knows that it is being done and that the person doing it expects compensation from the person for whom it is done, and believes that such compensation will be made, and the latter does nothing to correct such impression, he is liable for the work thus done.² One who ships freight is liable, therefore, to the carrier in the absence of special contract if the consignee refuses to accept the goods.³ If the consignee accepts the goods and pays part of the freight, a promise on his part to pay the balance is thereby implied.⁴

Even where a husband and wife may make contracts with one another,⁵ the fact that the husband works upon his wife's farm will not establish an implied contract on her part to pay him for such labor; but to enable him to recover, an express contract must be shown.⁶

§ 1445. Acceptance of work and labor. If the services are accepted voluntarily, a previous request is not necessary to the creation of liability.¹ If A has prepared incorporation papers under a contract with B, and if A then delivers such incorporation

¹⁴ Coos Bay Times Pub. Co. v. Coos County, 81 Or. 626, 160 Pac. 532.

¹ Alabama. Tyson v. Thompson, 195 Ala. 230, 70 So. 649.

Florida. Lewis v. Meginniss, 30 Fla. 419, 12 So. 19.

Kentucky. Evans' Administrator v. McVey, 172 Ky. 1, 188 S. W. 1075.

Michigan. Vandecar v. Nowland's Estate, 188 Mich. 429, 154 N. W. 137.

Oregon. Ingram v. Basye, 67 Or. 257, 135 Pac. 883.

Wisconsin. Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

² Evans' Administrator v. McVey, 172 Ky. 1, 188 S. W. 1075; Kiser v. Holladay, 29 Or. 338, 45 Pac. 759.

³ Baltimore & Ohio Railroad Co. v. Luella Coal & Coke Co., 74 W. Va. 167, 52 L. R. A. (N.S.) 398, 81 S. E. 1044.

⁴ Chicago, Milwaukee & St. Paul Railway Co. v. Greenberg, 139 Minn. 428, L. R. A. 1918D, 158, Ann. Cas. 1918E, 456, 166 N. W. 1073.

⁵ See § 1679.

⁶ Estate of Simonson v. Bergum, 164 Wis. 590 [sub nomine, In re Simonson's Estate, 160 N. W. 1040].

¹ Delaware. Nichols v. Vinson, 9 Houst. (Del.) 274, 32 Atl. 225.

Illinois. Rockford, etc., Ry. v. Wilcox, 66 Ill. 417.

Indiana. Palmer v. Miller, 19 Ind. App. 624, 49 N. E. 975.

papers to C, to whom B has transferred his interests under a contract by which C is to retransfer such interests to B if B could make certain payments, A may recover for his services in drawing such corporation papers from C if he delivers such papers to C at C's request, not knowing of such condition subsequent, and if C makes use of such papers in forming a new corporation.² Whether the act of a property owner in making use of a party-wall agrees to an implied contract on his part to pay his proportion of the expenses thereof, or not, is a question upon which there is a divergence of authority. In some cases an implied contract is found to exist by reason of such conduct;³ while in other jurisdictions it is said that such facts do not amount to an implied contract.⁴ Where the party-wall was originally constructed with the expectation of reimbursement in case the adjoining owner made use thereof, the act of the adjoining owner in making use of such wall may be regarded as an acceptance of such offer.⁵ An agent who acquiesces in the rebuilding of a division-wall between the land of his principal and that of the adjoining owner is not liable to such adjoining owner for a portion of the expenses of such wall;⁶ nor is the principal liable, there being no express contract to pay such expenses.⁷ If a litigant knows that a stenographer is taking and transcribing testimony during a trial for the use of the

Iowa. Shoemaker v. Roberts, 103 Ia. 681, 72 N. W. 776.

Kentucky. Viley v. Pettit, 96 Ky. 576, 29 S. W. 438; Baxter v. Knox (Ky.), 44 S. W. 972.

Maine. Ladd v. Bean, 117 Me. 445, 104 Atl. 814.

Massachusetts. Paul v. Wilbur, 189 Mass. 48, 75 N. E. 63.

Michigan. Snyder v. Neal, 129 Mich. 692, 89 N. W. 588.

New Hampshire. Hill v. Carr, — N. H. —, 101 Atl. 525.

New York. Port Jervis Water Works Co. v. Port Jervis, 151 N. Y. 111, 45 N. E. 388.

North Carolina. Moffitt v. Glass, 117 N. Car. 142, 23 S. E. 104.

Oregon. Kiser v. Holladay, 29 Or. 338, 45 Pac. 759.

Vermont. Jones v. Campbell, — Vt. —, 102 Atl. 102.

Wisconsin. Wheeler v. Hall, 41 Wis. 447.

² Paul v. Wilbur, 189 Mass. 48, 75 N. E. 63.

³ Younker v. McCutchen, 177 Ia. 634, 159 N. W. 441; Walker v. Stetson, 162 Mass. 86, 44 Am. St. Rep. 350, 38 N. E. 18; Reid v. King, 158 N. Car. 85, 73 S. E. 168.

⁴ Bisquay v. Jeunelot, 10 Ala. 245, 44 Am. Dec. 483; Eckleman v. Miller, 57 Ind. 88; Abrahams v. Krautler, 24 Mo. 69, 66 Am. Dec. 698; Hawkes v. Hoffman, 56 Wash. 120, 24 L. R. A. (N.S.) 1038, 105 Pac. 156.

⁵ Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347.

⁶ Cheseboro v. Lockwood, 88 Conn. 219, 91 Atl. 188.

⁷ Cheseboro v. Lockwood, 88 Conn. 219, 91 Atl. 188.

attorney of the litigant, the latter, on accepting the benefit of such services, is liable therefor.⁸ So if A nurses and cares for B, and B accepts such services, he is liable therefor.⁹ If A renders services on a farm owned in part by B and in part by C, and such services are rendered for the benefit of both, and A expects to be paid by both, B and C are jointly liable for such services if they accept them knowing of A's belief.¹⁰ So if water is furnished to a village, and the authorities accepting it were authorized to contract therefor, and were not required by law to make contracts in a specified form, the village is liable for a reasonable compensation therefor.¹¹

Acceptance of work and labor under contracts entered into by an unauthorized agent,¹² or by an unauthorized agent of a private corporation,¹³ or by an unauthorized agent of a public corporation;¹⁴ or acceptance by a corporation of services rendered under a contract entered into by a promoter,¹⁵ create liabilities which are discussed elsewhere.

The question of liability for work and labor performed under a mistake or through fraud or by duress, or performed under a contract which is unenforceable or which is discharged before it was performed in full, is discussed under other headings.¹⁶ The principle that voluntary acceptance of services creates a liability to pay therefor often takes us into cases of constructive contract, since there is often no enforceable contract in fact between the parties.

§ 1446. Services rendered as gratuity. If A renders services for B, and A does not intend at the time of their rendition to make any charge therefor, and B knows of such intention, A can not subsequently, upon changing his mind, recover for such services as upon an implied contract, even if such work was done with B's knowledge or at B's request.¹ The operation of this principle is clearest where the services are rendered under an express agree-

⁸ *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975.

⁹ *Baxter v. Knox* (Ky.), 44 S. W. 972.

¹⁰ *Snyder v. Neal*, 129 Mich. 692, 89 N. W. 588.

¹¹ *Port Jervis Water Works Co. v. Port Jervis*, 151 N. Y. 111, 45 N. E. 388.

¹² See §§ 1764 et seq.

¹³ See §§ 1803 et seq.

¹⁴ See §§ 1791 et seq.

¹⁵ See § 1830.

¹⁶ See §§ 278, 342, 372, 435, 477, 504, 1071, 1530 et seq., 1622, 1637 et seq., 1652, 1683, 1792, 1802, 1811, 1816, 1821, 1827, 1860, 1876, 1958, 2002, and ch. LXXXVIII.

¹ *Connecticut. Gillette's Appeal*, 82 Conn. 500, 74 Atl. 762.

Delaware. Levy v. Gillis, 1 Penn. (Del.) 119, 39 Atl. 785.

Illinois. Evans v. Henry, 66 Ill. App. 144.

ment that no charge shall be made therefor. If A performs services for B under an express agreement that they are to be gratuitous, he can not subsequently recover therefor.² The fact that the person who rendered gratuitous services did not know that the person for whom they were rendered was able to pay for them, does not entitle him to recover compensation thereafter if the person for whom they were rendered was not guilty of fraud.³ The principle is by no means limited to cases of express agreement that no compensation shall be made, but extends to cases where from the acts of the parties and the surrounding circumstances it is apparent that the party by whom the services were rendered did not intend to charge therefor and the party for whom they were rendered accepted them in reliance upon such intention. Thus where services are rendered solely because of friendship and mutual accommodation,⁴ as where a real estate broker and an attorney interchange services for accommodation;⁵ or one renders services as attorney in fact, both parties knowing that the services are to be gratuitous;⁶ or one renders political services for a friend in a campaign;⁷ or one friend indorses a note for another, the note being ultimately paid out of the maker's property and no loss

Indiana. *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

Iowa. *Tank v. Rohweder*, 98 Ia. 154, 67 N. W. 106; *Cochran v. Zachery*, 137 Ia. 585, 16 L. R. A. (N.S.) 235, 15 Ann. Cas. 297, 115 N. W. 486.

Maine. *Cole v. Clark*, 85 Me. 336, 21 L. R. A. 714, 27 Atl. 186.

Michigan. *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396; *Cicotte v. Church*, 60 Mich. 552, 27 N. W. 682; *Allen v. Allen*, 60 Mich. 635, 27 N. W. 702.

Missouri. *Buelterman v. Meyer*, 132 Mo. 474, 34 S. W. 67; *Woods v. Land*, 30 Mo. App. 176.

New Jersey. *Disbrow v. Durand*, 54 N. J. L. 343, 33 Am. St. Rep. 678, 24 Atl. 545.

New York. *Potter v. Carpenter*, 71 N. Y. 74; *Doyle v. Trinity Church*, 133 N. Y. 372, 31 N. E. 221.

Oregon. *Forbis v. Inman*, 23 Or. 68, 31 Pac. 204.

Pennsylvania. *Hoffeditz v. Iron Co.*, 141 Pa. St. 58, 21 Atl. 764.

Vermont. *State v. St. Johnsbury*, 59 Vt. 332, 10 Atl. 531; *Crampton v. Seymour*, 67 Vt. 393, 31 Atl. 889.

Washington. *Gross v. Cadwell*, 4 Wash. 670, 30 Pac. 1052.

² *Hanrahan v. Baxter* (Ia.), 16 L. R. A. (N.S.) 1046, 116 N. W. 595; *Sidway v. Live Stock Co.*, 163 Mo. 342, 63 S. W. 705.

³ *Hanrahan v. Baxter* (Ia.), 16 L. R. A. (N.S.) 1046, 116 N. W. 595.

⁴ *Tank v. Rohweder*, 98 Ia. 154, 67 N. W. 106; *Rabasse's Succession*, 49 La. Ann. 1405, 22 So. 767.

⁵ *Gross v. Cadwell*, 4 Wash. 670, 30 Pac. 1052.

⁶ *Royston v. McCully* (Tenn.), 52 L. R. A. 899, 59 S. W. 725.

⁷ *Levy v. Gillis*, 1 Penn. (Del.) 119, 39 Atl. 785.

resulting to the indorser by reason thereof,⁸ no recovery can be had. If services are rendered without the intent of making a charge therefor, or of creating a legal liability thereby, the fact that the person rendering them did so in the hope that the party receiving them would be grateful therefor, and would manifest such gratitude in some substantial form, such as a gift or legacy, does not give to the party rendering such services a right to recover a reasonable compensation therefor if such hopes are disappointed.⁹ No recovery can be had for gratuitous services, although they would not have been rendered if it had been foreseen that another agreement between the same parties would not have been performed.¹⁰

If services are rendered for each other by persons who are under contract to intermarry,¹¹ as where one party furnishes board to the other,¹² recovery can not be had therefor upon breach of the contract to marry, as on an implied contract. The remedy, if any, is said to be by an action in quantum meruit. If the original contract between the parties to intermarry did not call for the rendition of such services, the result is probably correct. If, however, the original contract to intermarry contemplated the rendition of such services, no reason appears why the party injured by the breach of such contract should not be permitted to waive an action upon the contract and to recover for services rendered under such contract as in cases of discharge by breach.¹³

If a woman marries a man, believing that he is single, and keeps house for him, it is said that she can not recover for services thus rendered when she discovers that he is already married.¹⁴ Where a man marries a woman, believing her single, and she was already married, he can not recover on an implied contract for furnishing her with board, lodging, medical attendance, and the like. His

⁸ *Hagar v. Whitmore*, 82 Me. 248, 19 Atl. 444. (The indorser subsequently sought to recover compensation for ever having incurred liability.)

⁹ *Osborn v. Governors*, etc., 2 Stra. 728; *Gillette's Appeal*, 82 Conn. 500, 74 Atl. 762; *Guenther v. Birkicht's Administrator*, 22 Mo. 439; *Castle v. Edwards*, 63 Mo. App. 564; *Swires v. Parsons*, 6 Watts. & S. (Pa.) 357.

¹⁰ *Cochran v. Zachery*, 137 Ia. 585, 16 L. R. A. (N.S.) 235, 115 N. W. 486.

¹¹ *La Fontain v. Hayhurst*, 89 Me. 388, 56 Am. St. Rep. 430, 36 Atl. 623.

¹² *Clary v. Clary*, 93 Me. 220, 44 Atl. 921.

¹³ See ch. LXXXVIII.

¹⁴ *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.

Contra, *Fox v. Dawson*, 8 Mart. (O. S.) (La.) 94; *Higgins v. Breen*, 9 Mo. 497.

See § 1515.

damages of this sort are inseparable from his claim for damages for deceit; and, accordingly, will not survive against her estate.¹⁵ Where no such liability exists a subsequent note payable to the order of the maker, not indorsed by him, but delivered to the person performing such services, creates no liability.¹⁶ Board and lodging furnished to one who comes on invitation as a guest are understood to be gratuitous and no recovery can be had therefor.¹⁷ By statute in Kentucky no recovery can be had for board and lodging unless furnished by the keeper of a tavern or house of private entertainment or unless under a contract therefor.¹⁸

Where A does work on land which he claims in good faith as his own, recovery therefor from the real owner, after the claimant is defeated by the real owner in an action for the possession of the real property, can not be had.¹⁹ He may, however, set off the increase in the value of the property resulting from his improvements against the amount due from him for rents and profits.²⁰ This right of set-off is founded on "broad and growing principles of equity,"²¹ and was originally an innovation at common law. The civil law allowed compensation for the value of the improvements less the use of the land.²² This rule of the civil law was

¹⁵ *Payne's Appeal*, 65 Conn. 397, 48 Am. St. Rep. 215, 33 L. R. A. 418, 32 Atl. 948.

¹⁶ *Rabasse's Succession*, 49 La. Ann. 1405, 22 So. 767.

¹⁷ Action by husband: invitation given by his wife to her sister, *Harrison v. McMillan*, 169 Tenn. 77, 69 S. W. 973.

¹⁸ *Hancock v. Hancock's Administrator* (Ky.), 69 S. W. 757.

¹⁹ *Georgia*. *Dudley v. Johnson*, 102 Ga. 1, 29 S. E. 50.

Iowa. *Lunquest v. Ten Eyck*, 40 Ia. 213.

Louisiana. *Pharr v. Broussard*, 106 La. 59, 30 So. 296.

Massachusetts. *Russell v. Blake*, 19 Mass. (2 Pick.) 505.

Texas. *Bonner v. Wiggins*, 52 Tex. 125.

West Virginia. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572.

²⁰ *Illinois*. *Potts v. Cullum*, 68 Ill. 217.

Michigan. *Jones v. Merrill*, 113 Mich. 433, 67 Am. St. Rep. 475, 71 N. W. 838; *Petit v. R. R.*, 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. 554.

Missouri. *Tice v. Fleming*, 173 Mo. 49, 96 Am. St. Rep. 479, 72 S. W. 689.

New York. *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

Pennsylvania. *Putnam v. Tyler*, 117 Pa. St. 570, 12 Atl. 43; *Estate of Gleeson*, 192 Pa. St. 279, 73 Am. St. Rep. 808, 43 Atl. 1032.

West Virginia. *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564.

Wisconsin. *Davis v. Louk*, 30 Wis. 308.

²¹ *Tice v. Fleming*, 173 Mo. 49, 56; 96 Am. St. Rep. 479, 483; 72 S. W. 689.

See also, *Barton v. Land Co.*, 27 Kan. 634.

²² *Putnam v. Ritchie*, 6 Paige (N. Y.) 390.

adopted by equity. Equity required the real owner to do equity if he was obliged to ask aid of equity to recover his property, and to make compensation for the increase in value due to the improvements placed thereon by the innocent claimant.²³ According to the weight of authority, equity could give no further relief than by way of set-off. Affirmative compensation could not be had.²⁴ In other cases, however, equity has ignored the restriction to set-off and allowed compensation for improvements to the extent of the increase in value due thereto, even if they exceed the amount of rents and profits.²⁵

Statutes known as occupying claimant acts, or betterment acts, have extended these principles in specific classes of cases. No detailed discussion of these statutes will, however, be undertaken here. The compact between Virginia and Kentucky which provided that rights which had arisen in Kentucky under the laws of Virginia should be determined under the laws of Virginia, renders invalid a statute of Kentucky which relieves an occupant from liability for rents and profits before judgment and which requires the true owner to pay for the improvements, or to secure such payment; and in default thereof, permits the occupant to elect between a judgment against the true owner for the value of the improvements and taking the land at its assessed value and giving security therefor.²⁶ One who by mistake erects a building on the land of another can not have compensation therefor.²⁷ The right of recovery exists only in favor of one who in good faith believes himself to be the owner. Thus a tenant for life,²⁸ or for years,²⁹ can not, in any form of action, have compensation for increase in value due to improvements made by him.

²³ Illinois. *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 21 L. R. A. 489, 34 N. E. 476.

Iowa. *Parsons v. Moses*, 16 Ia. 440.

Kentucky. *Sale v. Crutchfield*, 71 Ky. (8 Bush.) 636.

New York. *Miner v. Beekman*, 50 N. Y. 337.

²⁴ *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71; *Dudley v. Johnson*, 102 Ga. 1, 29 S. E. 50; *Jackson v. Loomis*, 4 Cow. (N. Y.) '68, 15 Am. Dec. 347; *Jones v. Perry*, 6 Tenn. (10 Yerg.) 59, 30 Am. Dec. 430.

²⁵ *Taylor v. James*, 109 Ga. 327, 34 S. E. 674; *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742.

²⁶ *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 5 L. ed. 547.

²⁷ *Dutton v. Ensley*, 21 Ind. App. 46, 69 Am. St. Rep. 340, 51 N. E. 380.

²⁸ *Springfield v. Bethel*, 90 Ky. 593, 14 S. W. 592; *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105.

²⁹ *Jones v. Hoard*, 59 Ark. 42, 43 Am. St. Rep. 17, 26 S. W. 193; *Willoughby v. Furnishing Co.*, 93 Me. 185, 44 Atl. 612; *Wolf v. Holton*, 92 Mich. 136, 52 N. W. 459; *Winton v. Stewart*, 43 W. Va. 711, 92 S. E. 776.

One who performs work and labor upon his own property can not hold others liable therefor upon an implied contract. He must be taken as having done the work for his own benefit, whatever his secret intention may have been. Thus where A's cattle were sold at auction, and the title thereto did not pass until possession was delivered and the money paid or security given, A can not recover from the purchaser for keeping such cattle between the time of the auction and the time of giving security.³⁰ A co-tenant in possession can not recover compensation from his co-tenants for work done in taking care of the common property, as in collecting the rents.³¹ The principle that no recovery can be had for services rendered by A, whereby B is benefited if A does not intend to make a charge against B therefor, applies even in cases where A believed when he performed the services, that he was bound by a contract with X,³² or by some positive rule of law,³³ to render such services. Thus where A, believing that he is doing work under his contract with X, does work which B is under contract to do, A can not recover from B.³⁴ So where A is employed by the government to transport mail, and he does not only the work which is required by his contract with the government, but also work which the railroad which hauls the mail is bound to do by reason of its contract with the government, he can not recover from the railroad where he does this work, thinking that he is bound by his contract with the government to do it.³⁵ So a county auditor can not recover from the treasurer where the auditor has made certain tax apportionments and statements which it was the legal duty of the treasurer to make, where both auditor and treasurer are under the impression that it is the auditor's duty to make such apportionment and statements.³⁶ Whether a public corporation or an individual furnished support to a pauper can recover therefor from such pauper if he proves to have property, or subsequently acquires property, depends in the absence of statute on whether the pauper has been guilty of any fraud in inducing such person to furnish

³⁰ *Chalmers v. McAuley*, 68 Vt. 44, 33 Atl. 767.

³¹ *Switzer v. Switzer*, 57 N. J. Eq. 421, 41 Atl. 486.

³² *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104, 61 N. E. 152; *Johnson v. Ry.*, 69 Vt. 521, 38 Atl. 267.

³³ *Keough v. Wendelschafer*, 73 Minn. 352, 76 N. W. 46.

³⁴ *Rohr v. Baker*, 13 Or. 350, 10 Pac. 627.

³⁵ *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104, 61 N. E. 152; *Johnson v. Ry.*, 69 Vt. 521, 38 Atl. 267.

Contra, *McClary v. R. R.*, 102 Mich. 312, 60 N. W. 695.

³⁶ *Keough v. Wendelschafer*, 73 Minn. 352, 76 N. W. 46.

such support. If he has not been guilty of fraud, he is not liable in the absence of statute.³⁷ Thus if a pauper subsequently acquired property, he is not liable for support furnished to him by a public corporation.³⁸ If, however, the pauper has received such support through fraudulent representations as to his financial condition, the person furnishing such support has been allowed to recover. Thus where a voluntary charitable association, thinking A a pauper through A's misrepresentations, supported A, and A promised to make a will in favor of such association, when it began to suspect that A was not in need of support, and A subsequently revoked the will made in performance of this contract and made another will, it was held that equity could not give specific performance of a promise to make a will, as the consideration was a past consideration, but that the voluntary association could recover for the support furnished.³⁹ In some jurisdictions the statute specifically provides for a recovery against a pauper for support furnished, if such pauper has or subsequently acquires property.⁴⁰ A right of action against one to whom support has been furnished as a pauper is limited by the statute giving such right. Thus a statute giving a right of action against certain relatives who were primarily liable for the support of a pauper does not give a right of action against such pauper.⁴¹ Under a constitutional provision that no special legislation shall be made with reference to the estates of persons under disability, an insane pauper can not be required, on acquiring property, to pay a greater sum for support than one who is not a pauper would have been obliged to pay.⁴² Thus in the absence of statute the estate of an insane person is not liable for support furnished if there is no special contract therefor.⁴³ In some cases already cited, language is used which seems to support

³⁷ *Maine*. Kennebunkport v. Smith, 22 Me. 445.

Massachusetts. Deer Isle v. Eaton, 12 Mass. 327.

New Hampshire. Charleston v. Hubbard, 9 N. H. 195.

New York. Albany v. McNamara, 117 N. Y. 168, 6 L. R. A. 212, 22 N. E. 931.

Pennsylvania. Montgomery County v. Nyce, 161 Pa. St. 82, 28 Atl. 999.

Vermont. Fairbanks v. Benjamin, 50 Vt. 99.

³⁸ *Deer Isle v. Eaton*, 12 Mass. 327; *Charleston v. Hubbard*, 9 N. H. 195.

³⁹ *Eggers v. Anderson*, 63 N. J. Eq. 264, 55 L. R. A. 570, 49 Atl. 578.

⁴⁰ *Cutler v. Maker*, 41 Me. 594; *East Sudbury v. Belknap*, 18 Mass. (1 Pick.) 512; *Directors v. Nyce*, 161 Pa. St. 82, 28 Atl. 999.

⁴¹ *Bremer County v. Curtis*, 54 Ia. 72, 6 N. W. 135.

⁴² *Schroer v. Asylum*, 113 Ky. 288, 68 S. W. 150.

⁴³ *Montgomery County v. Gupton*, 139 Mo. 303, 39 S. W. 447, 40 S. W. 1094.

the broad principle that one who performs services with another without intending to charge therefor, can not recover even if the services are of a sort for which charges are usually made, and the party for whom the services are rendered does not know that the other party does not intend to make a charge. While this principle is supported by occasional dicta, the cases in which the point is actually presented for decision do not go so far. The secret uncommunicated intention of one party to a contract is generally of no importance, and as it can not be invoked to confer legal rights upon him, it ought not to be invoked to defeat legal rights. The true rule seems to be that one who performs services, such as are usually the subject of charge, at the request of the party for whom they are performed, whether express or implied, is entitled to recover therefor, even if at the time he rendered the services his own secret intention was to make no charge for such services.⁴⁴ Thus where A performed work for a shooting club at the request of the officers thereof in obtaining leases of land for the use of such club, he can recover a reasonable compensation for such work, even though he did not intend to make any charge if the club would buy his house, which they did, and employ him as steward at a salary, which they did not do.⁴⁵ So a physician who performed services which he intended at the time of performing them to be gratuitous, can recover therefor, irrespective of his intention, if the other party was not induced by such intention to accept the services.⁴⁶ Thus where A has rendered services for B, not intending to charge therefor, an instruction by a court to the jury, in an action by A to recover a reasonable compensation to the effect that A's intention to make no charge will not prevent recovery unless A's "conduct and course of dealing was such as to justify B in believing and understanding that no charge was intended," was held correct.⁴⁷ In some cases the rights of the parties who have rendered mutual services, which are intended by the parties to be reciprocal and gratuitous, have been worked out on a somewhat different theory. Thus where A was B's ward and lived in B's family, and rendered services for B and his family, not expecting

⁴⁴ *Thomas v. Shooting Club*, 121 N. Car. 238, 28 S. E. 293; *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291.

⁴⁵ "Here as the implied promise is not met by any agreement that there should be nothing paid, the plaintiff is entitled

to recover." *Thomas v. Shooting Club*, 121 N. Car. 238, 240; 28 S. E. 293.

⁴⁶ *Prince v. McRae*, 84 N. Car. 674.

⁴⁷ *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291.

to be paid for such services, but expecting such services would offset her board, A can recover a reasonable compensation for such services when B has as a matter of fact made a charge against her for her board, and settled his accounts by applying her estate in his hands to the payment of such account for board.⁴⁸ From one point of view, strict logic might hold that A should have resisted B's charge for board by showing the circumstances under which the board was furnished. A seems, however, to have learned of the facts too late to resist the settlement of B's accounts, and her rights were decided on the theory that she had performed the services either under a mistake of fact or by reason of B's fraud and concealment.

§ 1447. Services between members of the same family—General principles. Services rendered between members of the same family form a common example of services which are usually rendered as a gratuity. Persons who live together as members of the same family, and render personal services each to the other, generally do so from motives of affection and not because of the expectation of a financial reward therefor. Accordingly, the mere rendition of personal services between persons so situated, does not establish a liability on the part of the person receiving such services to make compensation to the person rendering them, even though the services may be performed at the express request of the person receiving the benefit thereof or may be voluntarily accepted by him.¹ Conversely, no recovery can be had by the party

⁴⁸ Boardman v. Ward, 40 Minn. 399, 12 Am. St. Rep. 749, 42 N. W. 202.

¹ Delaware. Morris v. Simpson, 3 Houst. (Del.) 568; Jones v. Tucker, 26 Del. (3 Boyce) 422, 84 Atl. 4, 1012.

Georgia. Poole v. Baggett, 110 Ga. 822, 36 S. E. 86.

Illinois. Stock v. Stoltz, 137 Ill. 349, 27 N. E. 604; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604.

Indiana. Hill v. Hill, 121 Ind. 255, 23 N. E. 87.

Iowa. McGarvey v. Roods, 73 Ia. 363, 35 N. W. 488; Cowan v. Musgrave, 73 Ia. 384, 35 N. W. 496; Spitzmiller v. Fisher, 77 Ia. 289, 42 N. W. 197.

Kentucky. Coleman v. Simpson, 32 Ky. (2 Dana) 166; Farley v. Stacy, 177 Ky. 109, 197 S. W. 636; Ballard v. Ballard, 177 Ky. 253, 197 S. W. 661; Armstrong's Administrator v. Shannon, 177 Ky. 547, 197 S. W. 950; Atha v. Webster, 181 Ky. 581, 205 S. W. 598.

Maryland. Bixler v. Sellman, 77 Md. 404, 27 Atl. 137.

Michigan. Allen v. Allen, 60 Mich. 635, 27 N. W. 702; Harris v. Smith, 79 Mich. 54, 6 L. R. A. 702, 44 N. W. 169; Harris v. Harris, 106 Mich. 246, 64 N. W. 15.

Minnesota. Baxter v. Gale, 74 Minn. 36, 76 N. W. 954; Lansing v. Gregory, 128 Minn. 496, 151 N. W. 277.

to such relationship who furnishes board and lodging.² This principle is sometimes spoken of as an exception to the general rule that liability exists where services for which compensation is usually made, are rendered by one person to another at the previous request of such other, or are voluntarily accepted by him. It is not, however, properly speaking, an exception to that rule, because such services as are here described are not ordinarily the subject of compensation. It is rather an illustration of the principle that services rendered for which the party rendering them does not expect to make a charge, and accepted by the person for whom they are rendered with that understanding, do not create a legal liability.

§ 1448. Who are members of family—Husband and wife. As between husband and wife, there is not only a presumption that mutual services are gratuitous,¹ but in many jurisdictions an express promise to make compensation therefor is unenforceable as against public policy.² Thus a contract whereby a husband agrees to pay his wife for services,³ even if not performed at their home,

Missouri. *Woods v. Land*, 30 Mo. App. 176; *Callahan v. Riggins*, 43 Mo. App. 130; *Louder v. Hart*, 52 Mo. App. 377.

Nebraska. *Moore v. Moore*, 58 Neb. 268, 78 N. W. 495.

New Hampshire. *Clark v. Sanborn*, 68 N. H. 411, 36 Atl. 14.

North Carolina. *Ellis v. Cox*, — N. Car. —, 97 S. E. 468.

Ohio. *Hinkle v. Sage*, 67 O. S. 256, 65 N. E. 999; *Merrick v. Ditzler*, 91 O. S. 256, 110 N. E. 403.

Pennsylvania. *Barhites' Appeal*, 126 Pa. St. 404, 17 Atl. 617.

Rhode Island. *Newell v. Lawton*, 20 R. I. 307, 38 Atl. 946.

South Carolina. *Sherwood v. McLaurin*, 103 S. Car. 370, 88 S. E. 363.

South Dakota. *Murphy v. Murphy*, 1 S. D. 316, 9 L. R. A. 820, 47 N. W. 142.

Virginia. *Beale v. Hall*, 97 Va. 383, 34 S. E. 53.

Washington. *Hodge v. Hodge*, 47

Wash. 196, 11 L. R. A. (N.S.) 873, 91 Pac. 764.

West Virginia. *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569; *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218.

Wisconsin. *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 4 L. R. A. 55, 42 N. W. 252.

² *Lessley v. Pond*, — Ala. —, 75 So. 298; *Tank v. Rohweder*, 98 Ia. 154, 67 N. W. 106; *Heinz v. Jacobi*, 76 N. J. L. 189, 68 Atl. 1069; *Anderson v. Osborn*, 62 Wash. 400, 114 Pac. 160; *Olsen v. Olsen*, 90 Wash. 174, 155 Pac. 747.

¹ *Lapworth v. Leach*, 79 Mich. 16, 44 N. W. 338.

² See § 932.

³ *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490, 64 N. W. 334; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *In re Collister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268.

but in business,⁴ or a contract whereby a wife agrees to support her husband,⁵ are void.

§ 1449. Persons related by consanguinity—Parent and child.

Where parents and children are living together as members of a family, services rendered by one for the other, come within this rule, and do not of themselves establish any implied contract to make compensation therefor.¹ Thus if a parent renders services for a child,² as where a father takes care of a horse for his son,³ there is no implied promise to pay therefor. The same principle applies where a parent furnishes provisions to her daughter as a gift. The husband of the daughter can not be held liable to make compensation therefor, as on an implied contract.⁴ So if a child renders services to a parent,⁵ as where board, care and lodging are fur-

⁴ *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711.

Contra, *Nuding v. Ulrich*, 169 Pa. St. 289, 32 Atl. 409.

⁵ *Corcoran v. Corcoran*, 119 Ind. 138, 12 Am. St. Rep. 390, 4 L. R. A. 782, 21 N. E. 468.

¹ *Alabama*. *Borum v. Bell*, 132 Ala. 85, 31 So. 454.

Georgia. *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *O'Kelly v. Faulkner*, 92 Ga. 521, 17 S. E. 847; *Poole v. Baggett*, 110 Ga. 822, 36 S. E. 86.

Illinois. *Stock v. Stoltz*, 137 Ill. 349, 27 N. E. 604; *Robnet v. Robnett*, 43 Ill. App. 191.

Indiana. *King v. Kelly*, 28 Ind. 89; *Niehaus v. Cooper*, 22 Ind. App. 610, 52 N. E. 761.

Kentucky. *Weir v. Weir*, 42 Ky. (3 B. Mon.) 645, 39 Am. Dec. 487.

Michigan. *Wright v. Senn*, 85 Mich. 191, 48 N. W. 545.

Missouri. *Penter v. Roberts*, 51 Mo. App. 222.

New Mexico. *Garcia v. Candelaria*, 9 N. M. 374, 54 Pac. 342.

New York. *Ulrich v. Ulrich*, 136 N. Y. 120, 18 L. R. A. 37, 32 N. E. 606.

Oregon. *Wilkes v. Cornelius*, 21 Or. 348, 28 Pac. 135.

Pennsylvania. *Butler v. Slam*, 50 Pa. St. 456; *Zimmerman v. Zimmerman*, 129 Pa. St. 229, 15 Am. St. Rep. 720, 18 Atl. 129.

South Carolina. *Sherwood v. McLaurin*, 103 S. Car. 370, 88 S. E. 363.

Vermont. *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. 791.

Virginia. *Harshberger v. Alger*, 72 Va. (31 Gratt.) 53.

West Virginia. *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569.

Wisconsin. *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559, 32 N. W. 623; *Leary v. Leary*, 68 Wis. 662, 32 N. W. 623; *Pritchard v. Pritchard*, 69 Wis. 373, 34 N. W. 506.

² *Larsen v. Hansen*, 74 Cal. 320, 16 Pac. 5; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364; *Bostwick v. Bostwick*, 71 Wis. 273, 37 N. W. 405.

³ *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364.

⁴ *Anderson v. Baird* (Ky.), 40 S. W. 923.

⁵ *Kentucky*. *Perry v. Perry*, 63 Ky. (2 Duv.) 312; *Bishop v. Newman*, 168 Ky. 238, 182 S. W. 165; *Norman v. Norman*, 168 Ky. 365, 182 S. W. 224; *Farley v. Stacy*, 177 Ky. 109, 197 S. W. 636; *Atha v. Webster*, 181 Ky. 581, 205 S. W. 598.

nished to a parent by a child,⁶ there is no implied liability on the part of the parent to make compensation therefor. This principle is not confined to cases where a child is a minor, and is therefor not to be referred solely to the fact that the earnings of the minor are the property of his parents. The principle is the same where an adult child lives with his parents as a member of the family, and receives his board and renders services. Even in such a case there is, on the one hand, no implied liability of the child to pay for his board; and, on the other hand, there is no implied liability of the parents to pay for the services of the child.⁷ So where an uncle, A, requested a minor child, B, who had been emancipated by his father, C, to work for C, and had expressed his approval of his conduct in so doing, no implied contract exists on the part of A to pay B for such services.⁸

§ 1450. Other relationships. The same principle applies to services rendered by brothers and sisters, each for the other, where they are living together in one family. No liability to make compensation is created by the mere fact of the rendition of the services in the absence of anything to show some understanding that compensation should be made.¹ Accordingly, the court commits no

Missouri. *Kostuba v. Miller*, 137 Mo. 161, 38 S. W. 946.

New York. *Ulrich v. Ulrich*, 136 N. Y. 120, 18 L. R. A. 37, 32 N. E. 606.

South Carolina. *Sherwood v. McLaurin*, 103 S. Car. 370, 88 S. E. 363.

Vermont. *Jones v. Campbell*, — Vt. —, 102 Atl. 102.

Washington. *Olsen v. Olsen*, 90 Wash. 174, 155 Pac. 747.

Alabama. *Lessley v. Pond*, — Ala. —, 75 So. 298.

Indiana. *Niehaus v. Cooper*, 22 Ind. App. 610, 52 N. E. 761.

Kentucky. *Turner v. Turner*, 100 Ky. 373, 38 S. W. 506; *Bishop v. Newman's Executor*, 168 Ky. 238, 182 S. W. 165; *Norman v. Norman*, 168 Ky. 365, 182 S. W. 224.

Tennessee. *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888.

Virginia. *Nicholas v. Nicholas*, 100 Va. 660, 42 S. E. 669, 866.

Washington. *Olsen v. Olsen*, 90 Wash. 174, 155 Pac. 747.

¹ *Schwachtgen v. Schwachtgen*, 65 Ill. App. 127; *Wall v. Wall*, 69 Ill. App. 389; *Donovan v. Driscoll*, 116 Ia. 339, 90 N. W. 60.

⁸ *Bristol v. Sutton*, 115 Mich. 365, 73 N. W. 424.

¹ **Indiana.** *Fuller v. Fuller*, 21 Ind. App. 42, 51 N. E. 373.

Kansas. *Ayres v. Hull*, 5 Kan. 419.

Michigan. *Martin v. Sheridan*, 46 Mich. 93, 8 N. W. 722.

Minnesota. *Knight v. Martin*, 124 Minn. 191, 144 N. W. 941.

Tennessee. *Taylor v. Lincumfelter*, 69 Tenn. (1 Lea) 83; *Hayes v. Cheatham*, 74 Tenn. (6 Lea) 1.

Washington. *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352; *Hodge v. Hodge*, 47 Wash. 196, 11 L. R. A. (N.S.) 873, 91 Pac. 764.

error in refusing to allow a question to be answered, which was intended to call forth evidence that the sister had rendered the services at the request of her brother.² It is error to refuse to order a non-suit if the undisputed evidence shows that services were rendered by one brother to another while members of the same family and without an express agreement for compensation.³ The same principle applies as between grandparents and grandchildren.⁴ If they are living together in one family, a grandchild can not recover for personal services rendered to his grandparents.⁵ If the grandchild renders services for his grandparents under an arrangement made by his parents, he can not recover from the estate of his grandparents, since such services were not rendered at their request.⁶ Similar considerations apply to services rendered between persons more remotely related, living-together as one family, as between cousins,⁷ or between uncle or aunt, on the one hand, and nephew or niece, on the other.⁸

In other jurisdictions it is said that except in transactions between parent and child, the relationship alone is not enough to show that the parties did not intend liability for services rendered.⁹ Accordingly, where this rule is in force a sister may recover from her brother for services rendered as his housekeeper in the absence of any express agreement.¹⁰

§ 1451. Persons related by affinity. This principle is not limited, however, to blood relationship. If a son-in-law or daughter-in-law renders services for parents-in-law, while members of the same family,¹ as by furnishing board and lodging,² no implied con-

² *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352.

³ *Hodge v. Hodge*, 47 Wash. 196, 11 L. R. A. (N.S.) 873, 91 Pac. 764.

⁴ *Dodson v. McAdams*, 96 N. Car. 149, 60 Am. Rep. 408.

⁵ *Missouri*. *Castle v. Edwards*, 63 Mo. App. 564.

North Carolina. *Dodson v. McAdams*, 96 N. Car. 149, 60 Am. Rep. 408, 2 S. E. 453.

Pennsylvania. *Barhite's Appeal*, 126 Pa. St. 404, 17 Atl. 617.

South Dakota. *Murphy v. Murphy*, 1 S. D. 316, 9 L. R. A. 820, 47 N. W. 142.

Virginia. *Jackson v. Jackson*, 96 Va. 165, 31 S. E. 78.

⁶ *Moyer's Appeal*, 112 Pa. St. 290, 3 Atl. 811.

⁷ *Neal v. Gilmore*, 79 Pa. St. 421.

⁸ *Armstrong's Administrator v. Shannon*, 177 Ky. 547, 197 S. W. 950.

⁹ *Curry v. Curry*, 114 Pa. St. 367, 7 Atl. 61.

¹⁰ *Curry v. Curry*, 114 Pa. St. 367, 7 Atl. 61.

¹ *Farmer v. Underwood*, 164 Ia. 587, 146 N. W. 18; *Ellis v. Cox*, — N. Car. —, 97 S. E. 468; *Hinkle v. Sage*, 67 O. S. 256, 65 N. E. 999.

² *Mariner v. Collins*, 2 Harr. (Del.) 290; *Ballard v. Ballard*, 177 Ky. 253, 197 S. W. 661; *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991; *Schmidt's Estate*, 93 Wis. 120, 67 N. W. 37.

Contra, *Rogers v. Millard*, 44 Ia. 466.

tract exists by reason of such facts alone. The same principle applies to mutual services rendered between step-parents and step-children.³ Thus if a step-father voluntarily supports his step-children,⁴ or a step-child voluntarily renders services for a step-father,⁵ no implied contract exists. Accordingly, if a step-daughter renders services to the family, in reliance upon a promise made by her mother that she should receive compensation for such services, she can not recover from the estate of her step-father for such services unless it can be shown that he not only knew that the promise had been made, but that he also knew that she continued to render such services upon such promise.⁶ The principle that a contract for compensation is not implied between a step-father and step-daughter, has been carried so far that an attorney who procured a divorce for his step-daughter, who at that time was living in his family and rendering domestic services, could not recover therefor four years after. In the meantime, however, he had set up claims for certain disbursements made by him in a foreclosure suit brought by her, but had not made any claim for such legal services.⁷ However, a step-father who supports his step-children on his wife's land undertakes their support only by his labor as applied to their property. Hence, in an action by them against him to recover railroad ties, made from timber growing on such land, he may counter-claim for their support.⁸ Similar principles apply where services are rendered between brothers-in-law, sisters-in-law, and the like, while members of one family.⁹

§ 1452. De facto membership of same family. The principle under discussion is not limited to cases of relationship by blood or affinity, but it applies also to persons who are de facto members of the same family, even if there is no relationship of any kind

³ **Kansas.** Longhofer v. Herbel, 83 Kan. 278, 111 Pac. 483.

Massachusetts. Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015.

Minnesota. Baxter v. Gale, 74 Minn. 36, 76 N. W. 954.

New York. Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301.

South Carolina. Gaston v. Gaston, 80 S. Car. 157, 61 S. E. 393.

Wisconsin. Ellis v. Cary, 74 Wis. 176, 17 Am. St. Rep. 125, 4 L. R. A. 55, 42 N. W. 252.

⁴ **Livingston v. Hammond**, 162 Mass. 375, 38 N. E. 968; **Haggerty v. McCanna**, 25 N. J. Eq. 48.

⁵ **Harris v. Smith**, 79 Mich. 54, 6 L. R. A. 702, 44 N. W. 169.

⁶ **Harris v. Smith**, 79 Mich. 54, 6 L. R. A. 702, 44 N. W. 169.

⁷ **Baxter v. Gale**, 74 Minn. 36, 76 N. W. 954.

⁸ **Kempson v. Goss**, 69 Ark. 235, 62 S. W. 582.

⁹ **Hill v. Hill**, 121 Ind. 255, 23 N. E. 87.

The same principle applies to services rendered for one by his wife's niece while a member of his household. **In re Bean's Estate**, — Pa. St. —, 107 Atl. 671.

between them.¹ Thus if a child has been taken into a family as a member thereof by persons in no way related to it, there is, on the one hand, no implied contract that the child, or the parents of the child, should make compensation for its board;² nor, on the other hand, that the persons who take such child into their family are to make compensation for the services performed by such child.³ This rule applies even where an "adopted" child remains a member of the family after becoming of age.⁴ If the "adopted" child works for his "adopting" parents for many years after coming of age and if his right to some compensation is assumed in their mutual dealings and the only question is as to the amount thereof, he is entitled to reasonable compensation.⁵

§ 1453. Nature of services. Some jurisdictions limit this doctrine to cases where the services rendered are purely personal in their nature, and such as would ordinarily be inspired by affection or the sense of duty.¹ Thus it has been held that there is an implied contract to pay for such services as washing or making and mending clothing rendered between persons living together.²

§ 1454. Services between persons not members of same family. The presumption that services are intended to be gratuitous applies only to services which are rendered between persons who are living together as members of the same family. The presumption does

¹ Colorado. *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192.

Georgia. *Howard v. Randolph*, 134 Ga. 691, 29 L. R. A. (N.S.) 294, 20 Am. & Eng. Ann. Cas. 392, 68 S. E. 586.

Massachusetts. *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023.

Nebraska. *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567.

Vermont. *Jones v. Campbell*, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

² Croton v. Foreman, 13 Ind. App. 442, 41 N. E. 838.

³ Colorado. *Walker v. Taylor*, 28 Colo. 233, 64 Pac. 192.

Georgia. *Howard v. Randolph*, 134 Ga. 691, 29 L. R. A. (N.S.) 294, 20 Am. & Eng. Ann. Cas. 392, 68 S. E. 586.

Massachusetts. *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023.

Rhode Island. *Bliven v. Wheeler*, 25 R. I. 313, 55 Atl. 760.

Virginia. *Starke v. Storm's Executor*, 115 Va. 651, 79 S. E. 1057.

⁴ Lang v. Dietz, 191 Ill. 161, 60 N. E. 841.

Apparently contra, where valuable services were rendered for many years, *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567.

⁵ Jones v. Campbell, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

See also, *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567.

¹ Hurst v. Lane, 105 Ga. 506, 31 S. E. 135; *Frailey v. Thompson* (Ky.), 49 S. W. 13.

² Frailey v. Thompson (Ky.), 49 S. W. 13.

not exist as between persons who are related but who are not living together.¹ If parents-in-law and children-in-law do not live together as members of the same family, no presumption arises that services which are rendered by one for the other are gratuitous if such services are of a sort for which compensation would ordinarily be made as between persons who are not related.² Thus if a woman who does washing and housecleaning for a living does work of the same sort for her daughter and her daughter's husband, and is not a member of the latter's household, there is an implied agreement on his part to pay therefor.³ It will not be presumed that services which are rendered by a step-child for a step-parent are gratuitous if such parties do not live together as members of the same family.⁴ So if A, a middle-aged man, works a year for his brother, B, in superintending the building of certain houses for B, and during such period A lives with his own family in one of B's houses, B is liable to pay A a reasonable compensation, even though A had been a guest at B's home for six weeks at the time of the beginning of such work, before his family had rejoined him.⁵

If persons who are related are not members of the same family when they enter into an arrangement under which one of them is to render services to the other and if as a result of such arrangement they live together as members of the same family and render services one to the other, there is no presumption that such services are intended to be gratuitous.⁶ If an adult child who is not living with his parents renders services to them, it will not be presumed that such services were intended to be gratuitous,⁷ even if he returns to their home in order to perform such services.⁸ If a sister takes her brother into her home and cares for him during his last illness there is no presumption that such services were in-

¹ *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875; *Winkler v. Killian*, 141 N. Car. 575, 115 Am. St. Rep. 694, 54 N. E. 540; *Brown v. Cummings*, 27 R. I. 369, 62 Atl. 378; *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835; *Winter v. Greiling*, 114 Wis. 378, 90 N. W. 425.

² *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875; *Winter v. Greiling*, 114 Wis. 378, 90 N. W. 425.

³ *Winter v. Greiling*, 114 Wis. 378, 90 N. W. 425.

⁴ *Brown v. Cummings*, 27 R. I. 369, 62 Atl. 378.

⁵ *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835.

⁶ *Mark v. Boardman* (Ky.), 1 L. R. A. (N.S.) 819, 89 S. W. 481, 28 Ky. L. Rep. 455; *Mathias v. Tingey*, 39 Utah 561, 38 L. R. A. (N.S.) 749, 118 Pac. 781.

⁷ *Winkler v. Killian*, 141 N. Car. 575, 115 Am. St. Rep. 694, 54 N. E. 540.

⁸ *Mathias v. Tingey*, 39 Utah 561, 38 L. R. A. (N.S.) 749, 118 Pac. 781.

tended to be gratuitous.⁹ On the other hand, it has been said that if a child takes his parent into his family and furnishes support and other services it will be presumed that such support and services were gratuitous.¹⁰

The mere fact that the persons between whom the services are rendered are living in the same house, is not conclusive that they are members of the same family.¹¹ If the persons who reside in the same house are not so related that one of them is bound in law to support the other, it is, in case of a dispute, a question of fact in what capacity the person who renders the services is residing in that house. Thus a nephew who lives with his uncle and renders services in connection with his uncle's business may recover if it can be shown that the board furnished him was in part compensation for the services rendered by him.¹² So where a wealthy man supported his second cousin at his house, it was a question of fact for the jury whether she lived there merely as a member of his family or whether she was living there as housekeeper; in the latter case there would be an implied contract on his part to pay for her services without any express contract.¹³ So a nephew may recover for board furnished his aunt, where he shows that she came to his house on a temporary visit, was taken ill while there, and remained there on account of ill health seven months, until her death.¹⁴ So where a person is shown to be living in another's house as a boarder, under an express contract for a compensation, he is liable for services rendered not included in the express agreement, such as nursing in sickness.¹⁵

It has, however, been held that where a devise is given A on the condition that she furnish a home for her uncle, B, on the property devised to her, as long as he lives, and she accepts such devise, and her uncle lives with her, a family relation is thereby created between uncle and niece, so that she can not recover for services in caring for him in the absence of an express contract on his part.¹⁶

⁹ *Mark v. Boardman* (Ky.), 1 L. R. A. (N.S.) 819, 89 S. W. 481, 28 Ky. L. Rep. 455.

¹⁰ *Olsen v. Olsen*, 90 Wash. 174, 155 Pac. 747.

¹¹ *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; *Sprague v. Sea*, 152 Mo. 327, 53 S. W. 1074.

¹² *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650.

¹³ *Sprague v. Sea*, 152 Mo. 327, 53 S. W. 1074.

¹⁴ *Glenn v. Gerald*, 64 S. Car. 236, 42 S. E. 155.

¹⁵ *Pfeiffer v. Michelsen*, 112 Mich. 614, 71 N. W. 156; *Cates v. Gilmer* (Tenn. Ch. App.), 48 S. W. 280.

¹⁶ *Lackey's Estate*, 181 Pa. St. 638, 37 Atl. 813.

§ 1455. Effect of lack of contractual capacity. The rule that services rendered between members of the same family are presumptively gratuitous grows out of the fact that, in most cases, there is a genuine implied understanding between the parties to this effect, and not out of any arbitrary rule of law which forbids recovery for such services in the absence of an express agreement. It follows that if one of the parties to the transaction lacks mental capacity to make a contract, there can be no valid genuine understanding between the parties for gratuitous services; and, accordingly, reasonable compensation for such services can be recovered, if the party who renders such services is not to render them in the absence of any agreement, because of the relationship between them.¹

If the person for whom services are rendered is incapable of making a contract by reason of insanity or imbecility, it is said that there will be no presumption that such services were to be gratuitous, since the parties were incapable of making a contract.² If the person by whom such services are rendered is mentally incapable of making a contract, there can be no genuine understanding that such services are gratuitous, and unless the parties are closely related by ties of blood, recovery for such services can be had.³ The guardian of an imbecile or an insane person has no right to the gratuitous services of such person, and accordingly such person can recover from such guardian for reasonable compensation for services performed.⁴ If an imbecile becomes a member of a household when a young child, it is said that her services up to the time of her coming of age will be presumed to be gratuitous, but that after she comes of age she will be entitled to recover reasonable compensation for the value of her services if they greatly exceed the value of the support which is furnished to her.⁵ A different rule would apply where the party who renders services or furnishes support is bound to do so without compensation by reason of the relationship existing between the parties as in the case of parents and minor children.

¹ *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567; *Scattergood v. Ingram*, 86 O. S. 76, 98 N. E. 923; *Champlin v. Slocum*, — R. I. —, 103 Atl. 706.

² *Scattergood v. Ingram*, 86 O. S. 76, 98 N. E. 923.

³ *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567; *Champlin v. Slocum*, — R. I. —, 103 Atl. 706.

⁴ *Champlin v. Slocum*, — R. I. —, 103 Atl. 706.

⁵ *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567.

§ 1456. Presumption of gratuitous service rebuttable—Express contract. The rule that there is no implied agreement for a compensation for services between persons in domestic relations living together as members of a family, is merely a *prima facie* rule. In the absence of any evidence there is a presumption that such services are gratuitous.¹ This presumption is rebuttable,² and it has been held error when evidence has been introduced to show that there was an understanding for compensation to charge that there was a presumption of law against such claim.³ The force of the presumption has been held to depend upon the relationship of the parties, the presumption becoming "weaker and therefore more easily rebutted as the relationship recedes."⁴ It is for the person alleging that such mutual services were not gratuitous to prove that fact.⁵ An express contract to make compensation between the persons between whom such services are rendered is sufficient to create a liability on the part of the person receiving such services to make compensation therefor,⁶ as where a father promises to make compensation to his son for furnishing board and lodging.⁷

¹ *In re Pauly's Estate* (Plowman v. King), 174 Ia. 122, 156 N. W. 355.

"A presumption of law arises that such service is gratuitous." *Bixler v. Sellman*, 77 Md. 494, 496; 27 Atl. 137.

² *Georgia.* *Howard v. Randolph*, 134 Ga. 691, 29 L. R. A. (N.S.) 294, 20 Am. & Eng. Ann. Cas. 392, 68 S. E. 586.

Indiana. *Pitts v. Pitts*, 21 Ind. 309.

Iowa. *Resso v. Lehan*, 96 Ia. 45, 64 N. W. 689; *In re Pauly's Estate* (Plowman v. King), 174 Ia. 122, 156 N. W. 355.

Kentucky. *Bryson's Administrator v. Biggs* (Ky.), 104 S. W. 982 [sub nomine, *Bryson's Administrator v. Briggs*, 32 Ky. Law Rep. 159].

Maryland. *Bixler v. Sellman*, 77 Md. 494, 27 Atl. 137.

New York. *Ulrich v. Ulrich*, 136 N. Y. 120, 18 L. R. A. 37, 32 N. E. 606.

Tennessee. *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888.

Virginia. *Buchanan v. Higginbotham*, — Va. —, 97 S. E. 340.

³ *Ulrich v. Ulrich*, 136 N. Y. 120, 18 L. R. A. 37, 32 N. E. 606.

⁴ *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888.

⁵ *Howard v. Randolph*, 134 Ga. 691, 29 L. R. A. (N.S.) 294, 20 Am. & Eng. Ann. Cas. 392, 68 S. E. 586; *Enger v. Lofland*, 100 Ia. 303, 69 N. W. 526; *Bixler v. Sellman*, 77 Md. 494, 27 Atl. 137; *Sherwood v. McLaurin*, 103 S. Car. 370, 88 S. E. 363.

⁶ *Kentucky.* *Frailey v. Thompson* (Ky.), 49 S. W. 13; *Bryson's Administrator v. Biggs* (Ky.), 104 S. W. 982 [sub nomine, *Bryson's Administrator v. Briggs*, 32 Ky. Law Rep. 159].

Michigan. *O'Connor v. Beckwith*, 41 Mich. 657, 3 N. W. 166.

Minnesota. *Johanke v. Schmidt*, 79 Minn. 261, 82 N. W. 582.

New York. *Ulrich v. Ulrich*, 136 N. Y. 120, 18 L. R. A. 37, 32 N. E. 606.

Virginia. *Jackson v. Jackson*, 96 Va. 165, 31 S. E. 78.

West Virginia. *Harris v. Orr*, 46 W. Va. 261, 76 Am. St. Rep. 815, 33 S. E. 257.

⁷ *Harris v. Orr*, 46 W. Va. 261, 76 Am. St. Rep. 815, 33 S. E. 257.

Thus where a brother-in-law induces his sister-in-law, who was a member of the family and worked in her brother-in-law's store as well as in the family, to believe that she would receive pay for such services, he is liable to her therefor, even if he did not intend to make such compensation, and was jesting when he made the statement on which she relied.⁸ A statement by a mother-in-law to her son-in-law when she asked him to support her, to the effect that she was not a pauper and was able to pay her way, but that as she had no immediate funds she wished an account to be kept, is sufficient to show an agreement on her part to pay for such support, even under a statute which provides that if persons in certain specified relations entertain one another without an agreement for compensation, no recovery can be had for such support.⁹ The fact that charges were made and accounts rendered regularly shows that there was an understanding for compensation.¹⁰ If an express contract for compensation exists, recovery for extra services is allowed whenever recovery could be had for extra services under other similar contracts.¹¹ The presumption of gratuitous service is rebutted by such contract.

If a child is taken into a family as a member thereof by persons who are not related to it or who are not its parents under a definite contract by which they agree to support such child and to care for it, it has been held that if the *de facto* parents break such contract the child may recover reasonable compensation for services rendered under such contract.¹²

It is not necessary, however, that the express contract between the parties should be enforceable. Even though for some reason it may be unenforceable as a contract, it may, nevertheless, suffice to show that the services were not rendered gratuitously.¹³ Thus where a step-daughter rendered services for her step-father under an oral agreement which is unenforceable by reason of the Statute of Frauds, she may recover a reasonable compensation for the

⁸ *Plate v. Durst*, 42 W. Va. 63, 32 L. R. A. 404, 24 S. E. 580.

⁹ *Bryson's Administrator v. Biggs* (Ky.), 104 S. W. 982 [sub nomine, *Bryson's Administrator v. Briggs*, 32 Ky. Law Rep. 159].

¹⁰ *Buchanan v. Higginbotham*, — Va. —, 97 S. E. 340.

¹¹ *Cryer v. Conway*, 181 Ky. 526, 205 S. W. 562.

¹² *Ottoway v. Milroy*, 144 Ia. 631, 123 N. W. 467; *Ingram v. Baaye*, 67 Or. 257, 135 Pac. 883.

Contra, *Blivin v. Wheeler*, 25 R. I. 313, 55 Atl. 760.

¹³ *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 4 L. R. A. 55, 42 N. W. 252; *Taylor v. Thieman*, 132 Wis. 38, 122 Am. St. Rep. 943, 111 N. W. 229.

services thus rendered.¹⁴ So where a mother makes an agreement with the guardians of her insane son when he comes to live at her house that she shall be paid for caring for him out of his estate, such agreement is sufficient to show that such services were not rendered gratuitously, even though the contract was unenforceable because the appointment of the guardians was void.¹⁵ So it has been held that recovery can be had for services rendered upon the understanding that the party for whom they were rendered would make compensation by will, where he dies without making any such provision in his will, even though there was no agreement as to the amount of such compensation.¹⁶ So if there has been an express enforceable contract, the person rendering such services may, in case of a breach of such contract for any reason, recover a reasonable compensation for such services.¹⁷ Thus where a son supported his father for life, under a contract by which the father was to devise to the son certain realty, and the father, by reason of subsequent insanity, was unable to perform such contract, the son may recover a reasonable compensation for such services, not exceeding the value of the land to be devised to him.¹⁸ So recovery may be had for services rendered by a son to a father under a contract which has since been rescinded, in which case the son is obliged to account for personalty received by him under such contract and not surrendered when the contract was terminated.¹⁹

§ 1457. Genuine understanding that compensation be made.

While an express contract is the most satisfactory and safe method of showing that the services were not intended to be gratuitous, it is not, however, necessary. If the facts and circumstances of the case show that there is in fact an understanding between the person rendering the services and the person for whom they were rendered, that a compensation should be made therefor, the person rendering the services may recover a reasonable compensation.¹

¹⁴ *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 4 L. R. A. 55, 42 N. W. 252.

¹⁵ *Jessup v. Jessup*, 17 Ind. App. 177, 46 N. E. 550.

¹⁶ *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71; *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74; *Taylor v. Thieman*, 132 Wis. 38, 122 Am. St. Rep. 943, 111 N. W. 229.

¹⁷ *Johanke v. Schmidt*, 79 Minn. 261, 82 N. W. 582.

¹⁸ *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349 [s. c., 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583].

¹⁹ *Walker v. Walker*, 100 Ia. 99, 69 N. W. 517 [reversing on rehearing, 63 N. W. 331].

¹ *California. Murdock v. Murdock*, 7 Cal. 511.

Such understanding, however, must be clearly proven,² or as some courts have held, there must be an express contract or its equivalent.³

§ 1458. Degree of proof requisite. Clear and convincing evidence is said to be necessary.¹ The courts have in one jurisdiction receded from this rule and they have said that if the person for whom the support was furnished is dead, the existence of an express contract must be proved by clear and convincing evidence; while if such person is alive, it is sufficient if the existence of the contract is proved by a preponderance of the evidence.²

Some courts have gone further than this. They have declared that such a contract can be proven only by direct and positive evidence, and that it is erroneous to charge the jury that such a contract may be proved by clear and satisfactory evidence,³ or have spoken as if an express contract were indispensable.⁴ This statement, however, carries the rule too far. The true rule is, that the rendition of such services is not by itself any evidence that there was an agreement between the parties for compensation, and does not of itself impose any liability upon the party for whom they were rendered. No liability exists, unless there is proof of a contract, implied or expressed, for compensation; and the rendition of such services is not such evidence. It has even been held not to

Georgia. Murrell v. Studstill, 104 Ga. 604, 30 S. E. 750.

Illinois. Morton v. Rainey, 82 Ill. 215, 25 Am. Rep. 311; Warren v. Warren, 105 Ill. 568; Heffron v. Brown, 155 Ill. 322, 40 N. E. 583; Neish v. Gannon, 198 Ill. 219, 64 N. E. 1000; Jones v. Adams, 81 Ill. App. 183.

Indiana. Collins v. Williams, 21 Ind. App. 227, 52 N. E. 92.

Iowa. Scully v. Scully's Executor, 28 Ia. 548; Ridler v. Ridler, 103 Ia. 470, 72 N. W. 671.

Michigan. Sammon v. Wood, 107 Mich. 506, 65 N. W. 529.

Missouri. Hart v. Hess, 41 Mo. 441.

Tennessee. Gorrell v. Taylor, 107 Tenn. 568, 64 S. W. 888.

Utah. Mathias v. Tingey, 39 Utah 561, 38 L. R. A. (N.S.) 749, 118 Pac. 781.

Vermont. Westcott v. Westcott, 69 Vt. 234, 39 Atl. 199; Jones v. Campbell, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

West Virginia. Broderick v. Broderick, 28 W. Va. 385.

²Price v. Price, 101 Ky. 28, 39 S. W. 429.

³Jackson v. Jackson, 96 Va. 165, 31 S. E. 78.

¹Hinkle v. Sage, 67 O. S. 256, 65 N. E. 999.

²Merrick v. Ditzler, 91 O. S. 256, 110 N. E. 493 [distinguishing, Hinkle v. Sage, 67 O. S. 256, 65 N. E. 999].

³Bash v. Bash, 9 Pa. St. 260.

⁴Hinkle v. Sage, 67 O. S. 256, 65 N. E. 999 (using the term "express contract" so as to include genuine implied contracts); Murphy v. Murphy, 1 S. D. 316, 9 L. R. A. 820, 47 N. W. 142.

be necessary to have in fact a mutual understanding that the services rendered between relatives are for compensation in order to create a liability therefor. If the person rendering such services expects to be compensated and the circumstances under which they are rendered are such that the person for whom they are rendered must, as a reasonable man, know that they are rendered for compensation, he is liable therefor, even if he did not in fact know of such expectation.⁵

Declarations to third persons, made by the person for whom services are rendered by a member of his family, to the effect that such services are valuable and will be paid for, are not sufficient to show the existence of a contract to pay therefor.⁶ At the same time such declarations are admissible if they tend to show that there was an understanding that compensation should be made for the services which were rendered.⁷

§ 1459. Extra work. If A has agreed with B to perform a certain definite and specific contract for B, without giving his entire time to B's employment, A may recover for services rendered by him in addition to those specified in the contract if B either requests A to render such extra services or voluntarily accepts the benefit of them, when B knows, or should know, that A expects compensation therefor.¹ Extra work done while per-

⁵ *Spencer v. Spencer*, 181 Mass. 471, 63 N. E. 947.

⁶ *Donovan v. Driscoll*, 116 Ia. 339, 90 N. W. 60; *Bishop v. Newman's Executor*, 168 Ky. 238, 182 S. W. 165; *Zimmerman v. Zimmerman*, 129 Pa. St. 229, 15 Am. St. Rep. 720, 18 Atl. 129.

⁷ *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74.

¹ *California*. *City Street Improvement Co. v. Kroh*, 158 Cal. 308, 110 Pac. 933.

Colorado. *Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77; *Hottel v. Poudre Valley Reservoir Co.*, 41 Colo. 370, 92 Pac. 918.

Connecticut. *Schaefer v. Ely*, 84 Conn. 501, Ann. Cas. 1912D, 899, 80 Atl. 775.

Illinois. *Chicago & Eastern Illinois*

Railroad Co. v. Moran, 187 Ill. 316, 58 N. E. 335.

Indiana. *Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982.

Iowa. *Evans v. McConnell*, 99 Ia. 326, 63 N. W. 570, 68 N. W. 790.

Kentucky. *Escott v. White*, 73 Ky. (10 Bush.) 169.

Massachusetts. *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

Michigan. *Pfeiffer v. Michelsen*, 112 Mich. 614, 71 N. W. 156; *Busse v. Douglass*, 165 Mich. 95, 130 N. W. 188.

Nebraska. *Sabin v. Cameron*, 90 Neb. 347, 133 N. W. 422.

North Carolina. *McEwen v. Loucheim*, 115 N. Car. 348, 20 S. E. 519.

Vermont. *Trow v. Forsyth*, 70 Vt. 498, 41 Atl. 501; *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 32 L. R. A. (N.S.) 135, 78 Atl. 718.

forming a building or construction contract is a common illustration of this principle.² If the owner requests the builder to remove rubbish which is not required by the original contract, the owner is liable for reasonable compensation for such services.³ Expense of excavating in difficult material not shown in the specifications may be allowed.⁴ So A, who has an express contract to act as a salesman for B within a specified territory, may recover his necessary expenses and a reasonable compensation for sales made outside of the territory specified, if made at B's request.⁵ If A has a contract to furnish B with board, A may recover a reasonable compensation for services rendered to B as a nurse during illness.⁶ So where A has contracted to furnish B with power to operate a certain derrick, A may recover for extra power furnished after B has put in a new derrick requiring greater power.⁷

§ 1460. Extras for unforeseen expense in performance. One who does no more than he agreed to do can not recover more than the contract price because the performance is less profitable than he had anticipated.¹ No recovery can be had, as for extra work, for work which is necessary in the performance of the contract

Washington. *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

Wisconsin. *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717; *Sterling Engineering & Construction Co. v. Berg*, 161 Wis. 280, 152 N. W. 851.

2 Colorado. *Hottel v. Poudre Valley Reservoir Co.*, 41 Colo. 370, 92 Pac. 918.

Connecticut. *Schaefer v. Ely*, 84 Conn. 501, Ann. Cas. 1912D, 899, 80 Atl. 775.

Illinois. *Chicago & Eastern Illinois Railroad Co. v. Moran*, 187 Ill. 316, 58 N. E. 335.

Indiana. *Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982.

Michigan. *Busse v. Douglass*, 165 Mich. 95, 130 N. W. 188.

Minnesota. *Meyer v. Berlandi*, 53 Minn. 59, 54 N. W. 937.

Nebraska. *Sabin v. Cameron*, 90 Neb. 347, 133 N. W. 422.

Vermont. *Creamery Package Mfg.*

Co. v. Russell, 84 Vt. 80, 32 L. R. A. (N.S.) 135, 78 Atl. 718.

Wisconsin. *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717; *Sterling Engineering & Construction Co. v. Berg*, 161 Wis. 280, 152 N. W. 851.

³ *Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77.

⁴ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁵ *McEwen v. Loucheim*, 115 N. Car. 348, 20 S. E. 519.

⁶ *Cryer v. Conway*, 181 Ky. 526, 205 S. W. 562; *Pfeiffer v. Michelsen*, 112 Mich. 614, 71 N. W. 156; *Cates v. Gilmer* (Tenn. Ch. App.), 48 S. W. 280.

⁷ *Trow v. Forsyth*, 70 Vt. 498, 41 Atl. 501.

¹ *United States v. Normile*, 239 U. S. 344, 60 L. ed. 319 [reversing judgment, *Normile v. United States*, 49 Ct. Cl. 73].

though not specifically mentioned therein,² as for blasting rock when necessary for the excavation of drains required by the specifications;³ digging to an extra depth,⁴ as where the contractor is obliged to do more excavating than he had anticipated in order to comply with his contract to construct the foundation on solid ground;⁵ or driving piling⁶ to obtain a secure foundation required by the contract, or underpinning an adjoining building to make an excavation and put in a foundation required by the contract.⁷ No additional compensation can be had for collecting logs in a boom if this is necessary to perform the original contract for delivering such logs.⁸ An attorney who has agreed to collect a claim on a contingent fee can not recover additional compensation because of the fact that an erroneous decision of the trial court obliged the attorney to prosecute an appeal and to give bond on the refusal of his client so to do.⁹

§ 1461. Work and labor demanded as gratuitous or under a claim of right. The circumstances of the case or positive rules of law may in some cases justify or require a finding that there was no real intention on the part of the person who requested such services to make compensation therefor.¹ A request for work and labor may be so made that it shows that the party who makes such request does not expect to pay therefor; and under such circumstances no implied contract is created by performance of such work and labor in accordance with such request.² If A insists that B shall perform certain work and labor under an existing contract into which A and B have entered, as performance thereof, B's

Contracts for excavating under directions of the owner's engineer. *Huckestein v. Inclined Plane Co.*, 173 Pa. St. 169, 33 Atl. 1108.

²*Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77; *Woods v. Ayres*, 39 Mich. 345; *Brigham v. Martin*, 103 Mich. 150, 61 N. W. 276; *Cavanaugh v. Robinson*, 138 Mich. 554, 101 N. W. 824.

³*Lee v. Brayton*, 18 R. I. 232, 26 Atl. 256.

⁴*Ruecking v. McMahon*, 81 Mo. App. 422.

⁵*Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77.

⁶*Stewart v. Cambridge*, 125 Mass. 102.

⁷*Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

⁸*Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396.

⁹*Cavanaugh v. Robinson*, 138 Mich. 554, 101 N. W. 824.

¹*Veitch v. Russell, Car. & Marsh.* 362; *Anderson & Fruitvale Transp. Co.*, 195 Mich. 734, 162 N. W. 273; *McGuire v. Hughes*, 207 N. Y. 516, 46 L. R. A. (N.S.) 577, Ann. Cas. 1914C, 585, 101 N. E. 460.

²*Green River Asphalt Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985.

performance of such work and labor creates no implied contract on the part of A to pay therefor, even if such work and labor were not required by the true construction of the contract between A and B.³ In such case, if the contractor is willing to take the chances of the correctness of his interpretation of the contract, he should perform the contract as he understands it, and enforce his contract rights against the adversary party.⁴ Even if an architect's certificate is by the contract necessary to recovery, he may recover without it if his interpretation of the contract is correct, since it is in such case withheld unreasonably.⁵ While a contract by which a contractor agrees to keep a street in repair for five years does not bind him to repair a street which has been injured by the bursting of a water main, still if such contractor makes such repair he can not recover from the city therefor.⁶ A owned a building which was being erected for him by B, the chief contractor. X, a subcontractor, was doing the plastering under his contract with B. X plastered one room which he claimed that B was not bound by his contract with A to have plastered. A knew that he was plastering such room and demanded that he plaster it, claiming that B was bound by his contract with A to have it plastered. Even if A was wrong in his contention, he was not liable to X on an implied contract.⁷ Extras can not be allowed for expenses due to a mistake in judgment on the part of the engineer who is in charge of the work.⁸

If a contract with a government or public corporation reserves to such party the right to direct performance by the contractor, it seems that the latter may recover compensation for extras which are required by such adversary party, even though under claim that they are necessary to performance of the original contract.⁹

³ *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110; *Green River Asphalt Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985; *O'Brien v. New York*, 139 N. Y. 543, 35 N. E. 323.

Apparently contra, *Wilson v. Salt Lake City*, 46 Utah 60, 174 Pac. 847.

⁴ *O'Brien v. New York*, 139 N. Y. 543, 35 N. E. 323.

⁵ *O'Brien v. New York*, 139 N. Y. 543, 35 N. E. 323.

⁶ *Green River Asphalt Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985.

⁷ *Hartnett v. Christopher*, 61 Mo. App. 64.

⁸ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁹ *Clark v. United States*, 73 U. S. (6 Wall.) 543, 18 L. ed. 916; *United States v. Barlow*, 184 U. S. 123, 46 L. ed. 463.

See also, *Wilson v. Salt Lake City*, 46 Utah 60, 174 Pac. 847.

§ 1462. Extras due to modification or breach. If the adversary party to the contract requests a departure therefrom which necessitates additional labor and material, the contractor may recover a reasonable compensation for such extra labor and material if no express contract is made therefor.¹ Thus extra recovery may be had by a railroad contractor for putting in a temporary track in order to enable the company to secure subscriptions which were conditioned on the completion of the road by a certain date.² If the original contract reserves a right to alter the plans without additional expense to the party for whom the work is to be performed, full effect must be given thereto,³ even though such change is expensive to the contractor.⁴

If the change in plans does not cause additional expense in performance, no recovery can be had.⁵

If the plans are changed by the consent of the owner and the contractor, in such a way that performance is less expensive to the contractor than the performance of the original contract would have been, there is no implied agreement on the part of the contractor to pay to the owner the amount thus saved to the contractor.⁶ If the contract permits the contractor to use an article which is equivalent to a specified standard, the contractor may recover extra compensation if the architect arbitrarily refuses to permit the contractor to exercise his choice between two or more articles of such standard, but demands that one particular article and that of the highest price be used.⁷

A contractor may recover for extra labor and material due to the failure of the adversary party to perform the contract on his part.⁸ One who agrees to construct a tunnel for which the adver-

¹ **United States.** *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. ed. 934; *Smith v. Salt Lake City*, 83 Fed. 784.

Illinois. *Cook County v. Harms*, 108 Ill. 151.

Iowa. *Evans v. McConnell*, 99 Ia. 326, 63 N. W. 570.

New Jersey. *Isaacs v. Reeve* (N. J. Eq.), 44 Atl. 1.

New York. *Delafield v. Westfield*, 77 Hun 124.

Rhode Island. *Lee v. Brayton*, 18 R. I. 232, 26 Atl. 256.

Utah. *Rhodes v. Clute*, 17 Utah 137, 53 Pac. 990.

² *Central Trust Co. v. Condon*, 87 Fed. 84.

³ *Denver v. Hindry*, 40 Colo. 42, 11 L. R. A. (N.S.) 1028, 90 Pac. 1028.

⁴ *Denver v. Hindry*, 40 Colo. 42, 11 L. R. A. (N.S.) 1028, 90 Pac. 1028.

⁵ *Thomsen v. Kenosha*, 165 Wis. 204, 161 N. W. 735.

⁶ *Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737.

⁷ *Camp v. Neufelder*, 49 Wash. 426, 22 L. R. A. (N.S.) 376, 95 Pac. 640.

⁸ *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929; *Martindale v. Lobdell-Emery Manufacturing Co.*, 189 Mich.

sary party is to furnish the timber, may recover as extra compensation expenses incurred by the caving in of such tunnel due to the defective quality of such timber.⁹ If A's delay renders performance more expensive on B's part, B may recover for such extra expense.¹⁰

No recovery can be had by a contractor for extra work made necessary by the failure of the contractor or his employes to comply with the specifications.¹¹

§ 1463. Effect of provision requiring written authority for extras. One who performs such extra work at the request of the owner may recover, even though such request is oral and the contract provides that extra work must be done only on a written order, or though such extra work is done on written and oral orders of an authorized agent, while the contract provides that it can be done only on written orders signed by the owner of the building.¹ In some jurisdictions the same result is reached by holding that the oral order for additional work and the performance thereof amount to a new contract to which the provision of the original contract requiring written modifications does not apply.² In other jurisdictions it is said that there can be no recovery upon an oral order for extras unless the provision of the original contract requiring such orders to be in writing has been waived;³ but that if such provision has been waived, the contractor may recover upon such oral order.⁴ Such a provision in a contract with a public corporation can not be waived by an engineer or by a subordinate

477, L. R. A. 1918F, 1, 155 N. W. 559; *Hayden v. Astoria*, 84 Or. 205, 164 Pac. 729.

⁹ *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

¹⁰ *Martindale v. Lobdell-Emery Manufacturing Co.*, 189 Mich. 477, L. R. A. 1918F, 1, 155 N. W. 559; *Hayden v. Astoria*, 84 Or. 205, 164 Pac. 729.

¹¹ *Smoot v. United States*, 237 U. S. 38, 59 L. ed. 829 [affirming judgment, *Smoot v. United States*, 48 Ct. Cl. 427]; *O'Brien v. New York*, 139 N. Y. 543, 35 N. E. 323.

¹ *Massachusetts. Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

Nebraska. Jobst v. Hayden, 84 Neb. 735, 50 L. R. A. (N.S.) 501, 121 N. W. 957.

Ohio. Expanded Metal Fire-Proofing Co. v. Noel Construction Co., 87 O. S. 428, 101 N. E. 348.

Washington. Gehri v. Dawson, 64 Wash. 240, 116 Pac. 673.

West Virginia. Simpson v. Mann, 71 W. Va. 516, 48 L. R. A. (N.S.) 579, 76 S. E. 895.

² *Pippy v. Winslow*, 62 Or. 219, 125 Pac. 298.

³ *Headley v. Cavileer*, 82 N. J. L. 635, 48 L. R. A. (N.S.) 564, 82 Atl. 908.

⁴ *Rizzolo v. Poysher*, 89 N. J. L. 618, 99 Atl. 390.

officer.⁵ If the contract requires a written order from the architect or engineer for extra work, no recovery can be had for extra work done without such order if the owner or his authorized agent has neither of them waived such provision.⁶ The architect has no authority in such cases to bind the agent by an oral order, by virtue alone of his employment as architect with power to order alterations in writing. The owner may waive such provision, however, and thus bind himself by oral modifications of the contract.⁷ A demand for certain work on the theory that it is required by the terms of the original contract is not a waiver of a clause requiring orders for extra work to be in writing.⁸

§ 1464. Extras furnished without knowledge of adversary party. If A has agreed with B to perform a certain definite and specific contract for B without giving his entire time to B's employment, and if A voluntarily renders services not called for by the terms of the original contract, A can not recover for such extra services if B did not know that they were being rendered,¹ or if he did not know that A intended to make a charge therefor.² One who does more work or furnishes more material than is required by the terms of a building contract without the consent of the adversary party can not recover therefor. Thus a contractor who has agreed to rub down brick-work can not recover as for extra work though he uses acid in cleaning the walls.³ So one who has agreed to put in glass for three elevations of a building, and without the knowledge of the owner, and in spite of the fact that the owner has warned him not to put in more than the contract calls for, puts glass in on the fourth elevation also, can not recover extra compensation.⁴

§ 1465. Employment for entire time—Request for extra work of similar nature. If, on the other hand, B has entered into a

⁵ *Thomsen v. Kenosha*, 165 Wis. 204, 161 N. W. 735.

⁶ *O'Keefe v. Church*, 59 Conn. 551, 22 Atl. 325; *Stewart v. Cambridge*, 125 Mass. 102; *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573; *Vanderwerker v. R. R.*, 27 Vt. 130.

⁷ *Perry v. Potashinski*, 169 Mass. 351, 47 N. E. 1022.

⁸ *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

¹ *Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871; *Beattie v. McMullen*, 80 Conn. 160, 67 Atl. 488; *Colwell v. Urbana Construction Co.*, 154 Ia. 623, 135 N. W. 76.

² *McLeod v. Genius*, 31 Neb. 1, 47 N. W. 473.

³ *Chamberlain v. Hibbard*, 26 Or. 428, 38 Pac. 437.

⁴ *Pittsburgh Plate Glass Co. v. MacDonald*, 182 Mass. 593, 66 N. E. 415.

contract of employment with A, whereby B is to give to A his time, for a compensation fixed by the week, month, and the like, the question whether B is entitled to any compensation for extra work depends, in the absence of an agreement for compensation therefor, on whether the extra work done is of the same general character as that for which B was employed or not. If it is of the same general character B can not recover.¹ So where A employs B to collect rents at two hundred and fifty dollars a month, B can not recover for extra services in preventing squatters from settling on A's land, in expelling them therefrom and in retaining exclusive possession for A.² So if A hires B as a domestic servant at a certain compensation per week, B can not recover for extra work because A became sick after B had entered on her employment, and B's work was thereby greatly increased,³ or because A's family has increased in size and B's work has thus been increased.⁴ The same principle applies where A employs B to nurse and to do housework.⁵ If B is to work for A for a certain sum per month, B can not recover for work done on Sunday,⁶ especially if he knew in advance that Sunday work was expected, and if he had received the stipulated wages without objection.⁷

§ 1466. Employment for entire time—Request for extra work of different character. If the extra work done is of a character different from the general nature of that for which the employee was hired, a previous request by his employer to do such work,¹ or a subsequent voluntary acceptance thereof,² will of itself create an implied agreement to pay therefor.³ If an agent of the United States to sell lands belonging to the United States is hired to sell other lands belonging to Indians, a contract to pay a reasonable

¹ *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128.

Connecticut. *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

Iowa. *Carlin v. Day*, 181 Ia. 903, 165 N. W. 172.

Kansas. *Guthrie v. Merrill*, 4 Kan. 187.

Michigan. *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547.

² *Cany v. Halleck*, 9 Cal. 198.

³ *Voorhees v. Coombs*, 33 N. J. L. 494.

⁴ *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

⁵ *Carlin v. Day*, 181 Ia. 903, 165 N. W. 172.

⁶ *Guthrie v. Merrill*, 4 Kan. 187.

⁷ *Lowe v. Marlowe*, 4 Ill. App. 420.

¹ *United States v. Brindle*, 110 U. S. 688, 28 L. ed. 286; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

² *Cincinnati, etc., R. R. v. Clarkson*, See also §§ 1441 et seq.

⁷ Ind. 595.

³ *Converse v. United States*, 62 U. S. (21 How.) 463, 16 L. ed. 192.

compensation is implied.⁴ An agent of a corporation at a monthly salary who does extra work in getting subscriptions to the corporation's stock under the offer of the corporation to pay two per cent. commission for obtaining such subscriptions can recover such commission.⁵ Where A, who is the mayor of a city and a member of its council, is employed by the council to act as attorney for the city in a pending case, he may recover.⁶ If A agrees to support B, A can recover for extra services due to B's illness.⁷

§ 1467. Extra services by directors, partners, etc. A director of a corporation can not recover for ordinary services performed by him for such corporation either as director,¹ or as an officer.² If, however, a director of a corporation at the request of the board of directors performs work outside of his official duties as director, the corporation is liable to him for reasonable compensation;³ and, accordingly, a subsequent agreement entered into in good faith between such director and the board of directors fixing the amount of such compensation is enforceable.⁴

⁴ *United States v. Brindle*, 110 U. S. 688, 28 L. ed. 286. Examples of claims of public officers for extra compensation are found in § 1443.

⁵ *Cincinnati, etc., R. R. v. Clarkson*, 7 Ind. 595.

⁶ *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

⁷ *Cryer v. Conway*, 181 Ky. 526, 205 S. W. 562.

¹ *In re Newman* [1895], 1 Ch. 674; *Huffaker v. Krieger's Assignee*, 107 Ky. 200, 46 L. R. A. 384, 53 S. W. 288; *Bagley v. Carthage, Watertown & Sackets Harbor Railroad Co.*, 165 N. Y. 179, 58 N. E. 895 (obiter); *Althouse v. Cobaugh Colliery Co.*, 227 Pa. St. 580, 136 Am. St. Rep. 908, 76 Atl. 316.

² *Winfield Mortgage & Trust Co. v. Robinson*, 89 Kan. 842, Ann. Cas. 1915A, 451, 132 Pac. 979; *Goodin v. Dixie Portland Cement Co.*, 79 W. Va. 83, L. R. A. 1917F, 308, 90 S. E. 544.

³ *United States. Fitzgerald & Malory Construction Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608.

California. Bassett v. Fairchild, 132

Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, 61 Pac. 791.

Colorado. Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Am. & Eng. Ann. Cas. 781, 90 Pac. 81.

Illinois. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17.

Maryland. McGowan v. Finola Mfg. Co., 120 Md. 335, 87 Atl. 694.

Michigan. Ten Eyck v. R. R., 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378, 41 N. W. 905.

Oregon. Barrenstecher v. Hof Braun, 67 Or. 194, 135 Pac. 518.

Washington. Blom v. Blom Codfish Co., 71 Wash. 41, 127 Pac. 596.

Wyoming. Hjorth Oil Co. v. Curtis, 25 Wyom. 1, 163 Pac. 362. Acquiescence in A's acting as director may entitle A to recover the statutory compensation. *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899.

⁴ *Ten Eyck v. Pontiac, Oxford & Port Austin R. R. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378, 41 N. W. 905.

A partner can not recover extra compensation for services performed by him in transacting the business of the partnership, even if he rendered services of greater value than the other partners;⁵ but evidence that the other partners have practically abandoned the conduct of the partnership business may justify a finding that there was a genuine implied contract for the payment of special compensation to the partner who continued to conduct such partnership business.⁶ If the surviving partner, in order to complete a contract, is obliged to do work, part of which the deceased partner would have been obliged to do if he had lived, such surviving partner is entitled to compensation therefor.

§ 1468. Effect of statutory limitation of hours of labor. If a statute limits the number of hours of a day's work,¹ or provides that in the absence of agreement to the contrary a certain number of hours shall constitute a day's work,² an employe who is hired at a certain sum by the week, month, and the like, can not recover for extra work in the absence of express contract or of facts from which an agreement to pay for extra work may be inferred. This is true especially if the employe knows in advance that the work

⁵ **Colorado.** *Peck v. Alexander*, 40 Colo. 392, 91 Pac. 38.

Georgia. *Bishop v. Pendley*, 138 Ga. 738, 76 S. E. 63.

Iowa. *Roth v. Boies*, 139 Ia. 253, 115 N. W. 930.

Washington. *Williams v. Pedersen*, 47 Wash. 472, 17 L. R. A. (N.S.) 384, 92 Pac. 287; *Sandberg v. Scougale*, 75 Wash. 313, 134 Pac. 1051.

West Virginia. *Gay v. Householder*, 71 W. Va. 277, Ann. Cas. 1914C, 297, 76 S. E. 450.

Wisconsin. *Drew v. Ferson*, 22 Wis. 651.

⁶ **Florida.** *Gonzalez v. Smith*, 66 Fla. 85, 62 So. 913.

Georgia. *Maynard v. Maynard*, 147 Ga. 178, L. R. A. 1918A, 81, 93 S. E. 289.

Idaho. *Jones v. Marshall*, 24 Ida. 678, 135 Pac. 841.

Iowa. *Roth v. Boies*, 139 Ia. 253, 115 N. W. 930; *Mondamin Bank v. Burke*, 165 Ia. 711, 147 N. W. 148.

Kansas. *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

Maine. *Whittaker v. Jordan*, 104 Me. 516, 72 Atl. 682.

Michigan. *Arthur v. McCallum*, 195 Mich. 618, 162 N. W. 118.

Tennessee. *Condon v. Callahan*, 115 Tenn. 285, 1 L. R. A. (N.S.) 643, 5 Ann. Cas. 659, 89 S. W. 400.

Wisconsin. *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593, 24 N. W. 129.

¹ *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128; *Grisell v. Feed Co.*, 9 Ind. App. 251, 36 N. E. 452; *McCarthy v. New York*, 96 N. Y. 1, 48 Am. Rep. 601.

² *Luske v. Hotchkiss*, 37 Conn. 219, 9 Am. Rep. 314; *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547.

for which he is employed will necessitate some work overtime,³ or if the employe is notified that if he wishes to keep his position he must do the extra work,⁴ especially as before the action here decided he had applied for and received an allowance for extra work. So where A is hired by B to work for him at a certain rate per month, which amount A receives regularly without objection, giving a receipt in full therefor, A can not thereafter claim compensation for extra time.⁵ So even if the statute provides that extra compensation shall be made for extra work unless there is a provision in the contract to the contrary, it has been held that an expert photographer who accepts employment for a year at twenty dollars a week must know that the nature of his work must require some extra work, and therefore it is an implied term of such contract that no compensation is to be made for extra work.⁶ Conversely, under a statute providing that ten hours shall constitute a day's work unless there is a provision in the contract to the contrary, an employer can not insist that his employe who is hired at two dollars and a half a day must estimate his time where he has worked less than ten hours on some days by counting the number of hours worked and dividing by ten.⁷ Some courts have used language intimating that only an express contract to pay for extra work could create liability in such cases,⁸ though the same authority concedes that such a proposition, while not containing prejudicial error under the facts of the particular case, is too broad for the statement of the rule in a legal treatise.⁹ The true rule is that a contract to pay for extra work may be either express or implied from the surrounding facts,¹⁰ but that the mere rendition of such extra services with the knowledge of the person for whom they are rendered, or voluntary acceptance by him does not constitute such a contract.

Some authorities, however, hold that a request for work, in addition to the number of hours fixed by statute as a day's work, creates an implied liability to pay therefor. Thus where A had

³ *Luske v. Hotchkiss*, 37 Conn. 219,
9 Am. Rep. 314; *Lowe v. Marlow*, 4
Ill. App. 420.

⁴ *United States v. Martin*, 94 U. S.
400, 24 L. ed. 128.

⁵ *Forster v. Green*, 111 Mich. 264, 69
N. W. 647.

⁶ *Schurr v. Savigny*, 85 Mich. 144, 48
N. W. 547.

⁷ *Brooks v. Cotton*, 48 N. H. 50.

⁸ *Cany v. Halleck*, 9 Cal. 198.

⁹ *Cany v. Halleck*, 9 Cal. 198.

¹⁰ *Luske v. Hotchkiss*, 37 Conn. 219,
9 Am. Rep. 314; *Grisell v. Feed Co.*,
9 Ind. App. 251, 36 N. E. 452; *Mc-
Carthy v. New York*, 96 N. Y. 1, 48
Am. Rep. 601.

agreed to work for B at eight shillings a day, payable weekly, and the statute provided that ten hours should constitute a day's labor unless there was some provision in the contract to the contrary, it was held that if B requested A to work at night, B could recover for the number of hours in excess of ten per day which he had worked. The fact that he received his weekly pay for day labor was held to be no bar for a subsequent recovery for his work at night, nor was the fact that he waited five years after his employment terminated before making his claim held to bar him.¹¹

§ 1469. Work and labor done under a contract void for mistake as to an essential element. If A and B attempt to make a contract, and by reason of some mistake in the formation no contract is made, A, who has performed work and labor under such supposed contract,¹ may recover a reasonable compensation therefor. Thus A cut timber on B's land and made it into lumber, believing that he had a special contract with B for payment therefor. In fact, owing to a mutual misunderstanding as to the time when payment was to be made there really was no contract between A and B. It was held that A could recover a reasonable compensation for his services.² A superintended the construction of a building for B, believing that he was working under a special contract. In fact, by mistake as to an essential fact there was no meeting of the minds. An instruction to the jury that under such facts A could recover a reasonable compensation for his services was held proper.³

§ 1470. Work done for one at request of another, without express contract. A request by A to B to render services or to deliver property to X, is not so likely to amount to a promise to pay therefor as where A is to receive the benefit of such performance.¹ If A requests B to render services for the benefit of X,

¹¹ *Bachelder v. Bickford*, 62 Me. 527.

¹ *Connecticut*. *Rowland v. R. R.*, 61 Conn. 103, 29 Am. St. Rep. 175, 23 Atl. 755; *Collins v. Stove Co.*, 63 Conn. 356, 28 Atl. 534.

Iowa. *Wyman v. Passmore*, 146 Ia. 486, 27 L. R. A. (N.S.) 683, 125 N. W. 213.

Massachusetts. *Vickery v. Ritchie*, 202 Mass. 247, 26 L. R. A. (N.S.) 810, 88 N. E. 835.

New Hampshire. *Russell v. Clough*, 71 N. H. 177, 93 Am. St. Rep. 507, 51 Atl. 632.

North Carolina. *Burton v. Mfg. Co.*, 132 N. Car. 17, 43 S. E. 480.

² *Russell v. Clough*, 71 N. H. 177, 93 Am. St. Rep. 507, 51 Atl. 632.

³ *Burton v. Mfg. Co.*, 132 N. Car. 17, 43 S. E. 480.

¹ *Clark v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930; *McGuire v.*

there is no implied agreement on the part of B to compensate A for such services unless B is bound by law to furnish such services to X.² Trustees of a voting trust have no right to compensation from the corporation which is not a party to the trust agreement, even though such voting trust might be beneficial to the stockholders.³ A request by A to B, a doctor, to render medical services to X, does not amount to a contract by A to pay B therefor, unless A was bound to support X.⁴ If a bystander calls in a physician to act for an injured person who can not act for himself;⁵ or a father calls in a physician to attend to an adult child who is sick at his father's house, and for whose support the father is not liable;⁶ or a mother calls in a physician to attend to an adult daughter who is married and who lives with her husband and is not dependent upon her mother for support;⁷ or a sister requests a doctor to render professional services to her brother,⁸ as where A requests a physician to care for A's insane brother, B, who is not a member of A's family,⁹ the person summoning the physician is not liable to him for his services. A different result was reached where A, who had been brought up in B's family, had gone away to work, but had returned to B and was then living in B's house and doing domestic work without any specific contract for compensation, became sick and B called in X, a physician to attend to A. It was held a question of fact whether the understanding between X and B was that B was personally liable to X for X's services to A.¹⁰ If, however,

Hughes, 207 N. Y. 516, 46 L. R. A. (N.S.) 577, Ann. Cas. 1914C, 585, 101 S. E. 460.

² Veitch v. Russell, Car. & Marsh. 362; Style v. Smith [cited in Marsh v. Rainsford, 2 Leon. 111]; Clark v. National Steel & Wire Co., 82 Conn. 178, 72 Atl. 930; Morrell v. Lawrence, 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571; McGuire v. Hughes, 207 N. Y. 516, 46 L. R. A. (N.S.) 577, Ann. Cas. 1914C, 585, 101 N. E. 460.

³ Clark v. National Steel & Wire Co., 82 Conn. 178, 72 Atl. 930.

⁴ England. Veitch v. Russell, 3 Q. B. (Adolp. & E.) 928.

⁵ Georgia. Norton v. Rourke, 130 Ga. 600, 124 Am. St. Rep. 187, 18 L. R. A. (N.S.) 173, 61 S. E. 478.

⁶ New York. Crane v. Baudouine, 55 N. Y. 256; McGuire v. Hughes, 207 N.

Y. 516, 46 L. R. A. (N.S.) 577, Ann. Cas. 1914C, 585, 101 N. E. 460.

⁷ Pennsylvania. Boyd v. Sappington, 4 Watts. (Pa.) 247.

⁸ Rhode Island. Churchill v. Hebden, 32 R. I. 34, 78 Atl. 337.

⁹ Starett v. Miley, 79 Ill. App. 658; Meisenbach v. Cooperage Co., 45 Mo. pp. 232.

¹⁰ Rankin v. Beale, 68 Mo. App. 325; Boyd v. Sappington, 4 Watts. (Pa.) 247.

¹¹ McGuire v. Hughes, 207 N. Y. 516, 46 L. R. A. (N.S.) 577, Ann. Cas. 1914C, 585, 101 S. E. 460.

¹² Veitch v. Russell, Car. & Marsh. 362.

¹³ Smith v. Watson, 14 Vt. 332.

¹⁴ Clark v. Waterman, 7 Vt. 76, 29 Am. Dec. 150.

A agrees with a hospital that A will pay for the care of B till further notice, A can not end his liability by giving such notice unless B has so far recovered as to be capable of being moved.¹¹ If a physician renders services at the request of a father for his adult son under circumstances which caused the physician to believe that the father has agreed to pay for such services and did charge the father with such services on the part of the physician, the physician may recover for such services from the father.¹² On the other hand, it has been said that if A requests his son, B, to render services for A's father, X, B's right of action is against his father, A, at whose request such services were rendered and not against X, for whose benefit they were rendered.¹³

If A is bound to support X, performance by B is a benefit to A as well as to X; and it will be understood that A is to pay therefor.¹⁴

III

GOODS SOLD

§ 1471. Goods sold and delivered. If A requests B to deliver property to A, and it is customary in such locality to pay for property of that sort, A's request will be regarded as equivalent to a promise to pay a reasonable price therefor.¹ An action for goods sold and delivered can be maintained wherever goods have been sold and delivered by one person to another under an express agreement which is incomplete in that the contract price had not been fixed.² Under some circumstances this action will not lie for goods delivered under a contract void for mistake as to an essential

¹¹ *St. Barnabas Hospital v. Electric Co.*, 68 Minn. 254, 40 L. R. A. 388, 70 N. W. 1120.

¹² *Morrell v. Lawrence*, 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571.

¹³ *Moyer's Appeal*, 112 Pa. St. 290, 3 Atl. 811.

¹⁴ *Jordan v. Wright*, 45 Ark. 237; *Carroll v. McCoy*, 40 Ia. 38.

¹ *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857; *Ceffarelli v. Landino*, 82 Conn. 126, 72 Atl. 564; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110; *Messmer v. Block*, 100 Wis. 664, 76 N. W. 598.

² *Arkansas. Bowser v. Marks*, 96 Ark. 113, 32 L. R. A. (N.S.) 429, 131 S. W. 334.

Illinois. McEwen v. Morey, 60 Ill. 32.

Kentucky. Gaines v. Reynolds Tobacco Co., 163 Ky. 716, 174 S. W. 482.

Michigan. James v. Muir, 33 Mich. 223.

North Carolina. Smith v. Summerfield, 108 N. Car. 284, 12 S. E. 997.

Pennsylvania. Graff v. Callahan, 158 Pa. St. 380, 27 Atl. 1009.

See also, *Moses v. Butler*, 43 O. S. 166.

element. A sold and delivered coal to B under what both parties believed to be a special contract. The contract was, however, void for mistake—A understanding that the transaction was a cash sale while B understood that the price of the coal was to be credited on A's account. A did not, on learning of the mistake, demand return of the coal, but insisted that B should keep it under the contract as claimed by A. B used it. It was held that B was not liable to A for a reasonable compensation for the coal in the absence of estoppel.³ X owed A, and to pay such debt X ordered goods from B, who furnished such goods to A with an invoice showing that B had furnished it. A expected that such goods were to be paid for by X, and B expected that such goods were to be paid for by A. A was held to be liable to B for the price of such goods.⁴ This action also lies where property has been taken by one person with the consent of the owner, the parties intending the title to pass, although no express agreement has been made.⁵ Thus a mortgagee of chattels, holding under a mortgage which provides that the mortgagor may sell the property in the name of the mortgagee, may recover under common counts in assumpsit against one who has bought such property from the mortgagor,⁶ even though under an ordinary mortgage the mortgagee could not recover on the common counts from a third person who bought mortgaged property.⁷ A builder who uses goods and materials belonging to another is liable to such other for their value in this form of action.⁸ Thus A had a contract to erect a building for B. A got the iron work for such building from X. The contract between A and B provided that no material should be estimated or paid for until used in the permanent construction of the building. X de-

³ *Concord Coal Co. v. Ferrin*, 71 N. H. 331, 93 Am. St. Rep. 496, 51 Atl. 283.

⁴ *Great Western Smelting and Refining Co. v. Evening News Association*, 139 Mich. 55, 102 N. W. 286. (The action of trover was brought in this case, but the court seems to have regarded assumpsit as a suitable remedy.) A different result has been reached where X is B's agent. *Felder v. Acme Mills*, 112 Miss. 322, 73 So. 52.

⁵ *Iowa. Carney v. Cook*, 80 Ia. 747, 45 N. W. 919.

Maine. Rumford Falls Power Co. v. Paper Co., 95 Me. 186, 49 Atl. 876.

Missouri. Krey v. Hussman, 21 Mo. App. 343.

Pennsylvania. Indiana Mfg. Co. v. Hayes, 155 Pa. St. 160, 26 Atl. 6.

Wisconsin. Goodland v. Le Clair, 78 Wis. 176, 47 N. W. 268.

⁶ *Flood v. Butzbach*, 114 Mich. 613, 68 Am. St. Rep. 501, 72 N. W. 603.

⁷ *Warner v. Beebe*, 47 Mich. 435, 11 N. W. 258; *Tate v. Torcott*, 100 Mich. 308, 58 N. W. 993.

⁸ *Clare v. Johnson (Ky.)*, 56 S. W. 5.

livered certain beams under his contract with A, but before they were used in the building A forfeited his contract, B let a new contract to C, and C used this iron. It was held that X could recover from C for such iron.⁹ A, a car-wheel company, shipped to B, the receiver of a railroad, a number of car-wheels in excess of his order. B refused to accept the entire number thus shipped, but A asked B to unload the wheels and hold them subject to A's order, and to be paid for by B only in case he actually used them. Subsequently at a receiver's sale, X, who knew all these facts, bought these wheels among other property. X was held liable to A for the value of such wheels in implied contract.¹⁰ A property owner who knowingly uses material purchased by a bankrupt contractor is liable to the seller.¹¹

If A furnishes goods to B without intending to charge therefor, A can not recover thereafter.¹²

§ 1472. Goods delivered to one at request of another. A's request to B to deliver goods to X is not equivalent in all cases to a promise by A to pay to B the value of such goods.¹ If A requests B to furnish board and lodging to C and others, employes of A, A is not liable to B unless he has promised to pay therefor.² Goods sold and delivered to one person may constitute a liability against another, at whose request and in reliance upon whose promise to pay, such goods were sold and delivered.³ Thus a lumber company drew orders for money upon itself in favor of its employes. A storekeeper, at the request of the lumber company, received these orders in payment of goods sold to such employes. It was held that the storekeeper could recover from the lumber company for the goods sold and delivered.⁴ One person is not liable for goods sold to another, though he may have received the proceeds thereof. Thus A, a creditor of B's, agreed that B could continue in business

⁹ *Bavley v. Anderson*, 71 Wis. 417, 36 N. W. 863.

¹⁰ *Northwestern, etc., Co. v. Ry.*, 94 Wis. 603, 69 N. W. 371.

¹¹ *School Board v. Saxon Lime & Lumber Co.*, 121 Va. 594, 93 S. E. 579.

¹² *Remarkis v. Reid (Okla.)*, 166 Pac. 728.

¹ "Furnishing or delivering to a third party, though upon defendant's request, does not as a matter of law imply an undertaking by defendant to

pay." *Conrad National Bank v. Ry.*, 24 Mont. 178, 183, 61 Pac. 1.

² *Conrad National Bank v. Ry.*, 24 Mont. 178, 61 Pac. 1.

The real intention of the parties is the determining factor. *Gessner v. Roeming*, 135 Wis. 535, 116 N. W. 171.

³ *Cox v. Peltier*, 159 Ind. 355, 65 N. E. 6; *East, etc., Co. v. Barnwell*, 78 Tex. 328, 14 S. W. 782.

⁴ *East, etc., Co. v. Barnwell*, 78 Tex. 328, 14 S. W. 782.

if A's bookkeeper could take charge of the cash and the drawing of checks. A temporary arrangement of that sort was entered into, which either party could avoid at will. Under such arrangement, A was not liable for goods sold and delivered to B.⁵

If goods are sold to A upon A's credit, the fact that they are delivered to B, and that B received the benefit of them, does not make B liable therefor.⁶ Thus a railroad company is not liable for material furnished to its main contractor for use upon its road;⁷ nor is the owner of property liable for material furnished to the main contractor, and used by such contractor in building a house upon such property.⁸

The right of one whose property has been wrongfully taken by the tort of another, to maintain an action in assumpsit against such other is discussed elsewhere.⁹

IV

MONEY HAD AND RECEIVED

§ 1473. General nature of right. If A receives money which belongs to B, under circumstances which give A no right thereto, but which bind A on principles of justice and fairness to repay such money to B, the common law allowed B to sue as on contract, although there was no express contract and no real implied contract,¹ in order to prevent A's unjust enrichment at B's expense.² This principle has survived in our law, and an action as upon contract will lie for money had and received wherever one person has received money which belongs to another, and which in "equity

⁵ Wood-Dryer Grocery Co. v. Bank, 110 Ala. 311, 20 So. 311.

⁶ Peirce v. Closterhouse, 96 Mich. 124, 55 N. W. 663.

⁷ Alabama, etc., Ry. v. Moore, 109 Ala. 393, 19 So. 804. So with work and labor. Woodruff v. Rochester, etc., R. R. Co., 108 N. Y. 39, 14 N. E. 832.

⁸ Limer v. Traders' Co., 44 W. Va. 175, 28 S. E. 730; Virginia Supply Co. v. Calfee, 71 W. Va. 300, 76 S. E. 669.

⁹ See §§ 1504 et seq.

¹ National Bank of Commerce v. Equitable Trust Co., 227 Fed. 526, 142 C. C. A. 158 [reversing decree, Equitable

Trust Co. v. National Bank of Commerce, 211 Fed. 688]; Donovan v. Purcell, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334. "If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt and gives this action, founded in the equity of the plaintiff's case as it were upon a contract." Moses v. Macferlan, 2 Burr. 1005, 1008 [quoted in Bates-Farley Savings Bank v. Dismukes, 107 Ga. 212, 217, 33 S. E. 175].

² Heywood v. Northern Assur. Co., 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

and good conscience," or in other words, in justice and right, should be returned.³ Since the contract alleged in the plaintiff's complaint is often purely fictitious, the plaintiff's right to recover in a contract does not depend upon any principles of privity of contract between the plaintiff and the defendant, and no privity is necessary.⁴ The plaintiff's right to recover is governed by prin-

³ **United States.** *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466; *Sanford v. First National Bank*, 238 Fed. 298, 151 C. C. A. 314; *Vincennes Bridge Co. v. Board of County Commissioners*, 248 Fed. 93; *Board of Commissioners v. Pollard-Campbell Dredging Co.*, 251 Fed. 249.

Arizona. *Copper Belle Min. Co. v. Gleeson*, 14 Ariz. 548, 48 L. R. A. (N.S.) 481, 134 Pac. 285.

California. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

Connecticut. *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112; *Manning v. Chesky*, 90 Conn. 647, 98 Atl. 357.

Georgia. *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175.

Idaho. *Milner v. Pelham*, 30 Ida. 594, 166 Pac. 574.

Illinois. *Wilson v. Turner*, 164 Ill. 398, 45 N. E. 820.

Indiana. *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123, 7 N. E. 763; *Indiana Business College v. Cline (Ind.)*, 119 N. E. 712; *Comer v. Hayworth*, 30 Ind. App. 144, 96 Am. St. Rep. 335, 65 N. E. 595.

Kentucky. *Garrott v. Jaffrey*, 73 Ky. (10 Bush.) 418.

Maine. *Pease v. Bamford*, 96 Me. 23, 51 Atl. 234; *Bither v. Packard*, 115 Me. 306, 98 Atl. 929.

Maryland. *Cromwell v. Chance Marine Construction Co.*, 131 Md. 105, 101 Atl. 623.

Michigan. *Spencer v. Towles*, 18 Mich. 9.

Minnesota. *Heywood v. Northern Assur. Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

Nebraska. *School District v. Thompson*, 51 Neb. 857, 71 N. W. 728.

Oklahoma. *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L. R. A. (N.S.) 511, 17 Ann. Cas. 184, 95 Pac. 468; *Brooks v. Hinton State Bank*, 26 Okla. 56, 30 L. R. A. (N.S.) 807, 110 Pac. 46; *Helm v. Mickleson (Okla.)*, 170 Pac. 704.

Oregon. *Siverson v. Clanton*, 88 Or. 261, 170 Pac. 933, 171 Pac. 1051.

Pennsylvania. *Gangwer v. Fry*, 17 Pa. St. 491, 55 Am. Dec. 578.

Washington. *Matthies v. Herth*, 31 Wash. 665, 72 Pac. 480.

⁴ **England.** *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Moses v. Macferlan*, 2 Burr. 1005.

United States. *Rapalje v. Emory*, 2 U. S. (2 Dall.) 51, 1 L. ed. 285; *Bank of the Metropolis v. Bank*, 19 Fed. 301; *National Bank of Commerce v. Equitable Trust Co.*, 227 Fed. 526, 142 C. C. A. 158 [reversing decree, *Equitable Trust Co. v. National Bank of Commerce*, 211 Fed. 688].

Alabama. *Levinshon v. Edwards*, 79 Ala. 293.

California. *Kreutz v. Livingston*, 15 Cal. 344.

Connecticut. *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112; *Manning v. Chesky*, 90 Conn. 647, 98 Atl. 357.

Georgia. *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175.

Illinois. *Allen v. Stenger*, 74 Ill. 119; *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280.

ciples of equity, although the action is one at law.⁵ The plaintiff may, in most cases, recover at law in assumpsit where he could have compelled an accounting for the money received by the defendant, had the action been in equity.⁶ If A has in his possession

Indiana. *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Indiana Business College v. Cline* (Ind.), 119 N. E. 712.

Maine. *Lewis v. Sawyer*, 44 Me. 332; *Howe v. Clancey*, 53 Me. 130; *Calais v. Whidden*, 64 Me. 249; *Bither v. Packard*, 115 Me. 306, 98 Atl. 929.

Maryland. *Mills v. Bailey*, 88 Md. 320, 41 Atl. 780.

Massachusetts. *Mason v. Waite*, 17 Mass. 560.

Michigan. *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786. [Decided on demurrer to petition. On hearing on the merits no liability to make compensation was found to exist. *Walker v. Conant*, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292].

Missouri. *Richardson v. Drug Co.*, 92 Mo. App. 515, 69 S. W. 398.

New Hampshire. *Fogg v. Worster*, 49 N. H. 503.

New York. *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. 606.

Oregon. *Salem v. Marion County*, 25 Or. 449, 36 Pac. 163.

South Carolina. *Madden v. Watts*, 59 S. Car. 81, 37 S. E. 209.

South Dakota. *Siems v. Bank*, 7 S. D. 338, 64 N. W. 167; *Finch v. Park*, 12 S. D. 63, 76 Am. St. Rep. 588, 80 N. W. 155.

Vermont. *Colgrove v. Fillmore*, 1 Aik. (Vt.) 347.

Washington. *Soderberg v. King County*, 15 Wash. 194, 55 Am. St. Rep. 878, 33 L. R. A. 670, 45 Pac. 785.

Wisconsin. *Ela v. Express Co.*, 29 Wis. 611, 9 Am. Rep. 619.

United States. *Palmer v. Doull Miller Co.*, 233 Fed. 309; *Vincennes Bridge Co. v. Board of County Commissioners*, 248 Fed. 93; *Board of Commissioners v. Pollard-Campbell Dredging Co.*, 251 Fed. 249.

Alabama. *Rushton v. Davis*, 127 Ala. 279, 28 So. 476.

Arizona. *Copper Belle Min. Co. v. Gleeson*, 14 Ariz. 548, 48 L. R. A. (N.S.) 481, 134 Pac. 285.

Connecticut. *Brainard v. Colchester*, 31 Conn. 407.

Idaho. *Milner v. Pelham*, 30 Ida. 594, 166 Pac. 574.

Illinois. *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280.

Maine. *Bither v. Packard*, 115 Me. 306, 98 Atl. 929.

Maryland. *Cromwell v. Chance Marine Const. Co.*, 131 Md. 105, 101 Atl. 623.

Oklahoma. *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L. R. A. (N.S.) 511, 17 Ann. Cas. 184, 95 Pac. 468; *Brooks v. Hinton State Bank*, 26 Okla. 56, 30 L. R. A. (N.S.) 807, 110 Pac. 46; *Helm v. Mickleson* (Okla.), 170 Pac. 704.

Oregon. *Siverson v. Clanton*, 88 Or.-261, 170 Pac. 933, 171 Pac. 105.

West Virginia. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575. "An action of assumpsit for money had and received is a remedy equitable in its nature existing in favor of one person against another when that other person has received money either from the plaintiff or a third person under such circumstances that in equity and good conscience he ought not to retain the same and which ex aequo et bono belongs to plaintiff." *Merchants', etc., Bank v. Barnes*, 18 Mont. 335, 337, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218.

* *Palmer v. Doull Miller Co.*, 233 Fed. 309; *Bither v. Packard*, 115 Me. 306, 98 Atl. 929; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

a fund the equitable title to which is in B, and A's only duty in connection therewith is to pay it over to B, B may sue at law for money had and received.⁷ B's right at law, if clear, will prevent B from obtaining relief in equity.⁸ If B has deposited money with A to be paid to C under certain conditions, and C fails to perform such conditions and A then refuses to pay such money over to B, B's remedy is at law and he can not sue in equity.⁹

Two general classes of questions are presented under the topic of money had and received. The first concerns the rights of the parties. It is whether, under the facts, the plaintiff has a right of recovery from the defendant. The second concerns the form of the action. It is, whether the proper form of action in contract has been used, if upon the facts the plaintiff has a right to recover in some form of action. The answer to the latter question, however, decides whether the right in question can be classed with contract rights or not.

Recovery can not ordinarily be had in this form of action if there is a special contract between the parties. Thus if a note is given for the loan the right of the lender to recover is on the note alone.¹⁰ However, if X obtains a loan from A through X's agent, B, and B's note is given therefor, A may ignore the note and sue X on the contract of loan.¹¹

§ 1474. Elements of right to recover in this action—Money or equivalent must be received. In order to support an action for money had and received, a person against whom the action is brought must be shown to have received, either money,¹ or some-

⁷ *Rushton v. Davis*, 127 Ala. 279, 28 So. 476.

⁸ *State Bank v. Parker*, 69 Fla. 258, 67 So. 915.

⁹ *State Bank v. Parker*, 69 Fla. 256, 67 So. 915.

¹⁰ *Pettyjohn v. Bank*, 101 Va. 111, 43 S. E. 203.

¹¹ *Harper v. National Bank*, 54 O. S. 425, 44 N. E. 97.

¹ *United States, Board of Commissioners v. Pollard-Campbell Dredging Co.*, 251 Fed. 249.

Alabama. Palmer v. Scott, 68 Ala. 380; *St. Louis, etc., Co. v. McPeters*, 124 Ala. 451, 27 So. 518.

Massachusetts. Palmer v. Guillo, 224 Mass. 1, 112 N. E. 493.

Michigan. Patterson v. Kasper, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

New York. National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

Wisconsin. Silkman v. Milwaukee, 31 Wis. 555; *Huganir v. Cotter*, 102 Wis. 323, 72 Am. St. Rep. 884, 78 N. W. 423.

"The rule is quite elementary that to enable a person to maintain an action for money had and received it

thing which is taken as the equivalent of money,² belonging to the person by whom the action is brought or for his use.³

To allow recovery in this form of action the money paid must have come to the possession of the person against whom the action is brought or it must have been paid to his use.⁴

B had given his wife, X, some money which she claimed to have invested. Subsequently X forged B's name to a note which X discounted. Subsequently an action was brought against B and X on this note. X then forged B's name to another note, which X discounted. A part of the proceeds of this note she applied to paying off the note sued upon in the first action, and part she applied to paying certain bills for which her husband was primarily liable. X told B that the money thus received came from the former investment of B's money. It was held that A, who had furnished the money on the second forged note could recover from B that part of the money applied to the payment of the bills mentioned, but could not recover that part applied to the payment of the first forged note, since B was not liable thereon, and the money did not come into his hands, nor was it paid for his use.⁵ If a public contractor is to be compensated out of the proceeds of assessments he can not maintain an action against the city for money had and received if the proceeds arising from the sale of land to satisfy

is necessary for him to establish that the persons sought to be charged have received money belonging to him or to which he is entitled. That is the fundamental fact upon which the right of action depends. The purpose of such action is not to recover damages but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." *Limited Investment Association v. Investment Association*, 99 Wis. 54, 58, 74 N. W. 633 [quoted in *Johnson v. Abresch Co.*, 109 Wis. 182, 85 N. W. 348].

² *Snapp v. Stanwood*, 65 Ark. 222, 45 S. W. 546; *Buckeye (Township of) v. Clark*, 90 Mich. 432, 51 N. W. 528; *Matthewson v. Powder Works*, 44 N. H. 289.

³ *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

⁴ *England. Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. Div. 234.

Alabama. St. Louis, etc., Co. v. Mc-Peters, 124 Ala. 451, 27 So. 518.

Florida. Worley v. Johnson, 60 Fla. 294, 33 L. R. A. (N.S.) 639, 53 So. 543.

Michigan. Patterson v. Kasper, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

New York. National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Dec. 632.

Oregon. Ulbrand v. Bennett, 83 Or. 557, 163 Pac. 445.

Wisconsin. Silkman v. Milwaukee, 31 Wis. 555.

⁵ *Mechanics' Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084; and see *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112.

such assessments have not been paid into the treasury.⁶ He may recover if the money has been paid into the public treasury and appropriated to another purpose by the public corporation.⁷ If X has dealt with a broker, A, through B, and A has tried unsuccessfully to apply money which X has advanced to a balance due from B to A, A can not maintain an action against B for money had and received to recover the amount which A has been obliged to pay to X.⁸ This action can not be brought by A against B, who should have collected B's claim against X, but, by negligence, failed to do so.⁹ It will not lie against an indorser who is liable only on his special contract.¹⁰ An action for money had and received can not be maintained against one who is known to the lender to be merely a surety, receiving none of the money advanced.¹¹ If A by fraud has assisted X in selling personalty to B, B can not recover from A the amount of the purchase price which B has paid to X, if A received no part thereof.¹² X, who falsely represented that he was Y's agent, assumed to sell to A a policy which Y had obtained upon his own life and which had already been mortgaged to B. A paid the premiums upon such policy. B did not know of the facts or of A's understanding. On Y's death it was found that the amount of the policy was not sufficient to pay B's mortgage. A was not allowed to recover the amount of such premiums out of the proceeds of such policy as against B.¹³ One who has obtained money by a fraudulent scheme which involves the organization of a corporation of which he is the sole stockholder and manager, is liable for money which has been paid to such corporation.¹⁴

No recovery can be had in an action for money had and received through mistake, unless either the money or something equivalent thereto has been in fact received.¹⁵ Thus A believed that he owed B one hundred and fifty dollars. B knew that the amount was only fifty dollars. In settlement of such claim A delivered to B a horse which A valued at one hundred and fifty

⁶ *Silkman v. Milwaukee*, 31 Wis. 555.

⁷ *Board of Commissioners v. Pollard-Campbell Dredging Co.*, 251 Fed. 249.

⁸ *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

⁹ *Jefferson County Savings Bank v. Hendrix*, 147 Ala. 670, 1 L. R. A. (N.S.) 246, 39 So. 295.

¹⁰ *Worley v. Johnson*, 60 Fla. 294, 33 L. R. A. (N.S.) 639, 53 So. 543.

¹¹ *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

¹² *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

¹³ *Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. Div. 234.

¹⁴ *Donovan v. Purtell*, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334.

¹⁵ *Hendricks v. Goodrich*, 15 Wis. 679.

dollars, and which was worth about that sum. It was held that A could not recover from B one hundred dollars as money had and received by mistake.¹⁶ This case involved the principle that A could not affirm in part and rescind in part. He could not affirm the payment so as to treat his original liability as discharged and yet avoid it as to the terms upon which the payment was made. In the settlement of a claim between A and a village, an illegal assessment imposed by the village was credited on A's account, the village refusing to pay A unless such credit was made. It was held that this did not amount to a payment by A of the illegal assessment, but that it was merely a case of A's failing to collect all that he was entitled to under his original cause of action. Accordingly, limitations ran from the time A's original claim against the village for work accrued, and not from the date when this settlement was made.¹⁷

§ 1475. Receipt of equivalent of money. It is not necessary that the person against whom an action for money had and received is brought should have received money belonging to, or to the use of, the plaintiff, for if he has taken something as the equivalent of the money, he is liable in this action.¹ One who takes a note belonging to another as cash may be liable to the real owner thereof for money had and received.² So where A, B's agent, accepts from X, from whom he is collecting money for B, a note signed by B and endorsed by X, as part payment of such sum, A is liable to B for money had and received.³ If he receives a voucher,⁴ or an order,⁵ as the equivalent of cash, and converts it

¹⁶ *Hendricks v. Goodrich*, 15 Wis. 679.

¹⁷ *Brundage v. Port Chester*, 102 N. Y. 494, 7 N. E. 398.

¹ *Snapp v. Stanwood*, 65 Ark. 222, 45 S. W. 546 [qualifying, *Hutchinson v. Phillips*, 11 Ark. 270, on this point, the syllabus of which restricts such action to cases where money only has been received]. *Kansas City v. Boyd Construction Co.*, 86 Kan. 213, 120 Pac. 347; *Matthewson v. Powder Works*, 44 N. H. 289; *Seavey v. Dana*, 61 N. H. 339.

"To maintain assumpsit for money had and received it must appear that the defendant received the money due the plaintiff or something which he had

received as and instead of it, or which he had actually or presumptively converted into money before suit." *Peay v. Ringo*, 22 Ark. 68, 71 [quoted in *Snapp v. Stanwood*, 65 Ark. 222, 45 S. W. 546].

² *Seavey v. Dana*, 61 N. H. 339.

³ *Snapp v. Stanwood*, 65 Ark. 222, 45 S. W. 546.

⁴ *Kansas City v. Boyd Construction Co.*, 86 Kan. 213, 120 Pac. 347.

⁵ *Bavins v. Bank* [1900], 1 Q. B. 270; *Bowen v. School District*, 36 Mich. 149; *Buckeye (Township of) v. Clark*, 90 Mich. 432, 51 N. W. 528.

or its proceeds to his own use, he is liable for money had and received. If X, a debtor, conveys to his creditor, A, his stock of goods, and A agrees to pay debts owing by X to B and other creditors of X, in consideration of such conveyance, A may be liable to B and such other creditors for money had and received, where he takes such goods, treats them as the equivalent of money, and converts them into money.⁶ If A agrees to pay B a certain sum of money out of the proceeds of the sale of certain agricultural produce, B may, after a reasonable time, maintain an action against A for money had and received for B's use in the absence of a showing by A that he has not yet sold such produce, since, after a reasonable time has elapsed, it will be presumed that such sale has been made.⁷ If a payment is made by mistake, recovery in this form of action may be had if something is delivered which is taken as money. Thus where a payment is made in small notes, which were not money and which were illegally issued, but which were in fact used as money, recovery can be had in such an action.⁸ So where an agent discharges a principal's debt by applying thereon a debt of the agent's, this is treated as the equivalent of money.⁹ A by mistake gave a negotiable note to B in settlement of an account which had already been paid. It was held that this might be treated as a payment of such account, the note being taken as money, and might justify a recovery.¹⁰

§ 1476. Receipt of definite sum necessary. An action for money had and received can be maintained only if the defendant has received a definite sum of money or the equivalent thereof which is due to the plaintiff.¹ If the defendant wrongfully sold stock in which the plaintiff was interested, together with a note in which the plaintiff was not interested, for a lump sum of money, plaintiff could not maintain an action for money had and received, since he was not able to show the amount which the defendant received for the stock.² If an action is brought against a merchant for money had and received, on the ground that goods bought by his agent without his authority were delivered at his

⁶ *Potts v. Bank*, 102 Ala. 236, 14 So. 663.

⁷ *Barfield v. McCombs*, 89 Ga. 799, 15 S. E. 666.

⁸ *Baltimore, etc., Ry. v. Faunce*, 6 Gill (Md.) 68, 46 Am. Dec. 655.

⁹ *Beardsley v. Root*, 11 Johns. (N. Y.) 464, 6 Am. Dec. 336.

¹⁰ *Gooding v. Morgan*, 37 Me. 419.

¹ *French v. Robbins*, 172 Cal. 670, 158 Pac. 188.

² *French v. Robbins*, 172 Cal. 670, 158 Pac. 188.

store and sold by him, the evidence must show that he sold such goods and received the money therefor.³ A and B agreed to buy land on their joint interest, and A was to negotiate the purchase; B furnished part of the purchase money, and subsequently, on learning that A's representations that the price agreed upon was the lowest possible price and did not include any commissions to A for making the purchase, were false, and that A had an agreement with the vendee, whereby A was to receive a certain amount of the last payment to be made as his commission, refused to pay the rest of the purchase price due from him. B was not allowed to recover for money had and received, where A subsequently completed the contract and resold the land at a loss.⁴ A had a contract for the performance of certain work and labor, and X was a subcontractor. The man whom X employed boarded with B, and when A paid X's employees A retained in his possession the amount owing by each for board furnished by B. B had a contract with X to operate a boarding house for the men at a certain sum per week, but B had no contract with A binding A to retain the amount due for such board. A paid the men and retained such amounts; but when such men were paid, X owed A for supplies to an amount in excess of the amount so retained by A. It was held that B had no right of action against A for money had and received, since A had received nothing from any person to the use of B.⁵

If A and B receive money which rightfully belongs to C under an arrangement by which B is to receive a definite part thereof, it has been held that B is liable to C only for the amount which he received.⁶ On the other hand, however, it has been held that C may recover against A and B jointly under such circumstances.⁷ A, B and C took part in a forgery, by means of which X was induced to pay to A a sum of money. It was held that X might recover from A, B and C for money had and received, if the understanding of the wrongdoers was that A was collecting it for their

³ *Leshner v. Loudon*, 85 Mich. 52, 48 N. W. 278.

⁴ *Blewitt v. McRae*, 100 Wis. 153, 75 N. W. 1003. The court held that there had been no rescission in this case, and that B's remedy was by action against A for fraud.

⁵ *Erickson v. Construction Co.*, 107 Wis. 49, 82 N. W. 694 [distinguishing,

Sterling v. Ryan, 72 Wis. 36, 7 Am. St. Rep. 818, 37 N. W. 572, as a case where A had agreed with B to retain such money].

⁶ *Ulbrand v. Bennett*, 83 Or. 557, 163 Pac. 445.

⁷ *Welch v. Beeching*, 193 Mich. 338, 159 N. W. 486.

common interests. X's right of recovery was not affected by the fact that A had appropriated all the proceeds of this crime, and that B and C had in fact received no part thereof from A.⁸ A, X's agent, forged A's name on certain stock certificates, sold them to B, deposited the money in A's name and then embezzled it. It was held that this was not such receipt by A that B, on being obliged to return the stock certificates, could maintain an action against A for such money had and received.⁹

§ 1477. Action not means of recovering damages. The action for money had and received can not be employed where the real relief which is sought is the recovery of damages for breach of contract.¹ One exception to this principle is the case where the only thing remaining for the party in default to do was to pay the money.² Assumpsit for money had and received can not be made the means for recovering damages for breach of a contract to erect improvements for plaintiff's use, upon a right of way conveyed by plaintiff to defendant;³ nor damages for a bailee's selling lumber consigned to him at less than the price agreed upon;⁴ nor damages for negligence in performing a contract to collect a claim.⁵ If B sues one to whom B alleges that insurance money has been paid to the use of B,⁶ B can not recover if the evidence discloses that no money was had and received, but that B's action is really for a breach of a contract to effect the insurance. An action for money had and received will not lie in favor of B against A where

⁸ *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632. "To charge a party in an action of that character the receipt of money by him directly or indirectly must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds." *National Trust Co. v. Gleason*, 77 N. Y. 400, 408, 33 Am. Rep. 632.

⁹ *Fay v. Slaughter*, 104 Ill. 157, 88 Am. St. Rep. 148, 56 L. R. A. 564, 62 N. E. 592 [reversing, 94 Ill. App. 111].

¹ *Alabama*. *Smith v. Sharpe*, 162 Ala. 433, 136 Am. St. Rep. 52, 50 So. 381.

Maryland. *P. Dougherty Co. v. Gring*, 89 Md. 535, 43 Atl. 912.

New Jersey. *Stewart Mfg. Co. v. Mfg. Co.*, 67 N. J. L. 577, 52 Atl. 391.

New Mexico. *Bushnell v. Cogshall*, 10 N. M. 601, 62 Pac. 1101.

Vermont. *Royalton v. Turnpike Co.*, 14 Vt. 311.

² *Smith v. Sharpe*, 162 Ala. 433, 136 Am. St. Rep. 52, 50 So. 381; *Stewart Mfg. Co. v. Mfg. Co.*, 67 N. J. L. 577, 52 Atl. 391.

³ *Labadie v. Ry.*, 125 Mich. 419, 84 N. W. 622.

⁴ *Anderson v. Corcoran*, 92 Mich. 628, 52 N. W. 1025.

⁵ *Jefferson County Savings Bank v. Hendrix*, 147 Ala. 670, 1 L. R. A. (N.S.) 246, 39 So. 295.

⁶ *Johnston v. Abresch Co.*, 109 Wis. 182, 85 N. W. 348.

X has done work for A, which should have inured in whole or in part to B.¹

§ 1478. Party who seeks to recover money must rightfully be entitled thereto. An action for money had and received can be brought only by one who shows that he is rightfully entitled to the money for which such action is brought.¹

This action ordinarily lies only in favor of the person who is the owner of the money which is the subject of the action. If A receives B's money, X can not maintain an action against A therefor. Thus where X drew a draft which was subsequently altered, the amount being raised, and the drawee bank accepted and paid such raised draft and charged X in its account for the amount of the draft as raised, X can not recover against A for money had and received, since A has not received any of X's money.² If A lends money to X secured by an alleged mortgage and by the terms of the contract part of such loan is to be used in discharging a prior alleged mortgage upon such property given by X to B, a conflict of authority has arisen as to whether such payment to B is a payment of A's money, in which case A can recover, or a payment of X's money, in which case A can not recover from B, but must look to X alone.³ If A insures his life in favor of B, and the insurance company repudiates its liability under the policy, B can not recover the premiums which A has paid.⁴ The state can not bring an action against a public service corporation to recover payments in excess of legal rates which such public service corporation has exacted from private customers.⁵ In the absence of statute a county can not maintain an action to recover money

¹ Craig v. Matheson, 32 N. S. 452; Hassard v. Tomkins, 108 Wis. 186, 84 N. W. 174.

² Third National Bank v. Rice, 161 Fed. 822, 88 C. C. A. 640, 23 L. R. A. (N.S.) 1167, 15 Ann. Cas. 450; Ball v. Clark, 179 Ky. 455, 200 S. W. 623; Loe v. State, 82 O. S. 73, 91 N. E. 982; Slocum v. Northwestern Nat. Life Ins. Co., 135 Wis. 288, 14 L. R. A. (N.S.) 1110, 115 N. W. 796.

³ National Bank v. Bank, 122 N. Y. 367, 25 N. E. 355.

⁴ That the payment is of A's money, see Grand Lodge Ancient Order of

United Workmen v. Towne, 136 Minn. 72, L. R. A. 1917E, 344, 161 N. W. 403. That the payment is of X's money, see Ex parte Richard, 180 Ala. 580, 61 So. 819 [denying certiorari to Russell v. Richard, 6 Ala. App. 73, 60 So. 411]. (In this case A paid X and X paid B.) Walker v. Conant, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292.

⁵ Slocum v. Northwestern Nat. Life Ins. Co., 135 Wis. 288, 14 L. R. A. (N.S.) 1110, 115 N. W. 796.

⁶ State, ex rel., v. Chicago & Alton Railroad Co., 265 Mo. 646, L. R. A. 1916C, 309, 178 S. W. 129.

which has been paid to a building contractor out of funds raised by local assessments upon the property benefited by such improvements.⁶ If A has wrongfully taken X's cattle and has delivered them to B, who holds a chattel mortgage thereon, A can not maintain an action against B for money had and received after A has been compelled to pay to X the value of such cattle.⁷ An agent who has paid his principal's money to a third person by mistake may maintain an action in his own name to recover such payment,⁸ on the theory that the agent has a special property in the money by reason of his possession and that he was liable primarily for the money to the real owner thereof, who was not bound to bring an action against the person to whom it had thus been paid.

§ 1479. From whom payment may be recovered. Recovery of money paid, as a payment made by mistake, can be had only from the person to whom it was made or to whose benefit it enured ultimately.¹ If A deposits money in a bank to the order of a county in reliance upon a forged note of such county, A can not recover from the county unless he is able to show that the money thus deposited was actually appropriated to the use of the county, as to the discharge of its valid obligation.² Recovery can be had from one to whose benefit the payment inured, although it was not paid to him personally.³ If money is paid to one of two joint claimants under a mistake, recovery can be had against both.⁴ If A makes a contract to buy B's land, and pays money to B as a deposit on such contract, thinking that he is buying land from B and C, A can not recover such deposit from B and C jointly, but only from B.⁵ Money paid to an agent for his principal may be recovered if the principal refuses to be bound by the contract under

⁶ *Loe v. State*, 82 O. S. 73, 91 N. E. 982 [overruled on question of right of county to bring such action under statutory authority in *State, ex rel., v. Baker*, 88 O. S. 165, 102 N. E. 732].

⁷ *Third National Bank v. Rice*, 161 Fed. 822, 88 C. C. A. 640, 23 L. R. A. (N.S.) 1167, 15 Ann. Cas. 450.

⁸ *Parks v. Fogleman*, 97 Minn. 157, 4 L. R. A. (N.S.) 363, 105 N. W. 560; *Kent v. Bornstein*, 94 Mass. (12 All.) 342; *Stevenson v. Mortimer*, 2 Cowp. 805.

¹ *Born v. Castle*, 175 Cal. 680, 167 Pac. 138; *Balls v. Haines*, 3 Ind. 461; *Hathaway v. Delaware County*, 185 N. Y. 368, 13 L. R. A. (N.S.) 273, 78 N. E. 153.

² *Hathaway v. Delaware County*, 185 N. Y. 368, 13 L. R. A. (N.S.) 273, 78 N. E. 153.

³ *Cole v. Bates*, 186 Mass. 584, 72 N. E. 333.

⁴ *Neil v. Cheves*, 1 Bailey (S. Car.) 537.

⁵ *Born v. Castle*, 175 Cal. 680, 167 Pac. 138.

which the money was paid and the agent still has such money.⁶ The effect of the alteration of position upon the right of recovery is considered elsewhere.⁷

§ 1480. Person receiving money must not be entitled in good conscience to retain it. The right of one person to recover money which belongs to him, and which is paid to another person, depends not on whether the person to whom such payment was made could have compelled it by law if it had not been made voluntarily, but upon whether the person to whom the money is paid is entitled in equity and good conscience to retain it.¹ Examples of payments which the payee could not have compelled by law, but which when made the payor can not recover, are to be found in gifts and voluntary payments.² This principle is not limited, however, to cases of payment which are technically voluntary. Where a widow pays the just debt of the estate of her husband out of the

⁶ *Simmonds v. Long*, 80 Kan. 155, 23 L. R. A. (N.S.) 553, 101 Pac. 1070.

⁷ See § 1484.

¹ *England. Bannatyne v. McIver* [1906], 1 K. B. 103.

United States. Sanford v. First National Bank, 238 Fed. 298, 151 C. C. A. 314.

Alabama. Traweek v. Hagler (Ala.), 75 So. 152.

Illinois. Malkan v. Chicago, 217 Ill. 471, 2 L. R. A. (N.S.) 488, 3 Ann. Cas. 1104, 75 N. E. 548.

Iowa. Adair County v. Johnston, 160 Ia. 683, 45 L. R. A. (N.S.) 753, 142 N. W. 210.

Kansas. Benjamin v. Welda State Bank, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

Louisiana. Wagnon v. Schick (In re Schick), 139 La. 347, 71 So. 534.

Massachusetts. Lime Rock Bank v. Plimpton, 34 Mass. (17 Pick.) 159, 28 Am. Dec. 286; *Le Breton v. Pierce*, 84 Mass. (2 All.) 8.

Minnesota. Grand Lodge, A. O. U. W. v. Towne, 136 Minn. 72, 161 N. W. 403; *Houck v. Hubbard Milling Co.*, 140 Minn. 186, 167 N. W. 1038.

New Hampshire. Winslow v. Anderson (N. H.), 102 Atl. 310.

New Jersey. Whitcomb v. Brant, 90 N. J. L. 245, L. R. A. 1917D, 609, 100 Atl. 175.

New Mexico. Elgin v. Gross-Kelly & Co., 20 N. M. 450, L. R. A. 1916A, 711, 150 Pac. 922.

North Dakota. Dickey County v. Hicks, 14 N. D. 73, 103 N. W. 423; *Jacobson v. Mohall Telephone Co.*, 34 N. D. 213, L. R. A. 1916F, 532, 157 N. W. 1033.

South Dakota. City of Howard v. Lefler, 38 S. D. 294, 161 N. W. 197.

West Virginia. Hix v. Scott, 80 W. Va. 727, 94 S. E. 399; *Gardner v. Nichols*, 80 W. Va. 738, 93 S. E. 817.

Wisconsin. Steuerwald v. Richter, 158 Wis. 597, 140 N. W. 692.

See however, *Tucker v. Denton* (Ky.), 15 L. R. A. (N.S.) 289, 106 S. W. 280, 32 Ky. Law Rep. 521. "However tortiously it (the money) may have come into his hands, the defendant can in this form of action set the plaintiff at defiance if he has the best right to it." *Goddard v. Seymour*, 30 Conn. 394, 401.

² See § 1519.

assets of such estate which are in her possession, and subsequently she is appointed administratrix, she can not recover on behalf of the estate the money thus paid by her without authority where there are no other creditors whose rights are interfered with, since the party to whom the money is paid is entitled in good conscience to retain it; and if such payment had not been made, he would have had a right to enforce payment from the administratrix in her official capacity.³ If A received money from X for the use of B, A is liable to B therefor, even if A could not have enforced the payment to himself of such money from X, or if he was not bound to B to receive such money when paid in. Thus A, a factor, took out insurance on butter which was consigned to him, and received the premiums therefor from his principal, B. Subsequently A claimed that loss was sustained upon B's butter, among other lots of butter; and the insurance money was paid to A, in part upon such loss. A was held liable to B for the amount of such insurance money representing the loss upon B's butter, although such butter was not in fact damaged; and A was not bound by a contract with B to procure such insurance.⁴ By mistake a public officer was paid his own salary and also the amount due to his clerks, and he applied the excess over his salary to the payment of his clerks, thus discharging the debt from the public corporation for such services. It was held that the public corporation could not recover such overpayment from such public official, although it was made improperly in the first instance.⁵ An employe who believes that he is liable on his bond for all shortages, whether due to his negligence or not, and who makes good a shortage, can not recover such payment;⁶ but his right to recover such payment is denied without regard to his actual liability.

An application of this principle is often found in cases of payment by mistake of fact. Thus A owed B, but B's right of action was barred by the Statute of Limitations. A subsequently paid B under mistake as to the existence of such defense. It was held that A could not recover.⁷ So where A loaned two hundred and eighty dollars to B and by mistake the note was drawn for two hundred

³ *Rainwater v. Harris*, 51 Ark. 401,
3 L. R. A. 845, 11 S. W. 583.

⁴ *Fish v. Seeberger*, 154 Ill. 30, 39
N. E. 982.

⁵ *Dickey County v. Hicks*, 14 N. D.
73, 103 N. W. 423.

⁶ *Jacobson v. Mohall Telephone Co.*,
34 N. D. 213, L. R. A. 1916F, 532, 157
N. W. 1033. (Possibly such employe
was liable personally.)

⁷ *Hubbard v. Hickman*, 67 Ky. (4
Bush.) 204.

and thirty dollars, and B repaid two hundred and eighty dollars to A, B can not recover the fifty dollars from A as paid under a mistake of fact.⁹ So where a retired army officer on half pay accepted a position in the diplomatic service, which by statute deprived him of his rank and pay in the army, and after his diplomatic service was ended he performed military duties for which he received pay, the United States can not recover such pay, since even if he was not an officer *de jure* he was *de facto*, and as such entitled to compensation.⁹ If the county has repaid assessments which are invalid but which it could not have been compelled to repay, the county can not thereafter recover such amounts from the persons to whom such payments have been made.¹⁰ A, a grantee of a mortgagor, X, and B, a mortgagee, both believed that certain land owned by A was covered by a mortgage to B. A made a payment to B to procure the release of such land from the lien of such mortgage. Subsequently, in a foreclosure suit between B and X, such payment was credited upon the amount of the mortgage debt. A majority of the court held that inasmuch as B had changed his position in reliance upon such payment, and his rights had been fixed by the decree, and A, who had opened the negotiations, and had asked B to receive the payment, was the more negligent of the two, A could not recover such payment.¹¹

A daughter who has made a payment to obtain the discharge of her parents from a contract for the sale of their land which the daughter believes to be enforceable, may recover such payment if such contract was in fact unenforceable because the mortgage did not comply with the Statute of Frauds;¹² and the moral obligation of her parents to perform such contract in spite of the Statute of Frauds is said not to prevent the daughter from recovering such payment.¹³

Another application of this principle is found in payments made by duress or compulsion of law.¹⁴ Where A had erected buildings upon the land of B, a minor, under a contract, with B's father, whereby A was to erect certain buildings, collecting rents there-

⁹ Foster v. Kirby, 31 Mo. 496.

¹⁰ Badeau v. United States, 130 U. S. 439, 32 L. ed. 997.

¹¹ Adair County v. Johnston, 160 Ia. 683, 45 L. R. A. (N.S.) 753, 142 N. W. 210.

¹² Richey v. Clark, 11 Utah 467, 40 Pac. 717.

¹³ Tucker v. Denton (Ky.), 15 L. R. A. (N.S.) 289, 106 S. W. 280, 32 Ky. Law Rep. 521.

¹⁴ Tucker v. Denton (Ky.), 32 Ky. Law Rep. 521, 15 L. R. A. (N.S.) 289, 106 S. W. 280.

¹⁵ See §§ 1530 et seq.

from as payment, it has been held that after A has erected such buildings and collected rents to apply on the cost thereof, he is not liable to the minor for such rents received, as it would not be just to give the minor the benefit of such material and labor without any compensation therefor, even though the contract is unenforceable.¹⁵ Taxes which have been paid can not be recovered because of technical irregularity in the proceedings affecting the substantial rights of the parties, even though such irregularity might have been a ground of resisting the payment in the first instance.¹⁶ The same principle applies to money paid on street assessments, which are technically, but not substantially, invalid.¹⁷ A municipal corporation which has changed its plan for paying for a public improvement so that the contractor receives more than the price agreed upon, can not recover such extra amount from such contractor, since by reason of such change of plan the contractor lost certain certificates which would have been issued to him under the original plan. Accordingly his rights, while more valuable, were substantially different from those under the original contract.¹⁸ such money from X,¹ even if X has not altered his position in reliance upon such payment other than applying such payment to a

§ 1481. Defendant receiving fund from third person. If A's money has been wrongfully appropriated by B, and B has paid such money to X, for value and without notice, A can not recover pre-existing debt.² If X is acting honestly and in good faith he can not be compelled to pay such fund, even though he could with diligence have discovered that B was not the real owner thereof.³

¹⁵ *McKee v. Preston*, 66 Cal. 522, 6 Pac. 379.

¹⁶ *Goddard v. Seymour*, 30 Conn. 394; *Wiemann v. Brighton*, 83 Wis. 550, 53 N. W. 911.

¹⁷ *Newcomb v. Davenport*, 86 Ia. 291, 53 N. W. 232; *Hopkins v. Butte*, 16 Mont. 103, 40 Pac. 171.

¹⁸ *Howard v. Lefler*, 38 S. D. 294, 161 N. W. 197.

¹ *Alabama*. *Finney v. Studebaker Corporation*, 196 Ala. 422, 72 So. 54.

Arkansas. *Oklahoma State Bank v. Bank*, 120 Ark. 369, 179 S. W. 509.

Kansas. *Benjamin v. Welda State Bank*, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

Louisiana. *First National Bank v. Gibert*, 123 La. 845, 25 L. R. A. (N.S.) 631, 49 So. 593.

Minnesota. *Houck v. Hubbard Milling Co.*, 140 Minn. 186, 167 N. W. 1038.

New Hampshire. *Winslow v. Anderson* (N. H.), 102 Atl. 310.

West Virginia. *Gardner v. Nichols*, 80 W. Va. 738, 93 S. E. 817.

² *Benjamin v. Welda State Bank*, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

³ *First National Bank v. Gibert*, 123 La. 845, 25 L. R. A. (N.S.) 631, 49 So. 593.

The same principle applies to cases in which B obtains a check or draft the proceeds of which belong to A, and B transfers such check or draft to X, who collects it in good faith. Such proceeds can not be recovered by A.⁴ A tenant who has abandoned leased premises of which the landlord has taken possession and which the landlord has leased to another tenant at increased rent, can not recover from such landlord the difference between the rent reserved in the first lease and the rent reserved in the second lease.⁵

If X knows of the facts, A may recover such money from X.⁶ If B collects A's money and deposits it with a bank, X, as a special deposit in B's name, X is liable for such fund to A if with knowledge of the facts he pays such money over to a creditor of B's who has attached it as B's debt.⁷ If B, a public officer, draws a check upon a public fund payable to himself, and endorses it to X in payment of B's personal debt to X, the public corporation may recover such fund from X if he took such check with knowledge of the facts.⁸ If B has stolen money from A and deposited it in a bank, X, X is liable to A for payments of such fund made after X has notice of such theft.⁹

§ 1482. Payments at tax sale. In many cases purchasers at tax sales which prove to be invalid seek to recover from the public corporation the amount of taxes paid at such sale or the amount of taxes paid upon such property thereafter in reliance upon such sale.¹ The great weight of authority denies the right to recover in the absence of statute.² The right to recover is denied in some

⁴ Benjamin v. Welda State Bank, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

⁵ Whitcomb v. Brant, 90 N. J. L. 245, L. R. A. 1917D, 609, 100 Atl. 175.

⁶ Cunningham v. Bank, 13 Ida. 167, 121 Am. St. Rep. 257, 88 Pac. 975; Newburyport v. Spear, 204 Mass. 146, 90 N. E. 522; Hindmarch v. Hoffman, 127 Pa. St. 284, 14 Am. St. Rep. 842, 4 L. R. A. 368, 18 Atl. 14.

⁷ Cunningham v. Bank, 13 Ida. 167, 121 Am. St. Rep. 257, 88 Pac. 975.

⁸ Newburyport v. Spear, 204 Mass. 146, 90 N. E. 522.

⁹ Hindmarch v. Hoffman, 127 Pa. St. 284, 14 Am. St. Rep. 842, 4 L. R. A. 368, 18 Atl. 14. For a similar ques-

tion in equity, see Aetna Indemnity Co. v. Malone, 89 Neb. 260, 131 N. W. 200.

¹ Harding v. Auditor General, 136 Mich. 358, 99 N. W. 275.

² California. Loomis v. Los Angeles County, 59 Cal. 456.

Indiana. Churchman v. Indianapolis, 110 Ind. 259, 11 N. E. 301.

Louisiana. Lissu & Brother v. Police Jury, 127 La. 283, 31 L. R. A. (N.S.) 1141, 53 So. 566.

Michigan. Ball v. Auditor General, 133 Mich. 521, 95 N. W. 539.

Nebraska. Barkley v. Lincoln, 82 Neb. 181, 130 Am. St. Rep. 659, 18 L. R. A. (N.S.) 392, 117 N. W. 398.

New York. Coffin v. Brooklyn, 116 N. Y. 159, 22 N. E. 227.

cases on the theory that the doctrine of caveat emptor applies;³ while in other jurisdictions the right of recovery seems to be denied on the ground that the defect in the sale was a matter of record and that such payment was accordingly made under a mistake of law.⁴ If provision is made by statute for repayment in certain specified cases of void tax sales, recovery can be had in the cases specified by statute but not in other cases.⁵ By some statutes recovery can be had from the owner of the property, who has received the benefit of such payments.⁶ Contrary to the general rule, it is sometimes held that the purchaser whose title fails is entitled to recover payments made in reliance upon such sale on the ground that such payments have been made under a mistake and that the purchaser has received nothing in return therefor.⁷

§ 1483. Payments at judicial sale. Whether a purchaser at judicial sale can recover from the judgment creditor in case of failure of title is a question upon which there has been a conflict of authority. In some jurisdictions it is said that the doctrine caveat emptor applies; that the purchaser buys at his own risk; and that, accordingly, he can not recover from the judgment creditor the amount which he has paid in,¹ and that his remedy is in equity against the execution debtor whose debt he has paid,² in the absence of statute and in cases in which the execution creditor has not caused a levy to be made upon the specific property in question.³ In other jurisdictions it has been said that the purchase money does not belong to the execution creditor, since he can not satisfy his execution against X by seizing the property of Y, but that it does belong to the purchaser who parted with it by mistake and without consideration; and, accordingly, the purchaser is

³ *Lisso & Brother v. Police Jury*, 127 La. 283, 31 L. R. A. (N.S.) 1141, 53 So. 566.

⁴ *Coffin v. Brooklyn*, 116 N. Y. 159, 22 N. E. 227.

⁵ *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018; *Lindsey v. Boone County*, 92 Ia. 86, 60 N. W. 173; *Harding v. Auditor General*, 136 Mich. 358, 99 N. W. 275.

⁶ *Chapman v. Sollers*, 38 O. S. 378.

⁷ *Barden v. Columbia County*, 33 Wis. 445, 14 Am. Rep. 762.

¹ *Neal v. Gillaspay*, 56 Ind. 451, 26 Am. Rep. 37; *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40, 3 L. R. A. 440, 20 N. E. 119; *Murphy v. Higginbotham*, 2 Hill. L. (S. Car.) 397, 27 Am. Dec. 395.

² *Brunner v. Brennan*, 49 Ind. 98; *Harrison v. Shanks*, 76 Ky. (13 Bush.) 620.

³ The purchaser can not recover from the sheriff. *State v. Prime*, 54 Ind. 450.

allowed to recover from the execution creditor.⁴ In some jurisdictions the right of the purchaser at an execution sale to recover the purchase money from the execution creditor in the case of failure of title is given by statute.⁵ If the execution creditor has procured a levy upon the specific property, the title to which fails, the purchaser may recover from the execution creditor in probably all jurisdictions.⁶

§ 1484. Party from whom recovery is sought must be placed in statu quo. Recovery in an action for money had and received can not be had against one who can not be put in statu quo,¹ unless he is a wrongdoer. If the person to whom the money was paid has not incurred any legal liability in reliance upon such payment, it is not necessary to put him in statu quo.²

A common illustration of this rule exists when money paid to an agent to be paid over to his principal and by him so paid over is sought to be recovered from the agent. If B pays money to A as agent for X, and A pays that money over to X, B can not recover such money from A if A's agency was disclosed when the payment was made, and A himself has committed no wrongful act in inducing or compelling B to pay him the money.³ Where a purchase price of a ward's land was paid to the guardian, and the guardian remitted the money to his ward, the guardian is not liable in an action for money had and received, to a broker suing for commissions for the sale of such property.⁴ So selectmen of a

⁴ *Piscataquis County v. Kingsbury*, 73 Me. 326; *Dresser v. Kronberg*, 108 Me. 423, 36 L. R. A. (N.S.) 1218, Ann. Cas. 1913B, 542, 81 Atl. 487.

⁵ *Hitchcock v. Caruthers*, 100 Cal. 100, 34 Pac. 627; *Rosenberger v. Hawker*, 127 Ia. 521, 103 N. W. 781; *Elling v. Harrington*, 17 Mont. 322, 42 Pac. 851.

⁶ *Sanders v. Hamilton* 33 Ky. (3 Dana) 550; *Hackley v. Swigert*, 44 Ky. (5 B. Mon.) 86, 41 Am. Dec. 256.

¹ *Alabama. Traweck v. Hagler* (Ala.), 75 So. 152.

Arkansas. Kansas City Southern Ry. Co. v. Oglesby (Ark.), 199 S. W. 98.

Kentucky. Commonwealth for use of Devoe v. Baske, 124 Ky. 468, 11 L. R. A. (N.S.) 1104, 99 S. W. 316.

Massachusetts. Palmer v. Guillow, 224 Mass. 1, 112 N. E. 493.

Minnesota. Grand Lodge A. O. U. W. v. Towne, 136 Minn. 72, 161 N. W. 403.

New York. Hathaway v. Delaware County, 185 N. Y. 368, 113 Am. St. Rep. 909, 13 L. R. A. (N.S.) 273, 78 N. E. 153.

² *Holt v. Ruleau* (Vt.), 102 Atl. 934.

³ *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. ed. 373; *Kansas City Southern Ry. Co. v. Oglesby* (Ark.), 199 S. W. 98; *Wilson v. Wold*, 21 Wash. 398, 75 Am. St. Rep. 846, 56 Pac. 223.

⁴ *Hudson v. Scott*, 125 Ala. 172, 29 So. 91.

town, who in good faith determine the value of a pauper's support furnished him by the town, which amount under the law he must refund to the town before he is put on the voting list, are not liable to him for money had and received, where in good faith they fix an excessive amount which he pays them and they pay into the town treasury.⁵ Where property is sold for a sidewalk assessment, and the proceeds of such sale are by law to be paid over to the contractor entitled thereto, a purchaser at such sale can not recover from the city to which the money is paid, and he pays it over to the contractor though the assessment proves to be illegal, and the purchaser takes nothing by reason of his purchase.⁶ A tax can not be recovered from a public corporation if no attempt is made to recover such payment until after such public corporation has paid such taxes over to the public funds which are entitled thereto if such taxes are valid.⁷

If, however, the fact of agency is not disclosed to the person making the payment, at the time of such payment, the person making the payment may recover from the agent to whom he pays the money, if the facts are such that he could have recovered from the principal had the payment been made direct to the principal. Thus where A, an investment company, made a loan for its principal, C, to B, and B supposed that she was dealing with A alone, and B makes overpayments to A, by way of usury, which B is permitted to recover, B may recover from A, though A has forwarded such payments to C.⁸

If payment is made under protest, this is sufficient notice to the person receiving it to make him liable therefor if, under the circumstances, he would have been liable to refund a payment for his own benefit, even if he has paid over to his principal the money thus received.⁹

If money is paid to a collector of internal revenue for stamps to be affixed to the manifest of a vessel in order to obtain clearance, without protest, and without notice to the collector of the port

⁵ *Brown v. Marden*, 61 N. H. 15 [distinguishing, *Ford v. Holden*, 39 N. H. 143, where the selectmen were liable for taxes, the payment of which had been wrongfully exacted as a condition precedent to allowing the person so paying them to vote].

⁸ *Richardson v. Denver*, 17 Colo. 398, 30 Pac. 333.

⁷ *Commonwealth for use of Devoe v. Baske*, 124 Ky. 468, 11 L. R. A. (N.S.) 1104, 99 S. W. 316.

⁶ *Thompson v. Investment Co.*, 114 Ia. 481, 87 N. W. 438.

⁹ *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. ed. 373.

from whom clearance was had, such payment can not be recovered as having been made by duress.¹⁰

If the agent has notice of the rights of the party by whom the payment was made and the agent has paid the fund over to his principal, such agent is liable to the person entitled to such fund if, under such circumstances, he pays such fund over to his principal.¹¹ If the person to whom the money was paid has retained it, the fact that he received it as agent is immaterial.¹² An agent who receives money rightfully on behalf of his principal under a contract, but who retains it after he knows that his principal has failed to perform such contract, is liable to the person by whom such money was paid.¹³

One who has given a check in exchange for a forged obligation of a public corporation, which check has been applied by the public officer who forged such obligation to the payment of his own debt to such public corporation, may recover the amount of such check from such public corporation if its claim against the defaulting public official and his surety has not been impaired in any way.¹⁴ If a county is charged with the duty of collecting and paying certain taxes, one from whom a tax has been exacted unlawfully can not recover the amount from such county if he makes no attempt to recover such amount until after such taxes have been paid out in accordance with law.¹⁵

§ 1485. Action does not enlarge substantive rights. In allowing an action for money had and received, the law intended to allow a simple and speedy remedy for a recognized right; but it did not intend to create a right where there was none already.¹ B had been dealing with X, a stock-broker, and the result of the transaction showed a balance in B's favor. B requested A, X's agent, for a settlement of that balance, and asked A to pay it. A

¹⁰ *United States v. N. Y. & Cuba Mail S. S. Co.*, 200 U. S. 488, 50 L. ed. 569 [following, *Chesebrough v. United States*, 192 U. S. 253, 48 L. ed. 432].

¹¹ *Alexander v. Coyne*, 143 Ga. 696, L. R. A. 1916D, 1039, 85 S. E. 831; *Jensen v. Miller*, 162 Wis. 546, 156 N. W. 1010.

¹² *Schorman v. McIntyre*, 92 Wash. 116, 158 Pac. 993.

¹³ *Jensen v. Miller*, 162 Wis. 546, 156 N. W. 1010.

¹⁴ *Hathaway v. Delaware County*, 185 N. Y. 368, 13 L. R. A. (N.S.) 273, 78 N. E. 153.

¹⁵ *Commonwealth for use of Devoe v. Baske*, 124 Ky. 468, 11 L. R. A. (N.S.) 1104, 99 S. W. 316.

¹ *Monday v. Siler*, 47 N. Car. (2 Jones L.) 389; *Mitchell v. Penny*, 66 W. Va. 660, 26 L. R. A. (N.S.) 788, 66 S. E. 1003.

finally made such payment, expecting X to remit the amount to him at once. X was insolvent, and such amount was never remitted. It was held that A could not recover such amount from B.² A, the publisher of a newspaper, made a subscription to a fund for the relief of the families of certain firemen who had lost their lives in the discharge of their duty, and published an appeal in his newspaper for other subscriptions. A number of subscriptions were made, and the money was paid to A. It was held that the only child and heir of one of the firemen had no right of action against A to recover his part of the money so paid in as money had and received, since under the terms of A's request the disposition of the fund thus paid in was left to his discretion and judgment.³ While it did not affect the legal rights of the parties, the dispute arose in this way: plaintiff was a minor, the only son and heir of one of the firemen for the benefit of whose families the money was collected. A consulted a legal adviser, and decided to deposit the plaintiff's share of the fund with a trust company until the plaintiff came of age. The lower court made certain orders as to the disposition of the income of that fund for the benefit of the plaintiff during his minority, and to which orders A did not except. In the supreme court the plaintiff was the party complaining of error in the proceedings of the court below, in refusing to turn over the entire fund to himself or his guardian.

Where an officer is holding over as *de facto* treasurer, his successor not having been elected legally, a school district can not compel him to pay over funds lawfully in his possession by an action for money had and received.⁴ Since the guardian owes no duty to his ward to pay over the property in his hands until his account has been settled by the court which has original jurisdiction of such account, the ward can not maintain an action in *assumpsit* to recover his money in the hands of his guardian, although such guardianship has ceased in law.⁵ If A advances money to B under a contract by which A is to be repaid only by B's transferring to A stock in a corporation which was to be formed to manufacture a machine upon which B was working, if B could perfect such machine, A can not recover for money had and received in case such machine proves to be a failure and such

² *Clippinger v. Starr*, 130 Mich. 463, 90 N. W. 280.

³ *Hallinan v. Hearst* (Cal.), 62 Pac. 1063.

⁴ *School District v. Smith*, 67 Vt. 566, 32 Atl. 484.

⁵ *Mitchell v. Penny*, 66 W. Va. 660, 26 L. R. A. (N.S.) 788, 66 S. E. 1003.

corporation is not formed.⁶ If A obtains money from B, under circumstances which make him liable to refund, and uses the money in whole or in part to discharge a valid debt which A owes X, and X takes without collusion or fraud, B can not recover in an action against X for money had and received.⁷ Thus where A borrowed money of X, and to secure the same he gave a forged note and mortgage apparently signed by third persons, and subsequently A borrows money from B and gives another forged mortgage, and with a part of the money thus borrowed pays the first mortgage to X, B can not recover from X.⁸ So where A gets money from B by giving a note to which A signs the name of his principal without authority, and A uses the money thus obtained to pay debts of his principal, which A should have paid out of those of X, which should have been in A's hands but which A in fact had embezzled, it was held that B could not recover from X for the money thus used.⁹ So where B, a vendee of land, has a right to rescind the sale, he can not recover in an action for money had and received from one who has received no part of the purchase price, except what was paid to him by the vendor, A, as commission for bringing about the sale.¹⁰ So where A gets money from B by a forged draft, and with part of the proceeds thereof he discharges a debt which he owes X, who knows nothing of the forgery, and who surrenders to A a note endorsed by a third person, B can not recover from X.¹¹ So where A, who is shipping hogs under an arrangement with B, a firm of commission brokers, whereby he agreed to consign the hogs to B, and draw upon B with each consignment, and to use the money thus obtained in paying for the hogs, it was held that where A took part of this money and paid a debt owing by him to a bank, X, B can not recover such money from X, although X knew of the arrangement under which the money was received, since the relation of A to B was that of mere debtor and creditor.¹² So where X, the cashier of a bank, who was

⁶ *Palmer v. Guillow*, 224 Mass. 1, 112 N. E. 493.

⁷ *Craft v. R. R.*, 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920; *Walker v. Conant*, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292.

⁸ *Walker v. Conant*, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292.

⁹ *Craft v. R. R.*, 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920.

¹⁰ *Limited Investment Association v. Investment Association*, 99 Wis. 54, 74 N. W. 633.

¹¹ *Alabama National Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95, 22 So. 580.

¹² *Hurlburt v. Palmer*, 39 Neb. 158, 57 N. W. 1019.

also county treasurer, owes certain taxes to the state as county treasurer, and draws a draft which he signs as cashier of his bank, on another bank in which his bank has deposited funds, and forwards such draft to the state in payment of the taxes due from him, which draft is accepted and paid, the bank of which X is cashier can not recover from the state, although the cashier never paid the bank for such draft.¹³ The court held that the fact that the cashier had signed the draft, was no notice to the state that he was using the bank's funds for his individual debt.¹⁴ If facts exist which discharge the plaintiff's right of action upon an express contract, the same facts will prevent him from waiving the express contract, and suing on an implied contract.¹⁵ Thus where A had deposited money with B to invest, and subsequently A and B had an accounting and made a settlement, this accounting will not only bar an action upon the express contract between A and B, but also will bar an action for money had and received.¹⁶ If A has paid money to B under such circumstances that he can not recover it from B, and such payment has discharged a debt due from C to B, A's right to recover from C can not be litigated in an action brought by A against B, even if C is made a party thereto.¹⁷ One whose interest in a trust fund is purely equitable can not maintain an action at law against one to whom such fund has been paid.¹⁸

§ 1486. Classes of rights—Receipt of money from third person.

In determining the right of one whose money has been placed in the hands of another to recover the same, we must distinguish between two general classes of cases. In the first class, the party who receives the money of another, receives it from a third person in whose hands it is, without the consent of the real owner thereof. In the second class of cases, the person receiving the money receives it from the real owner, or from a third person, with the consent of the real owner. The chief distinction in legal effect,

¹³ *Goshen National Bank v. State*, 141 N. Y. 379, 36 N. E. 316.

¹⁴ *Goshen National Bank v. State*, 141 N. Y. 379, 36 N. E. 316 [distinguishing, *Claffin v. Bank*, 25 N. Y. 293, where one who took the president's individual check certified to by him as president was charged with notice that the president had no authority to accept his individual check on behalf of the bank].

¹⁵ *Hammer v. Downing*, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

¹⁶ *Hammer v. Downing*, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

¹⁷ *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891; *Langevin v. St. Paul*, 49 Minn. 189, 51 N. W. 817.

¹⁸ *Monday v. Siler*, 47 N. Car. (2 Jones L.) 389.

between these two classes of cases, is this: In the first class, we are not embarrassed by the question whether the payment was a voluntary one. In the second class, in addition to the question of ownership of the original fund and the right to recover the same, presented in the first class, we have the further complicating question whether the payment was not a voluntary one, since if the payment was voluntary no recovery can be had, although all the other facts might be such as to entitle the original owner to recover.

If A receives money from X which belongs to B, without B's consent, the general rule is that in the absence of special circumstances B may recover such money from A.¹ A public officer, as a sheriff who has retained money which he claims to be due him as commissions, but which belongs to a board of education, is liable in an action for money had and received.² The treasurer of a public corporation who has deposited public funds in a bank which has paid him interest upon such deposits must account to the public corporation for such interest.³

If X pays taxes to a public corporation, A, and a part or all of such taxes should be paid to another public corporation, B, B may recover from A the amount of taxes to which B is entitled,⁴ especially if such payment discharges X from further liability.⁵ A public quasi-corporation, as a county which receives taxes and applies them all to its own use when it should pay bonds issued by a town out of such taxes, is liable to such town therefor.⁶ If a

¹ United States. *Bayne v. United States*, 93 U. S. 642, 23 L. ed. 997; *United States v. Bank*, 96 U. S. 30, 24 L. ed. 647.

Minnesota. *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42.

New Hampshire. *Knapp v. Hobbs*, 50 N. H. 476.

New York. *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 15 L. R. A. 588, 30 N. E. 963; *Symmers v. Carroll*, 207 N. Y. 632, 47 L. R. A. (N.S.) 196, 101 N. E. 698.

Vermont. *State v. St. Johnsbury*, 59 Vt. 332, 10 Atl. 531.

² *Socorro Board of Education v. Robinson*, 7 N. M. 231, 34 Pac. 295. The same principle applies to fines. *State v. St. Johnsbury*, 59 Vt. 332, 10 Atl. 531.

³ *Eshelby v. Board of Education*, 66 O. S. 71, 63 N. E. 586.

⁴ *California*. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457.

Nevada. *Humboldt County v. Lander County*, 24 Nev. 461, 56 Pac. 228.

New York. *Bridges v. Supervisors of Sullivan County*, 92 N. Y. 570; *Strough v. Board of Supervisors*, 119 N. Y. 212, 23 N. E. 553.

Oregon. *Salem v. Marion County*, 25 Or. 449, 36 Pac. 163.

Virginia. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

⁵ *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

⁶ *Strough v. Jefferson County*, 119 N. Y. 212, 23 N. E. 552.

county receives money belonging to other persons without authority, it must refund to such persons.⁷ Where taxes are paid in to a county by a sheriff, when they should have been paid to a city, the city may recover.⁸ Where a county is divided, and the original county is legally entitled to taxes which were due when the division was made, but which had not then been paid, but the state officials through whose hands such taxes passed, pay a part thereof to the new county, the original county may recover such taxes from the new county.⁹ A public corporation may bring an action of assumpsit against another public corporation which has collected taxes, part of which should have been paid over to such plaintiff corporation.¹⁰ A public corporation or a public officer who has collected taxes is liable in assumpsit to such public corporations as are entitled by law to receive such taxes.¹¹

A stockholder who receives dividends when the corporation is insolvent, and the dividends are paid out of the capital of the corporation, knowing of such condition, may be compelled to repay such dividends in an action brought by the receiver of the company.¹² Where a school trustee expends money for the actual use and benefit of township schools, which by law he is required to pay over to another school corporation, such township is liable to such corporation for the amount of money thus expended.¹³ If a wife has taken money belonging to her husband and paid premiums on an insurance policy, taken out by her upon his life without his authority, the husband may recover the premiums thus paid from the insurance company.¹⁴ The owner of a vessel who has insured the vessel and goods thereon for the benefit of whom it may concern and who collects such insurance, is liable to the owners of such goods for the amount of the insurance on such goods.¹⁵ Where

⁷ *Chapman v. County of Douglas*, 107 U. S. 348, 27 L. ed. 378.

⁸ *Salem v. Marion County*, 25 Or. 449, 36 Pac. 163.

⁹ *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457.

¹⁰ *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280.

¹¹ *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457; *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E.

280; *Salem v. Marion County*, 25 Or. 449, 36 Pac. 163.

¹² *Warren v. King*, 108 U. S. 389, 27 L. ed. 769; *Davenport v. Lines*, 72 Conn. 118, 44 Atl. 17.

¹³ *Center School Township v. State*, ex rel., 150 Ind. 168, 49 N. E. 961 [citing, *Argenti v. San Francisco*, 16 Cal. 255; *Merrill v. Marshall County*, 74 Ia. 24, 36 N. W. 776].

¹⁴ *Metropolitan Life Ins. Co. v. Trende* (Ky.), 53 S. W. 412.

¹⁵ *Symmers v. Carroll*, 207 N. Y. 632, 47 L. R. A. (N.S.) 196, 101 N. E. 698.

the statute provided that property to the value of one thousand dollars is exempt from administration for the benefit of the widow and minor children, and such property is delivered to the widow, a minor child may recover its share from the widow in an action for money had and received, where the widow refuses to pay to such child its share of such amount.¹⁶ A village incorporated under an unconstitutional act, borrowed money from the state for school purposes. The county, as the agent of the state, collected from the village and the township in which it was situated the entire amount thus borrowed, and paid it to the state, and then collected another and additional sum as a part of such loan. It was held that the township could collect from the county the amount thus collected by the county in excess of the actual loan, the county having retained such excess of amount, and not having paid it over to the state.¹⁷

If X is indebted to B and A claims that he is entitled to such debt and X pays the amount of such debt to A under circumstances which leave X still liable to B, it is held in some jurisdictions that B can not recover such payment from A, since B's claim against X is not affected by such transaction.¹⁸ Where A gave B a note, which B indorses before maturity to C, and X brought suit against B and garnisheed A, and A disclosed his indebtedness to B, and paid the amount of the indebtedness to the sheriff, who forwarded it to X, it has been held that C has no right of action against X on the theory that he had no claim to the specific fund, his right of action being against A.¹⁹ If a bank makes a payment to a person not entitled thereto, under circumstances which do not protect the bank as against the person who

¹⁶ *Lanford v. Lee*, 119 Ala. 248, 72 Am. St. Rep. 914, 24 So. 578.

¹⁷ *Milwaukee v. Milwaukee County*, 114 Wis. 374, 90 N. W. 447.

¹⁸ *Indiana*. *Shultz v. Boyd*, 152 Ind. 166, 52 N. E. 750.

Massachusetts. *Moore v. Moore*, 127 Mass. 22; *Cole v. Bates*, 186 Mass. 584, 72 N. E. 333.

Michigan. *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982; *Finn v. Adams*, 138 Mich. 258, 4 Am. & Eng. Ann. Cas. 1186, 101 N. W. 533 [citing, *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982].

Montana. *Merchants' & Miners' Na-*

tional Bank v. Barnes, 18 Mont. 335, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218.

New Jersey. *Sergeant v. Stryker*, 16 N. J. L. 464, 32 Am. Dec. 404.

New York. *Butterworth v. Gould*, 41 N. Y. 450.

Rhode Island. *Richmond v. Read*, 33 R. I. 527, 82 Atl. 387.

Virginia. *Norfolk v. Norfolk County*, 120 Va. 379, 91 S. E. 820.

¹⁹ *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982; *Merchants', etc., Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218.

is rightfully entitled thereto, it is held that the person who is rightfully entitled can not recover from the person to whom it has been paid, since his right of action is against the bank.²⁰ If B was sentenced to imprisonment for life, and A, as guardian of B's children, collected from X a claim which was due to B, B can not recover such amount from A, since B's right against X still exists.²¹ If B is the real beneficiary under an insurance policy and the insurance company has paid the amount of such policy to A who has claimed under an assignment, B can not recover such amount from A.²²

In other jurisdictions it is held that under these circumstances B is not bound to compel X to pay such debt to B a second time, but that he may recover the amount of such payment from A.²³ In some jurisdictions in which B is allowed to recover from A, the fact that A knew at the time that he collected the money from X that B was entitled thereto, has been referred to as a controlling fact in determining that B may recover from A.²⁴ If X's note has been endorsed to B, and A, with knowledge of B's rights, demands and receives payment of such note from X, B may recover

²⁰ *Cole v. Bates*, 186 Mass. 584, 72 N. E. 333.

²¹ *Finn v. Adams*, 138 Mich. 258, 4 Ann. Cas. 1186, 101 N. W. 533 [citing, *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982].

²² *Shultz v. Boyd*, 152 Ind. 166, 52 N. E. 750.

²³ *United States. Bank of the Metropolis v. First National Bank*, 19 Fed. 301.

California. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457.

Connecticut. *Goodrich v. Alfred*, 72 Conn. 257, 43 Atl. 1041.

Georgia. *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175.

Illinois. *Whitton v. Barringer*, 67 Ill. 551; *Allen v. Stenger*, 74 Ill. 119.

Iowa. *Homire v. Rodgers*, 74 Ia. 395, 37 N. W. 972.

Minnesota. *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42; *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337; *Libby v. Johnson*, 37 Minn. 220, 33 N. W. 783; *Landin v. Moorhead National*

Bank, 74 Minn. 222, 77 N. W. 35; *Quigley v. Welter*, 95 Minn. 383, 104 N. W. 236; *Stoakes v. Larson*, 108 Minn. 234, 121 N. W. 1112; *Heywood v. Northern Assur. Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

Nevada. *Humboldt County v. Lander County*, 24 Nev. 461, 56 Pac. 228.

New York. *Bridges v. Supervisors of Sullivan Co.*, 92 N. Y. 570; *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. 606; *Strough v. Board of Supervisors*, 119 N. Y. 212, 23 N. E. 553.

Oregon. *Salem v. Marion County*, 25 Or. 449, 36 Pac. 163; *Wagener v. United States National Bank*, 63 Or. 299, 42 L. R. A. (N.S.) 1135, 127 Pac. 778.

South Dakota. *Siems v. Pierre Savings Bank*, 7 S. D. 338, 64 N. W. 167; *Knott v. Kirby*, 10 S. D. 30, 71 N. W. 138; *Finch v. Park*, 12 S. D. 63, 76 Am. St. Rep. 588, 80 N. W. 155.

²⁴ *Heywood v. Northern Assur. Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

from A the amount of such payment.²⁵ If B draws a check upon a bank, X, in favor of A, and by mistake as to the amount of the check X overpays A, B can recover from A the amount of such payment.²⁶

If X is indebted to B under circumstances which give B a property right in a specific fund, and A collects that fund from X under circumstances which leave X still liable to B, it has been held that B has an election to sue A or X at his option. If he sues A, A can not defend on the theory that B has a right of action against X.²⁷ If fines are paid into the treasury of a municipal corporation, and by statute they should have been paid into the treasury of the county, the county may recover such amounts from such municipal corporation.²⁸ On the other hand, it has been held that if B sues X, and obtains a judgment, this amounts to an election, and B can not afterwards maintain an action against A.²⁹ Thus, where A had deposited money in a savings bank, in trust for his wife, B, and the bank had given a pass-book for such money, and after the death of A and B, B's executor had demanded payment, but had been refused because he did not have the pass-book, and A's executor produced the pass-book and was paid by the bank, and B's executor sued A's executor and obtained a judgment, execution upon which was returned because no property could be found, and B's executor then sued the bank, it was held that the first action and judgment amounted to an election, and operated as a bar to the second action.³⁰

²⁵ Heywood v. Northern Assur. Co., 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

²⁶ Wagener v. United States National Bank, 63 Or. 299, 42 L. R. A. (N.S.) 1135, 127 Pac. 778.

²⁷ Bates-Farley Savings Bank v. Dis-
mukes, 107 Ga. 212, 33 S. E. 175; Cleve-
land v. Jewett, 39 O. S. 271.

"He chose the latter alternative; he saw fit to ratify the unauthorized collection by the defendant and the unauthorized payment by the association, and it does not now lie in the mouth of the defendant to say, when called upon to pay over to him the money which it unlawfully collected upon his and his assignor's claims against the

building and loan association that his only remedy is against the association.

* * * Under such circumstances the law implies a promise on the part of the defendant to pay the money over to the one who was entitled to receive it." Bates-Farley Savings Bank v. Dis-
mukes, 107 Ga. 212, 218, 33 S. E. 175.

²⁸ Cleveland v. Jewett, 39 O. S. 271.

²⁹ Fowler v. Savings Bank, 113 N. Y. 450, 10 Am. St. Rep. 479, 4 L. R. A. 145, 21 N. E. 172.

³⁰ Fowler v. Savings Bank, 113 N. Y. 450, 10 Am. St. Rep. 479, 4 L. R. A. 145, 21 N. E. 172. The court said that a different result would have been reached had this been a special deposit.

If A collects a fund from B under circumstances which discharge B from liability to X and X is entitled to such fund or a part thereof as against A, X may maintain an action of assumpsit against A for money had and received.³¹ Since compensation fixed by law for members of a board is not to be distributed among them in proportion to the work actually done by each, one member may recover from another for money had and received where such member has collected the salary due to the entire board, but retained a disproportionate amount under the claim that he had performed more work than the other member.³²

If B has in some way obtained a lien upon a fund or property belonging to X, and this fund or property is delivered to A, who takes with full knowledge of B's lien, B can enforce the amount of his lien in an action against A for money had and received. Thus, where B seizes a certain property belonging to X on a judgment, and A with knowledge of the judgment induces the sheriff to sell the attached property and pay the proceeds to him, X can maintain an action against A for money had and received.³³ Where the sheriff wrongfully pays to A money in his hands which he should have paid to B, B has an election to sue the sheriff or A.³⁴ Where B obtained a judgment in an action against X, and A claiming a lien on the property, intervenes, and has the attachment vacated, and A then induces the sheriff to pay him the money made on such attachment, and on appeal the attachment is held valid, and B takes judgment against X, and shows an execution which is returned unsatisfied, X can maintain an action against A for money had and received.³⁵ An assignee of a part of a claim whose assignment is so made as to give him priority therein, may recover from a subsequent assignee who has collected the entire amount of such claim even though such subsequent assignee was acting in good faith.³⁶ If A and his wife, B, have sold property which they owned jointly, and a note therefor has been given to

³¹ *Norfolk v. Norfolk County*, 120 Va. 379, 91 S. E. 820.

³² *Stone v. Towne*, 67 N. H. 113, 29 Atl. 637.

³³ *Finch v. Park*, 12 S. D. 63, 76 Am. St. Rep. 588, 80 N. W. 155.

³⁴ *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42.

³⁵ *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 15 L. R. A. 588,

30 N. E. 963. The court said that such action could be maintained by "those who would have been entitled to the money on the reversal of the order, provided it had not been paid to the defendants."

³⁶ *Brooks v. Hinton State Bank*, 26 Okla. 56, 30 L. R. A. (N.S.) 807, 110 Pac. 46.

A, A's written account to B showing the amount due to her is such an acknowledgment as will justify a finding that he promised to pay her such share of the proceeds of such note when collected.³⁷ If a check payable to B is forwarded to him, but is stolen by X before B receives it, and X deposits such check with a bank, A, which collects the check and pays the proceeds to X, B may recover from such bank in an action for money had and received.³⁸ If A places money in B's hands to be expended for A's support and B uses only a part thereof for such purpose, A may maintain an action for money had and received for the unexpended balance.³⁹ Where a de facto officer receives his fees or other compensation and retains the same, the liability of the public corporation to the officer de jure is discharged; but the de jure officer may recover such fees from the de facto officer as money had and received.⁴⁰

A legal right to a definite sum must be shown to enable the plaintiff to recover. A and B, each owning stock in a corporation, agreed jointly to sell their interests to X. By a secret agreement between X and A, A was to receive additional compensation. B sued A to recover his share of such amount. It was held that whatever B's rights might be in an action of deceit, or in a suit in equity for an accounting, he could not maintain this action.⁴¹

If A holds money in his hands which is claimed by B and X, and A voluntarily pays such money over to X, A is liable to B for money had and received if B proves to be the real owner thereof.⁴² Where X stole B's money and deposited it with A, who took it in good faith, but before payment A was notified that the money was really that of B, A is liable to B for money had and received if after such notice he pays it to X on X's order.⁴³

³⁷ *Lurty v. Lurty*, 107 Va. 466, 59 S. E. 405.

³⁸ *Buckley v. Bank*, 35 N. J. L. 400, 10 Am. Rep. 249; *Shaffer v. McKee*, 19 O. S. 526; *Farmer v. Bank*, 100 Tenn. 187, 47 S. W. 234.

³⁹ *Flye v. Hall*, 224 Mass. 528, 113 N. E. 366.

⁴⁰ *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; *Palmer v. Darby*, 64 O. S. 520, 60 N. E. 626.

Contra by statute, *Chubbuck v. Wilson*, 151 Cal. 162, 12 Ann. Cas. 888, 90 Pac. 524. No damages as such

could be recovered. *Palmer v. Darby*, 64 O. S. 520, 60 N. E. 626.

⁴¹ *Cummings v. Synnott*, 120 Fed. 84, 58 C. C. A. 490. This case impliedly holds that a right to money in equity does not always give a right to this action at law.

⁴² *McDuffee v. Collins*, 117 Ala. 487, 23 So. 45; *Osborn v. Bell*, 5 Den. (N. Y.) 370, 49 Am. Dec. 275; *Hindmarch v. Hoffman*, 127 Pa. St. 284, 14 Am. St. Rep. 842, 4 L. R. A. 368, 18 Atl. 14.

⁴³ *Hindmarch v. Hoffman*, 127 Pa. St. 284, 14 Am. St. Rep. 842, 4 L. R. A. 368, 18 Atl. 14.

Where, contrary to law, attorneys' fees are included in the amount for which property is advertised on foreclosure of a mortgage, and the amount of the mortgage and such attorneys' fees is bid therefor, the mortgagor may recover from the party to whom such excess amount is paid.⁴⁴ Thus, if the mortgagee bids in the property for the amount of the mortgage debt, costs, and such fees, the mortgagor may recover such surplus from him.⁴⁵ If costs are included by the sheriff, which he has no right to include, as where the mortgagee buys the land in, and such costs are paid over by the sheriff to the county, the mortgagor may recover such amount from the county.⁴⁶ If an excessive judgment is rendered, and the judgment creditor bids in the land for the full amount of such judgment and costs, and such judgment is subsequently corrected, the judgment debtor may recover such difference as surplus from the judgment creditor.⁴⁷

§ 1487. Receipt of money to discharge specific obligation due another. If X is in some way liable to B, and places money in A's hands with which A is to pay B's debt, B may enforce such liability against A if A is not holding such money solely as X's agent.¹ Thus, if X puts in A's hands money to pay A's debt to B for goods furnished, B may recover from A.² An arrangement was made between A, B and X, by which it was agreed that A was to discount a certain note which X owned, and out of the proceeds was to pay to B one thousand dollars; in reliance upon which arrangement, B was to extend credit to X in the sum of one thousand dollars. B extended such credit, and A refused to

⁴⁴ *Wilkinson v. Baxter's Estate*, 97 Mich. 536, 56 N. W. 931.

⁴⁵ *Eliason v. Sidle*, 61 Minn. 285, 63 N. W. 730.

⁴⁶ *Soderberg v. King County*, 15 Wash. 194, 55 Am. St. Rep. 878, 33 L. R. A. 670, 45 Pac. 785.

⁴⁷ *Mitchell v. Weaver*, 118 Ind. 55, 10 Am. St. Rep. 104, 20 N. E. 525.

¹ *Alabama*. *Rockett v. Edmundson*, 164 Ala. 478, 51 So. 143.

California. *Logan v. Talbott*, 59 Cal. 652.

Indiana. *Coppage v. Gregg*, 127 Ind. 359, 26 N. E. 903.

Michigan. *Liesemer v. Burg*, 106 Mich. 124, 63 N. W. 990.

Minnesota. *Heywood v. Northern Assurance Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

New York. *Williams v. Fitch*, 18 N. Y. 546.

Oklahoma. *Martindale v. Shaha*, 51 Okla. 670, 151 Pac. 1019.

Oregon. *Baker City Mercantile Co. v. Idaho Cement Pipe Co.*, 67 Or. 372, 136 Pac. 23.

Pennsylvania. *Benner v. Weeks*, 159 Pa. St. 504, 28 Atl. 355.

Wisconsin. *Sterling v. Ryan*, 72 Wis. 36, 7 Am. St. Rep. 818, 37 N. W. 572.

² *Benner v. Weeks*, 159 Pa. St. 504, 28 Atl. 355.

perform the contract on his part, but discounted the note for his own benefit. A was held liable to B for money had and received.³ B held a mortgage on certain personal property belonging to X. X agreed to cause the proceeds of such property to be paid to B if B would refrain from foreclosure proceedings. X made an arrangement whereby the purchase price was paid to A under a contract whereby A was to pay X's debt to B out of such funds. It was held that B could recover from A.⁴ If A holds money as X's agent, under instructions to pay B, A is not liable to B as where he subsequently delivers such money to X on X's demand.⁵ Where an agent has made an unauthorized contract on behalf of his principal, the fact that the agent turns over personal property other than money to his principal, and reimburses him for any possible loss by reason of such contract, does not make the principal liable to the adversary contracting party in an action for money had and received. Thus, B held a bill of lading issued by X, an agent of A, a steamship company, without any authority, and before the goods were received. X subsequently transferred his property to A, to protect A against any loss on account of such bill of lading. B could not recover from A in an action for money had and received.⁶ If money is delivered to A by B for a specific purpose, and he refuses to perform the agreement under which it is received, but undertakes to apply the money to a liability owing to him by B, A is liable for such money in an action for money had and received to the person for whose benefit it was so deposited. Thus, where A received from C, the agent of B, money, to be applied upon the purchase price of stock bought by C for B, and such money was furnished by B, A can not apply such money to a debt due to him from C, even if A does not know when the money is received that it is B's money.⁷ B, as sheriff, had incurred certain expenses in caring for a property seized by him in his official capacity, and such expenses were included in a bill of costs, and were collected as a part of the judgment. The entire amount of the judgment was paid to A, the attorney for C, the successful party. A credited the entire amount upon his account with C. It was held that B could maintain an action against A for such expenses, even if B could not prove that A had received this money

³ Ehrman v. Rosenthal, 117 Cal. 491, 49 Pac. 460.

⁴ Coppage v. Gregg, 127 Ind. 359, 26 N. E. 903.

⁵ Lewis v. Sawyer, 44 Me. 332.

⁶ Lazard v. Transportation Co., 78 Md. 1, 26 Atl. 897.

⁷ Bearce v. Fahrnow, 109 Mich. 315, 67 N. W. 318.

under an express agreement to pay B out of such proceeds.⁸ If money belonging to B, or on which B has a lien, is paid by X to A, A can not retain such money and apply it to the discharge of the debt due to him from X.⁹ Thus, where X owns certain cattle, upon which he had given a lien to a bank, B, of which John D. Myers was president, and X's agent, under an arrangement with B, was to sell the cattle and forward the money to a bank, A, of which John Q. Myers was president, the bank A could not retain the money and apply it to an indebtedness from that bank to X, but was liable over to B for such amount.¹⁰ B held certain receivership certificates which, by an arrangement between himself and A, were to have priority over those held by A. It was held that if A received payment of his certificates to the exclusion of B, B could maintain an action against A therefor.¹¹ So where B, a beneficiary of a life insurance policy taken out by A, had agreed with A to pay a debt owing by A to X out of such policy, it has been held that B's executor may maintain an action against A for the amount of such debt.¹² If money which is due from X to A is paid to B under circumstances which prevent A from enforcing such claim against X, or which impair A's collateral security, A may recover such payment from B.¹³ If X is indebted to A and B and X pays the amount of such debt to A, B may recover from A his proportion of such debt.¹⁴ If an attorney fee which is due to A and B is paid to B, A may maintain an action against B for money had and received to recover his proportion of such fee.¹⁵ If X is the agent of A and B, who are both mortgage creditors of Y, and Y makes a payment to X to apply on his debt to A and X applies

⁸ *Knott v. Kirby*, 10 S. D. 30, 71 N. W. 138.

⁹ *United States. Central National Bank v. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724.

Michigan. Burtnett v. Bank, 38 Mich. 630.

Nebraska. Cady v. Bank, 46 Neb. 756, 65 N. W. 906; *Alter v. Bank*, 53 Neb. 223, 73 N. W. 667.

Pennsylvania. Bank v. King, 57 Pa. St. 202, 98 Am. Dec. 215.

Wyoming. Rock Springs Nat. Bank v. Luman, 6 Wyom. 123, 167, 42 Pac.

874, 43 Pac. 514 [reversing, 5 Wyom. 159, 38 Pac. 678].

¹⁰ *People's National Bank v. Myers*, 65 Kan. 122, 69 Pac. 164.

¹¹ *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896.

¹² *Maybury v. Berkery*, 102 Mich. 126, 60 N. W. 699.

¹³ *Martindale v. Shaha*; 51 Okla. 670, 151 Pac. 1019; *Midland Savings & Loan Co. v. Sutton*, 55 Okla. 84, 154 Pac. 1133.

¹⁴ *Martindale v. Shaha*, 51 Okla. 670, 151 Pac. 1019.

¹⁵ *Martindale v. Shaha*, 51 Okla. 670, 151 Pac. 1019.

such payment to B's debt, A may recover such amount from B if B knew of the facts and if A's mortgage had been canceled by judicial decision.¹⁶

V

MONEY LOANED

§ 1488. Money loaned—Necessity of genuine contract. A request to lend money usually implies a genuine promise to repay it; and accordingly money which is lent by one at the request of another may be recovered from the person at whose request it was lent.¹

A request of some sort, either express or implied, is necessary to authorize recovery in this form of action.² If A lends money to B and B pays it over to C, A can not recover from C if B was not acting as C's agent,³ unless, by the agreement of all the parties, A gave credit to C.⁴ A payment of money by a married woman to her husband,⁵ or her expenditure of money on his realty,⁶ does not prima facie amount to a loan.

The action can not be brought unless money was lent.⁷ It can not be brought by one who has lent a bond to another to recover the value of the bond.⁸ If A borrows money from B, B may recover in the common counts in *assumpsit*.⁹

§ 1489. Against whom action will lie. If money is lent by one person in reliance upon a genuine contract by another person

¹⁶ *Midland Savings & Loan Co. v. Sutton*, 55 Okla. 84, 154 Pac. 1133.

¹ *England. Stevenson v. Hardie*, W. Bl. 872.

California. Brown v. Spencer, 163 Cal. 589, 126 Pac. 493.

Connecticut. Mechanics' Bank v. Woodward, 74 Conn. 689, 51 Atl. 1084.

Minnesota. Wintermute v. Stinson, 16 Minn. 468.

Montana. Clarkson v. Kennett, 17 Mont. 563, 44 Pac. 88.

Oregon. Devlin v. Moore, 64 Or. 464, 130 Pac. 46.

West Virginia. Hix v. Scott, 80 W. Va. 727, 94 S. E. 399.

Wisconsin. Whitman v. Lake, 32 Wis. 189.

² *Cummings v. Long*, 25 Minn. 337.

³ *Di Orio v. Venditti*, 39 R. I. 101, 97 Atl. 599.

⁴ *Di Orio v. Venditti*, 39 R. I. 101, 97 Atl. 599.

⁵ *Spruance v. Equitable Trust Co.* (Del. Ch.), 103 Atl. 577; *Stone v. Curtis*, 115 Me. 63, 97 Atl. 213.

⁶ *Spruance v. Equitable Trust Co.* (Del. Ch.), 103 Atl. 577.

⁷ *Waterman v. Waterman*, 34 Mich. 490.

⁸ *Waterman v. Waterman*, 34 Mich. 490.

⁹ *Hix v. Scott*, 80 W. Va. 727, 94 S. E. 399.

to repay such loan, it is immaterial whether the money is lent to the person who requests the loan,¹ or whether it is paid to another person at his request.²

While the action will lie against the primary debtor whether the money was paid to him or to another at his direction,³ it will not lie against a guarantor.⁴

VI

MONEY LAID OUT AND EXPENDED

§ 1490. Money paid. If A pays B's debt upon B's request, either express or implied, A may recover from B if the circumstances are such as to show a fair understanding that such money should be repaid.¹ A genuine request is necessary to enable A to recover,² apart from cases in which considerations of humanity and decency are involved,³ and apart from cases in which A is obliged to make such payment to protect his own interests.⁴ The action of assumpsit will lie; and the common count for money laid out and expended for

¹ **California.** *Brown v. Spencer*, 163 Cal. 589, 126 Pac. 493.

Connecticut. *Mechanics' Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084.

Minnesota. *Wintermute v. Stinson*, 16 Minn. 468.

Oregon. *Devlin v. Moore*, 64 Or. 464, 130 Pac. 46.

Wisconsin. *Whitman v. Lake*, 32 Wis. 189.

² *Stevenson v. Hardie*, W. Bl. 872; *Clarkson v. Kennett*, 17 Mont. 563, 44 Pac. 88.

³ See ante, note 1.

⁴ *Douglass v. Reynolds*, 32 U. S. (7 Pet.) 113, 8 I. ed. 626.

¹ **United States.** *Riggs v. Lindsay*, 11 U. S. (7 Cranch.) 500, 3 L. ed. 419.

Arkansas. *Donaghey v. Williams*, 123 Ark. 411, 185 S. W. 778.

Georgia. *Howard v. Behn*, 27 Ga. 174.

Iowa. *Littleton Savings Bank v. Land Co.*, 76 Ia. 660, 39 N. W. 201; *In re Barnes' Estate*, 177 Ia. 122, 158 N. W. 754.

Kentucky. *Armstrong v. Keith*, 26

Ky. (3 J. J. Mar.), 153, 20 Am. Dec. 131.

Louisiana. *Powell v. Lawhead*, 13 La. Ann. 627.

Massachusetts. *Wheeler v. Young*, 143 Mass. 143, 9 N. E. 531.

Minnesota. *Rosemond v. Register Co.*, 62 Minn. 374, 64 N. W. 925; *Kosanke v. Kosanke*, 137 Minn. 115 [sub nomine, *In re Kosanke's Estate*, 162 N. W. 1060].

Nebraska. *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373, 83 N. W. 172.

New Jersey. *Rodman v. Weinberger*, 81 N. J. L. 441, 79 Atl. 338.

New York. *Albany v. McNamara*, 117 N. Y. 168, 6 L. R. A. 212, 22 N. E. 931.

Texas. *Lee v. Stowe*, 57 Tex. 444.

West Virginia. *Bartlett v. Bank of Mannington*, 77 W. Va. 329, 87 S. E. 444.

² *Donaghey v. Williams*, 123 Ark. 411, 185 S. W. 778. See § 1520.

³ See §§ 1521 et seq.

⁴ See § 1542.

the use of the defendant at his request may be used.⁵ Thus where the president and general manager of a corporation takes up a debt of the corporation, in part with his individual funds, and in part with funds furnished by a stockholder, they may join in an action against the corporation for money thus furnished.⁶ If A, the agent of a railroad company, delivers freight to B upon B's promise to pay the freight charges thereon, and B does not make such payment, and as a result thereof A is obliged to pay such amount to the company, it being contrary to the rules of the company to deliver the freight until the charges were paid, A may recover from B.⁷ A carrier of imports may pay the duties thereon and claim a lien on the property therefor.⁸ A payment to a third person made on request may be recovered even if made under a special contract which proves unenforceable. Thus the directors and a majority of the stockholders in a corporation agreed with A, a stockholder, that A should spend a certain amount of money in developing a mine belonging to the corporation and receive compensation in stock. The contract was set aside by the court; but as the performance was beneficial to the corporation it was held that A could recover from the corporation the money thus expended.⁹ If A expends money on B's account at X's request, A has no right to recover from B unless X was authorized by B to make such request.¹⁰

VII

USE AND OCCUPATION

§ 1491. Assumpsit for occupation under genuine but informal contract. One who is in possession of the land of another under a genuine agreement by which he is to pay for such use and occupation, but not under a valid formal lease, is liable in assumpsit for use and occupation.¹ This action will lie where possession was

⁵ *Bartlett v. Bank of Mannington*, 77 W. Va. 329, 87 S. E. 444.

⁶ *Rosemond v. Register Co.*, 62 Minn. 374, 64 N. W. 925.

⁷ *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373, 83 N. W. 172.

⁸ *Wabash R. R. v. Pearce*, 192 U. S. 179, 48 L. ed. 397.

⁹ *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

¹⁰ *Little Bros. Fertilizer & Phosphate Co. v. Wilmott*, 44 Fla. 166, 32 So. 808;

Allen v. Bobo, 81 Miss. 443, 33 So. 288.

¹ *England. Phipps v. Sculthorpe*, 1 B. & Ald. 50.

Arkansas. Cooley v. Ksair, 105 Ark. 307, 43 L. R. A. (N.S.) 527, 151 S. W. 254.

California. Hidden v. Jordan, 57 Cal. 184.

taken under an oral lease,² or under a lease of public land which the public officials had no authority to make.³ It is not necessary that an express contract be entered into under which possession is taken. Use and occupation will lie if possession was taken under a genuine implied contract for paying for such use and occupation.⁴ Where possession is taken under a contract other than one for the sale of such realty, an action for use and occupation will lie.⁵ Thus where a railroad construction company took possession of the working plant of certain contractors, claiming the right so to do under the contract on the ground of contractor's default, and asserting such right by means of an injunction, it was held that after it was adjudged that the construction company did not possess such right, it was liable to the contractor for a reasonable compensation for the use of such plant.⁶

A mortgagee, who purchases at foreclosure sale, and enters into rightful possession, and who upon redemption by the mortgagor within a year from the date of such sale, is liable for rents during the period of his occupation, is liable to the mortgagee for such rents collected in an action for money had and received.⁷ If A holds over after the expiration of a lease, B who lives with A and who assists A in operating a boarding house, receiving no compensation therefor, is not liable for use and occupation on the theory that A and B were occupying the premises jointly.⁸

Kentucky. *Crouch v. Briles*, 30 Ky. (7 J. J. Mar.) 255, 23 Am. Dec. 404.

Nebraska. *Rosenberg v. Sprecher*, 74 Neb. 176, 103 N. W. 1045, 105 N. W. 293.

Ohio. *Moore v. Beasley*, 3 Ohio 294; *Wilson v. Trustees*, 8 Ohio 174.

Oklahoma. *Rodman v. Davis*, 34 Okla. 766, 127 Pac. 411.

Rhode Island. *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184.

Virginia. *Sutton v. Mandeville*, 15 Va. (1 Munf.) 407, 4 Am. Dec. 549. Use and occupation will not lie where possession was taken wrongfully. See §§ 1512 et seq.

² *Moore v. Beasley*, 3 Ohio 294.

³ *Wilson v. Trustees*, 8 Ohio 174.

⁴ **England.** *Wheatley v. Boyd*, 7 Exch. 20.

Arkansas. *Cooley v. Ksair*, 105 Ark.

307, 43 L. R. A. (N.S.) 527, 151 S. W. 254.

Kentucky. *Crouch v. Briles*, 30 Ky. (7 J. J. Mar.) 255, 23 Am. Dec. 404.

Massachusetts. *Little v. Pearson*, 24 Mass. (7 Pick.) 301, 19 Am. Dec. 289.

Michigan. *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105.

Oklahoma. *Rodman v. Davis*, 34 Okla. 766, 127 Pac. 411.

Rhode Island. *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184.

⁵ *P. P. Emory Mfg. Co. v. Rood*, 182 Mass. 166, 65 N. E. 58.

⁶ *Champlain Construction Co. v. O'Brien*, 117 Fed. 271.

⁷ *Siems v. Bank*, 7 S. D. 338, 64 N. W. 167.

⁸ *Austin v. Whittle*, 178 Mass. 155, 59 N. E. 636.

§ 1492. Assumpsit for occupation of realty under a formal lease. An action for use and occupation would not lie at common law, if the occupant was holding by a formal lease under seal.¹ At modern law the same principle applies, where the occupant holds by a formal lease which is enforceable and contains an express covenant to pay rent. An occupant who enters under a formal lease, may be liable for use and occupation, if for any reason the lease itself proves unenforceable. Thus, where a tenant was partially evicted by his landlord, and his landlord had sued in debt and failed to recover because of such partial eviction,² it was held that he might sue the tenant on a quantum meruit account in assumpsit for the beneficial use which the tenant had.³ If a lease under seal has been subsequently modified or varied in legal effect, in any other way whatever than by another instrument under seal, the resulting obligation is treated in law as a simple obligation, and not a specialty. Accordingly, an action in assumpsit can be brought upon such an obligation in a proper case, and the fact that the original lease was under seal does not prevent this form of action. Thus, where by statute the election of a city to take for public use part of any land under lease, discharges such lease as to the part taken, but leaves it valid as to the residue, and upon such election the city acquires legal title in the part taken, a tenant holding under a sealed lease is liable after such election in an action for the use and occupation of the residue.⁴ If A holds property under a perpetual lease from B, and A sells to X, subject to the annual rent reserved, and X recognizes B's rights in such property, the law implies a promise by X to B to pay the rent; and accordingly, assumpsit will lie.⁵ A statute allowing assumpsit on sealed contracts makes it possible to maintain assumpsit on a written lease under seal.⁶

¹ Reade v. Johnson, Cro. Eliz. 242, 1 Leon. 155; Green v. Harrington, Hob. 284, Hutt. 34; Brett v. Read, Cro. Car. 343, W. Jones 329; Codman v. Jenkins, 14 Mass. 93.

² Meredith Association v. Twist-Drill Co., 66 N. H. 539, 30 Atl. 1119.

³ Meredith Association v. Twist-Drill Co., 67 N. H. 450, 39 Atl. 330.

⁴ McCardell v. Miller, 22 R. I. 96, 46 Atl. 184.

⁵ Derrick v. Luddy, 64 Vt. 462, 24 Atl. 1050; Dalton v. Laudahn, 30 Mich. 349; Conklin v. Tuttle, 52 Mich. 630, 18 N. W. 391; Beecher v. Duffield, 97 Mich. 423, 56 N. W. 777.

⁶ Dalton v. Laudahn, 30 Mich. 349; Beecher v. Duffield, 97 Mich. 423, 56 N. W. 777.

CHAPTER XLIV

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I

GENERAL NATURE

§ 1493. Quasi-contracts. When we deduct the express contract and the genuine implied contract from the rights upon which in the latest development of the common law, an action *ex contractu* could have been brought, we find that we have left remaining a number of rights.¹ These rights consist of combinations of facts to which the law attached an obligation without regard to the agreement of the parties thereto, and frequently in defiance of the intentions of one or both of such parties, which obligation could be enforced by an action *ex contractu*, and generally by the action of *assumpsit*.² This type of liability is merely "an implication of law that arises from the facts and circumstances independent of agreement or presumed intention."³ Since an action

¹ For a discussion of the nature of quasi-contracts as distinguished from genuine implied contracts, see *Highway Commission v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280.

² *Harty Bros. & Harty Co. v. Polakow*, 237 Ill. 559, 86 N. E. 1085; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865; *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

"The term quasi-contract describes a situation where there is an obligation or duty arising by law upon which the same remedy is given as would be given if the obligation or duty arose out of

contract. The term itself implies that the obligation or duty is not a contractual one." *Sibley v. Connecticut*, 89 Conn. 682, 96 Atl. 161.

³ *Pracht v. Daniels*, 20 Colo. 100, 103; 36 Pac. 845. "There is some confusion in the statement of the law applicable to what are frequently called implied contracts, arising from the fact that obligations generally different have been classed as such, not because of any real analogy, but because where the procedure of the Common Law prevails, by the adoption of a fiction in pleading—that of a promise where none in fact exists or can in reason be supposed to exist—the favorite remedy of implied *assumpsit* could

ex contractu lay to protect and enforce such a right, it is called

be adopted. This was so in that large class of cases, where suit is brought to recover money paid by mistake or has been obtained by fraud. Here it is said the law implies a promise to repay the money, when it was well understood that the promise was a mere fiction, and in most cases without any foundation whatever in fact. The same practice was adopted where necessities had been furnished an insane person or a neglected wife or child. In all these cases no true contract exists. They are, by many authors, termed quasi-contracts, a term borrowed from the civil law. In all these cases no more is meant than that the law imposes a civil obligation on the defendant to restore money so obtained, or to compensate one who has furnished necessities to his wife or child, where he has neglected his duty to provide for them, or, by reason of mental infirmity, is unable to obtain them for himself. But contracts that are true contracts are frequently termed implied contracts, as, where from the facts and circumstances, a court or jury may fairly infer, as a matter of fact, that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts; the difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in the other case the terms are inferred as a matter of fact from the evidence offered of the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are, or can be, indulged. The evidence must satisfy the court and jury that the parties understood that each sustained to the other a contractual relation; and that by reason of this relation the de-

fendant is indebted to the plaintiff for services performed or for goods sold and delivered. In the leading case of *Hertzog v. Hertzog*, 29 Pa. St. 465, the distinction is clearly stated by Judge Lowrie. After quoting from Blackstone, and observing that his language is open to criticism, he says: "There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of parties to transactions, and are dictated only by their natural and accordant wills. When the intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances really existing, and then the contract thus ascertained is called an implied one. * * * It is quite apparent, therefore, that radically different relations are classified under the same term, and this often gives rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are only implied ones. In one case the contract is a mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one the intention is disregarded; in the other it is ascertained and enforced. In one the duty defines the contract; in the other the contract defines the duty." *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104, 113; 61 N. E. 152 [quoting *Hertzog v. Hertzog*, 29 Pa. St. 468].

"In many cases where there is no contract, the law upon equitable grounds imposes an obligation often called quasi-contractual. Such obliga-

a contract implied in law,⁴ a contract created by law,⁵ a constructive contract,⁶ or a quasi-contract.⁷

tions are not contracts in the proper sense, since they are created by law and not by the parties. In such so-called contracts the law creates a fictitious promise for the purpose of allowing the remedy by action of *assumpsit*. Though created by law and clothed with the semblance of a contract, the obligation is not a contract at all. The proper term for such obligations is 'quasi-contract,' a term borrowed from the Roman law. They are called 'quasi-contracts' because, as the term implies, they are not contracts at all, but have a semblance of contract in that they may be enforced by an action of *assumpsit*. Much of the apparent confusion in the cases arises from a failure to distinguish clearly between implied contracts in fact and contracts implied in law, or constructive contracts." *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

"A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy." *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

"It is a mistake, in the technical sense, to speak of the contract as one implied by law. There are such contracts. They arise where there is a

legal duty to respond in money which by a legal fiction may be enforced as upon an implied promise. In such case there is no element of contract strictly so called. There is only the duty to which the law fixes a legal obligation of performance as in case of a promise *inter partes*. So it is called in the books a quasi-contract. There are implied contracts in the strict sense of the term. In this case we are dealing with the subject of implied contracts in such sense. Such a contract requires, the same as an express contract, the element of mutual meeting of minds and of intention to contract. The two species differ only in methods of proof. One is established by proof of expression of intention, the other by proof of circumstances from which the intention is implied as a matter of fact. The implication arises upon legal principles and is conclusive in the absence of something efficiently displacing it, as a presumption of law. Unlike the latter, it being an implication of fact though springing into existence as matter of law, it is rebuttable." *Wojahn v. National Union Bank*, 144 Wis. 646 (666), 129 N. W. 1068.

⁴ *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 Pac. 1003; *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

⁵ *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934; *Bishop on Contracts*, ch. VIII.

⁶ *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

⁷ *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 Pac. 1003; *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

No genuine promise was supposed to exist in fact, but the duty was fictitiously deemed to be contractual in order to fit the cause of action to a contractual remedy.⁸

If liability in quasi-contract is to be explained on the theory of a fictitious promise, the presumption that such promise was made must be conclusive.⁹ Accordingly, if a joint liability is shown, a joint promise will be presumed.¹⁰ The term "quasi-contract" is not applied to statutory duties or liabilities,¹¹ such as the duties or rights of public officers,¹² on which a contract action does not lie.

§ 1494. Historical use of term "quasi-contract." The term "quasi-contract" is of considerable antiquity in English law, although its actual use is quite recent and is still less common than it should be. Bracton undoubtedly based his *de Legibus et Consuetudinibus Angliae* on the plea rolls of the King's courts as far as they furnished material for the specific subject under discussion. When this material failed he adapted civil laws as best he could to the English situation, following Azo's *Summa* very closely wherever it was practicable. When Bracton reached this subject, however, the plea rolls of the King's courts failed him, as they would have failed him if he had written many years later. On this point Azo, too, failed him, for Azo's treatment of this subject in his *Summa* is chiefly a series of references to his code. Accordingly, Bracton resorted to Justinian's *Institutes*; and finding there a discussion of obligations *quasi ex contractu*,¹ which possibly bewil-

⁸ *Highway Commissioners v. Bloomington*, 253 Ill. 104, Ann. Cas. 1913A, 471, 97 N. E. 280; *People v. Dusenbury*, 77 N. Y. 144; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

⁹ *Humbird v. Davis*, 210 Pa. St. 311, 59 Atl. 1082.

¹⁰ *Humbird v. Davis*, 210 Pa. St. 311, 59 Atl. 1082.

¹¹ *Sibley v. State*, 89 Conn. 682, 96 Atl. 161.

¹² *Sibley v. State*, 89 Conn. 682, 96 Atl. 161.

¹ "In addition to the classes of contracts which have been named, let us also consider those obligations which are known not to arise out of contract in the proper sense of the term, but

nevertheless do not arise out of a wrong and accordingly appear to arise out of contract so to speak (*quasi ex contractu*). Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions can not properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation even though he

dered him as much as it helped him, he reproduced it in this form: "As we have already discussed obligations which arise *ex contractu*, we must now discuss obligations which arise *quasi ex contractu*. And it must be understood that actions arise *quasi ex contractu*, as in unauthorized agency, wardships, partition of property

knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected; and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better. Guardians again, who can be sued by the action on guardianship, can not properly be said to be bound by contract, for there is no contract between guardian and ward; but their obligation, as it certainly does not originate in delict, may be said to be quasi-contractual. In this case too each party has a remedy against the other; not only can the ward sue the guardian directly on the guardianship, but the guardian can also sue the ward by the contrary action of the same name, if he has either incurred any outlay in managing the ward's property, or bound himself on his behalf, or pledged his own property as

security for the ward's creditors.

"Again, where persons own property jointly without being partners, by having, for instance, a joint bequest or gift made to them, and one of them is liable to be sued by the other in a partition suit because he alone has taken its fruits, or because the plaintiff has laid out money on it in necessary expenses: here the defendant can not properly be said to be bound by contract, for there has been no contract made between the parties; but as his obligation is not based on delict, it may be said to be quasi-contractual. The case is exactly the same between joint heirs, one of whom is liable to be sued by the other on one of these grounds in an action for partition of the inheritance. So, too, the obligation of an heir to discharge legacies can not properly be called contractual, for it can not be said that the legatee has contracted at all with either the heir or the testator: yet, as the heir is not bound by a delict, his obligation would seem to be quasi-contractual. Again, a person to whom money not owed is paid by mistake is thereby laid under a quasi-contractual obligation; an obligation, indeed, which is so far from being contractual, that, logically, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money, intending thereby to discharge a debt, his purpose is clearly to loose a bond by which he is already bound, not to bind himself by a fresh one. Still, the person to whom money is thus paid is laid under an obligation exactly as if

owned in common, the distribution of an inheritance, an action based upon a will, an action to recover money paid when it is not justly due, and actions of this sort."²

Bracton's recognition of quasi-contract as a topic to be discussed in a treatise on English law was undoubtedly premature as far as the law of the King's courts was concerned. Bracton wrote long before the Statute of Westminster Second, and accordingly long before the action of trespass on the case was recognized by the King's courts, to say nothing of its development into the action of assumpsit. His statement of the law on this point had no relation to the actions which were recognized in the King's courts or to the substantive law which was enforced thereby. While there were a number of rights which were enforced by the action of debt and which we would term quasi-contractual since they did not originate in the agreement of the parties, these rights were probably not thought of by any one in Bracton's day as related in any way to quasi-contracts. When the courts have not reached any theory of contract, it is much too early to expect a theory of quasi-contract. It is possible that rights of this sort were recognized to some extent in the local courts; but so few of the records of these courts are available that it is unsafe to make generalizations from the material to which we have access. Each court seems to have felt free to find its own law without regard to the law of the other courts; and an occasional recognition of a right of this sort by one court does not make it safe to infer that such a right would have been recognized by the local courts generally.

Whether Bracton's statement as to the law of obligations quasi ex contractu have much effect upon the development of English

he had taken a loan for consumption, and therefore he is liable to a condiction. Under certain circumstances money which is not owed, and which is paid by mistake, is not recoverable; the rule of the older lawyers on this point being that wherever a defendant's denial of his obligation is punished by duplication of the damages to be recovered—as in actions under the *lex Aquilia*, and for the recovery of a legacy—he can not get the money back on this plea. The older lawyers, however, applied this rule only to such legacies of specific sums of money as

were given by condemnation; but by our constitution, by which we have assimilated legacies and trust bequests, we have made this duplication of damages on denial an incident of all actions for their recovery, provided the legatee or beneficiary is a church, or other holy place honored for its devotion to religion and piety. Such legacies, although they may be paid when they are not due, can not be recovered." III Institutes, Title 27. (Adapted from Moyle's translation.)

² Bracton Book III, 2 § 10f, 100b; Twiss's edition, Vol. II, 118.

law may also be doubted. His influence had died out and his book had become obsolete before the action of assumpsit had become established. At the same time his book always remained a classic of its day; and those who read it would find that there were rights enforced in an action in personam which were neither tort nor genuine contract.

§ 1495. Historical reason for confusion between implied contract and quasi-contract. As has already been said, the action of assumpsit was at first limited to express promises.¹ It was gradually extended without much regard to consistency first to one type of genuine implied contract and then to another.² While this process was going on we find that at the same time debt, and to some extent, assumpsit were being used to enforce rights of action which were neither tort nor genuine contract, and which we would class as quasi-contract if we were applying our modern ideas to the law of that day. At the same time, it probably did not occur to the men who were recognizing and enforcing these rights that they were nothing but rights based on promises. A debt was looked upon as a debt without the slightest regard to the facts which created the duty to pay a fixed and liquidated sum of money. The test of the debt was the nature of the duty itself and not its source or origin. If assumpsit was extended to include rights which did not arise on genuine contract, these rights were grouped with those which arose out of a genuine implied contract and they were always called implied contracts. This confusion was increased by the text writers who vied with the courts in grouping under the heading "implied contract" rights which arose out of genuine implied contract, and those which had no connection with contract. Blackstone says that contracts implied by law are "such as reason and justice dictate and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance."³ Under this general heading Blackstone groups judgments, forfeitures, penalties, work and labor, goods sold without an agreement as to the price, money had and received including money obtained by mistake, oppression and the like, money laid out and expended at the request of the defendant, accounts stated, the duty of one who takes an office, em-

¹ See § 27.

³ 3 Black. Com. 158.

² See §§ 29 et seq.

ployment or trust, to perform his work with integrity and diligence and skill, implied warranties as to title and quality of goods sold, and an implied promise not to defraud the adversary party to a transaction.⁴ The authority of Blackstone in the United States has made his definition of an implied contract a favorite one in American courts;⁵ even with courts which recognize the difference between the genuine contract and the constructive contract. The confusion between the genuine implied contract and the quasi-contract was intensified by rule of common law pleading which required a declaration in assumpsit to allege a promise even though no promise was in fact ever made and which treated as insufficient a declaration which alleged all the facts which created the liability if it did not also allege the fictitious promise of the defendant.⁶ Under the Code of Civil Procedure it is not necessary to allege a promise if no promise was in fact made; but it is sufficient to allege the facts which create liability without also alleging the fictitious promise.⁷

§ 1496. Fictitious character of promise in quasi-contract. The fiction of a promise was at first of great help in enabling the courts

⁴ 3 Black. Com. 158 to 165.

⁵ *Ottumwa Mill & Construction Co. v. Manchester*, 139 Ia. 334, 115 N. W. 911.

⁶ *England*. *Carter v. Goddard*, Cro. Eliz. 79; *Lee v. Welch*, 2 Strange 793; *Buckler v. Angel*, 1 Lev. 164, 1 Sid. 246, 1 Keb. 878.

Alabama. *Hill's Administrator v. Nichols*, 50 Ala. 336.

Illinois. *Massachusetts Mutual Life Ins. Co. v. Kellogg*, 82 Ill. 614.

Maine. *Coffin v. Hall*, 106 Me. 126, 75 Atl. 385.

Massachusetts. *Avery v. Tyringham*, 3 Mass. 160, 3 Am. Dec. 105.

Michigan. *Hoard v. Little*, 7 Mich. 468.

New York. *Candler v. Rossiter*, 10 Wend. (N. Y.) 487.

Vermont. *Douglass v. Morrisville*, 84 Vt. 302, 79 Atl. 391.

West Virginia. *Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co.*, 62 W. Va. 288, 57 S. E. 826.

"It is true that there is nothing in that count that amounts to an express promise by the defendant to pay although there are allegations of abundant evidence of quasi promise to pay. But that is not enough. There should have been an averment of assumpsit super se or its equivalent, for assumpsit without assuming is no assumpsit."

⁷ *California*. *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 N. W. 86.

Indiana. *Cox v. Peltier*, 159 Ind. 355, 65 N. E. 6.

Minnesota. *Solomon v. Vinson*, 31 Minn. 205, 17 N. W. 340.

Nebraska. *Ball v. Beaumont*, 59 Neb. 631, 81 N. W. 858.

North Dakota. *Weber v. Lewis*, 19 N. D. 473, 24 L. R. A. (N.S.) 364, 126 N. W. 105.

Oregon. *Waite v. Willis*, 42 Or. 288, 70 Pac. 1034.

Wisconsin. *Potter v. Van Norman*, 73 Wis. 339, 41 N. W. 524.

to develop law while professing to follow precedent, and it met with general praise,¹ except from the ultra-conservatives, who objected to the development, and accordingly objected to the fiction, not because it was a fiction, but because it was a means of development. The fictitious character of the promise was noted soon after the development of these actions began.² If facts exist which impose a duty of a sort for which an action in *assumpsit* would lie, a genuine promise to perform such duty is not necessary.³

To-day the fiction of the promise is rather a clog on further development and a cause of confused thinking; and the confusion arising from the use of this fiction has caused it to be criticized sharply.⁴ We should have outgrown the need for fictions in law, especially a fiction with which the law has had three centuries to become acquainted. We should discard the metaphysical notion of a promise, and treat these obligations, as in truth they are, as legal duties which are neither contracts nor torts, whatever their origin may have been.

¹ "Great benefit arises from a liberal extension of the action * * * because the charge and defense in this kind of action are both governed by the true equity and conscience of the case." *Longchamp v. Kenny*, 1 Dougl. 137. See to the same effect, *Todd v. Bettingen*, 109 Minn. 493, 124 N. W. 443; *Heywood v. Northern Assur. Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

² "The notion of promises in law was a metaphysical notion, for the law makes no promise but where there is a promise of the party." *Starke v. Cheesemen*, 1 Ld. Raym. 538.

See also, *Heywood v. Northern Assur. Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

³ *People v. Dummer*, 274 Ill. 637, 113 N. E. 934; *Fidelity Savings Bank v. Reeder*, 142 Ia. 373, 120 N. W. 1029; *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

⁴ "To say that the law supplies the privity and the promise is but to indulge in legal fiction. There is no

place for fiction in modern law. At a time when it was thought that no new right could be recognized unless it could be enforced through some old form of procedure, a fiction which undertook to clothe a newly-recognized right with the semblance of the garb of an old one, may have served a purpose, but fictions of the law never did deceive, nor can they now serve any real useful purpose. They should not be allowed to help or to hurt any man's cause, but should be discarded as the archaic contrivances which they are. If a man has suffered a wrong which on recognized principles of right and justice the law ought to redress a remedy should be given him, otherwise not. It seems to us better to say with frankness that neither privity nor promise is required at all, and to say, as was said by Mitchell, J., in *Sibley v. County of Pine*, 31 Minn. 201, 17 N. W. 337: "The obligation * * * to repay * * * arises from the moral obligation, resting upon every person, * * * to make restitution where they have

§ 1497. Confusion in terms at modern law. The confusion between the different meanings of implied contract persists at modern law.¹ The agreement of the parties may be reached in part by their words and in part by their acts.² A loose use of terms still continues and causes a confusion not necessary, although probably it does not cause as great a confusion in ideas. Acts and conduct of the parties which show that they are intending to enter into a genuine agreement, have been explained on the theory that the law implies a contract from such acts and conduct.³ A contract in which the agreement of the parties is ascertained from their acts has been called an express contract.⁴

Quasi-contracts are still classed with contracts for the historical reasons already given, even if the facts show affirmatively that there was no real agreement between the parties.⁵ Occasionally the courts still speak of a contract which is implied by law, but the obligation of which the party never intended to assume.⁶ A "personal contract" in admiralty means a contract which is made

received without consideration the money of another, which they have no right to retain." *Heywood v. Northern Assur. Co.*, 133 Minn. 360, Ann. Cas. 1918D, 241, 158 N. W. 632.

¹ "There is no distinction between contracts implied by law from the existence of a plain legal obligation, without regard to the intention of the parties, or even contrary thereto, and contracts implied, in fact, from acts or circumstances indicating the mutual intention." *Harty Bros. v. Polakow*, 237 Ill. 559 (565), 86 N. E. 1085.

² See §§ 108 et seq., and 188 et seq.

³ *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

⁴ In *re Oldfield's Estate* (*Bowie v. Trowbridge*), 175 Ia. 118, L. R. A. 1916D, 1260, Ann. Cas. 1917D, 1067, 156 N. W. 977. "Express contracts which are proved by the declaration and conduct of the parties and other circumstances, all of which are explainable only upon the theory of a mutual agreement, are often called, although not with entire accuracy, implied contracts; and this distinction will explain

the ambiguity of some authorities and the apparent contrariety of others." *Hinkle v. Sage*, 67 O. S. 256, 263, 65 N. E. 999.

⁵ "It must be remembered, that the promise upon which the action rests, is not the direct act of the parties, but a promise which the law implies from the facts, on the theory that a party is willing and undertakes to do what he ought to do. It does not militate against the promise which the law implies that the facts are inconsistent with the intent or promise to pay over. * * * While it may seem illogical for the law to imply a promise on the part of one whose conduct and declarations clearly disprove any intention to promise, still it is constantly done. It is one of the fictions of the law which it seems convenient, if not necessary, to retain until the courts adopt the doctrine that such contracts are created by law, rather than implied by it." *Siems v. Bank*, 7 S. D. 338, 342, 64 N. W. 167.

⁶ *Chudnovski v. Eckels*, 232 Ill. 312, 83 N. E. 846.

by the person to be bound as distinguished from a contract which is said to be imputed to such person.¹

Many cases, however, insist upon the distinction between genuine implied contract and quasi-contract.²

§ 1498. Practical importance of distinction between contract and quasi-contract. In discussing genuine implied contracts, the questions usually presented are: (1) What presumptions of law arise on the facts in evidence? (2) What inferences of fact will the law permit to be drawn therefrom? (3) Do positive rules of law negative the presumption of a genuine agreement which would otherwise be drawn from the facts which are in evidence? In constructive contracts the questions usually presented are: (1) Under the facts does any liability of the defendant to the plaintiff exist? (2) If there is a liability, could it be enforced in an action *ex contractu*? The latter question is of little importance to-day in jurisdictions where the common-law forms of actions have been abolished as far as concerns the actual right of recovery,¹ although it is still of practical importance where matters of procedure are involved.²

§ 1499. Distinction between contract and quasi-contract in procedure—Attachment. The question of the propriety of classing quasi-contract with implied contract at modern law arises to a large extent out of statutory provisions which refer to contract or debt without indicating whether the word is used in the common-law sense of any obligation which can be enforced by an action *ex contractu*, or whether it is used in its modern-law sense of a right arising out of an agreement of the parties. Since quasi-contracts were originally grouped with implied contracts because the same procedure and the same form of action was used in both cases, there is a strong tendency to treat quasi-contract as included in the term "contract" where this term is used in a

¹ *Benner Line v. Pendleton*, 217 Fed. 497, 133 C. C. A. 349.

² *Illinois*. *Highway Commissioners v. Bloomington*, 253 Ill. 164, Ann. Cas. 1913A, 471, 97 N. E. 280; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934.

Montana. *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 970.

New York. *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337.

Vermont. *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

Wisconsin. *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068.

¹ See §§ 1504 et seq.

² See §§ 1499 et seq.

statute which deals with procedure and which attempts to divide rights in contract from rights in tort for the purpose of indicating the procedure in each kind of action. In statutes which provide for attachment, the right to attach property is frequently limited to actions arising out of contract. Under such statute it is clear that the right to attach property exists in an action upon a genuine implied contract,¹ especially if the statute refers to contracts express and implied. Whether such a statute includes quasi-contractual obligations is a question upon which there has been a division of authority. Where the statutes provide that attachment may issue in an action upon a contract, but not in an action upon a tort, there is a strong tendency to group actions on quasi-contract with actions on contract, since they are not tort actions, except as to those quasi-contracts in which the injured waives the tort and sues in *assumpsit*.² Accordingly it is generally held that attachment may issue in an action in quasi-contract.³ This is especially clear where the quasi-contractual right arose out of a contract in the first instance, although the right is not measured by the terms of the contract,⁴ as where the action is brought to recover the consideration paid under a contract which has not been performed by the party to whom such payment was made.⁵ The right is also clear where the liability is imposed by statute upon those who enter into a contract or succeed to rights which are acquired by contract,⁶ such as the statutory liability of a stockholder in a corporation.⁷ Under attachment statutes a quasi-

¹ *Simpson v. McCarty*, 78 Cal. 175, 12 Am. St. Rep. 37; *Flagg v. Dare*, 107 Cal. 482, 40 Pac. 804.

² See §§ 1504 et seq.

³ *United States. Nevada Co. v. Farnsworth*, 89 Fed. 164.

Colorado. Adams v. Clark, 36 Colo. 65, 10 Am. & Eng. Ann. Cas. 774, 85 Pac. 642.

Illinois. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001.

Kansas. Lipscomb v. Citizens' Bank, 66 Kan. 243, 71 Pac. 583.

Maryland. Downs v. Baltimore, 111 Md. 674, 41 L. R. A. (N.S.) 255, 19 Am. & Eng. Ann. Cas. 644, 76 Atl. 861.

Michigan. Farmers' National Bank v. Fonda, 65 Mich. 533, 32 N. W. 664.

Oregon. Hanley v. Combs, 48 Or. 409, 87 Pac. 143.

South Dakota. First National Bank v. Van Vooris, 6 S. D. 548, 62 N. W. 378.

Texas. El Paso National Bank v. Fuchs, 89 Tex. 197, 34 S. W. 206.

Vermont. Elwell v. Martin, 32 Vt. 217.

Wisconsin. Barth v. Graf, 101 Wis. 27, 76 N. W. 1100.

⁴ *Santa Clara Valley Peat Fuel Co. v. Tuck*, 53 Cal. 304.

⁵ *Santa Clara Valley Peat Fuel Co. v. Tuck*, 53 Cal. 304; *Hanley v. Combs*, 48 Or. 409, 87 Pac. 143.

⁶ *Adams v. Clark*, 36 Colo. 65, 10 Am. & Eng. Ann. Cas. 774, 85 Pac. 642.

⁷ *Adams v. Clark*, 36 Colo. 65, 10 Am. & Eng. Ann. Cas. 774, 85 Pac. 642.

contractual right which originates in tort, but which the injured party may treat as a contract for the purpose of maintaining assumpsit at common law, has been grouped with contracts.⁸ Under a statute which authorizes an attachment in an action to recover a "debt," an attachment may issue in an action upon a quasi-contractual right,⁹ such as an action to recover money which has been obtained upon forged vouchers.¹⁰ It has, however, been said without discussion that an attachment can not be had in a quasi-contractual obligation which arises in tort,¹¹ as in an action brought by A, an employer, against B, who has won A's money from A's clerk at gambling.

§ 1500. Statute of limitations. The statutes of limitations frequently prescribe one period of limitations for an action on a written contract, another period of limitations for an action on a contract not in writing, whether express or implied, and another period of limitations for an action on a tort. Whether an action in quasi-contract is an action upon an implied contract within the meaning of this statute, is a question upon which there is a conflict of authority. In many jurisdictions certain forms of quasi-contractual liability at least are held to be within the terms of such a statute.¹ In some of these cases the quasi-contractual right arose out of a contract, although it was not measured thereby,² such as a quasi-contractual right for something of value furnished under an attempted contract which proved invalid because it was too indefinite.³ This principle, however, has also been applied to quasi-contractual rights which do not arise out of contract,⁴ such

⁸ *Downs v. Baltimore*, 111 Md. 674, 41 L. R. A. (N.S.) 255, 19 Am. & Eng. Ann. Cas. 644, 76 Atl. 861; *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100.

⁹ *Morgan's Louisiana & T. R. & S. S. Co. v. Stewart*, 119 La. 392, 44 So. 138.

¹⁰ *Morgan's Louisiana & T. R. & S. S. Co. v. Stewart*, 119 La. 392, 44 So. 138.

¹¹ *Babcock v. Briggs*, 52 Cal. 502.

¹ *United States. Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738.

Georgia. Cooper v. Claxton, 122 Ga. 596, 50 S. E. 399.

Idaho. Lincoln County v. Twin Falls North Side Land & Water Co., 23 Ida. 433, 130 Pac. 788.

Kentucky. Postal Telegraph Cable Co. v. Newport, 160 Ky. 244, 169 S. W. 700.

Massachusetts. Lamb v. Clark, 22 Mass. (5 Pick.) 193.

Nebraska. Reeves v. Nye, 28 Neb. 571, 44 N. W. 736.

² *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399.

³ *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399.

⁴ *Lincoln County v. Twin Falls North Side Land & Water Co.*, 23 Ida. 433, 130 Pac. 788; *Lamb v. Clark*, 22 Mass. (5 Pick.) 193; *Reeves v. Nye*, 28 Neb. 571, 44 N. W. 736.

as an action to recover an unpaid balance of statutory fees,⁵ or an action to recover money which has been obtained wrongfully,⁶ or an action to recover in assumpsit for goods wrongfully converted.⁷ A liability which is inferred by law from an express contract is regarded as a contract liability within the meaning of such a statute.⁸ Some statutes of limitations, it may be added, provide expressly for express or implied contracts which arise out of written contracts.⁹ In other jurisdictions a quasi-contractual action is not governed by the period of limitations which is provided by statutes for actions upon contracts.¹⁰ A statutory right of a municipal corporation to enforce exoneration against a wrongdoer for a tort for which the city has been compelled to respond in damages is not an action on a contract within the meaning of the statute of limitations.¹¹ This conflict of authority, however, can be reconciled to a considerable extent by a careful consideration of the terms of the different statutes and of the nature of the different quasi-contractual rights involved. If the statute of limitations does not confine its classification of rights of action to contract and tort, but if it also creates a special class of obligations other than contracts, quasi-contractual rights may be regarded as included within this class and not within the class of contracts.¹² If the statute provides expressly for certain classes of quasi-contractual rights, such express provisions, of course, control.¹³ If the quasi-contractual right is created by statute, and the statute of limitations imposes the same period for an action

⁵ *Lincoln County v. Twin Falls North Side Land & Water Co.*, 23 Ida. 433, 130 Pac. 788.

⁶ *Lamb v. Clark*, 22 Mass. (5 Pick.) 193.

⁷ *Reeves v. Nye*, 28 Neb. 571, 44 N. W. 736.

⁸ *Arnett v. Howard*, 156 Ky. 458, 161 S. W. 531.

⁹ *Lindblom v. Johnston*, 92 Wash. 171, 158 Pac. 972.

¹⁰ *England*. *Jones v. Pope*, 1 William's Saunders, 37, 1 Sid. 306, 2 Keb. 93, 1 Lev. 191; *Talory v. Jackson*, Croke Car. 513.

Connecticut. *Baker v. Lee*, 52 Conn. 145; *Cromwell v. Savage*, 85 Conn. 376, 82 Atl. 972.

Georgia. *Lane v. Morris*, 10 Ga. 162. *Kentucky*. *Bank of U. S. v. Dallam*, 34 Ky. (4 Dana) 574.

Mississippi. *Musgrove v. Jackson*, 59 Miss. 390.

New Hampshire. *Wilson v. Towle*, 19 N. H. 244.

New York. *Pease v. Howard*, 14 Johns. (N. Y.) 479.

¹¹ *Louisville v. O'Donaghue*, 157 Ky. 243, 162 S. W. 1110.

¹² *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 970; *Butte v. Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670.

¹³ *West v. Fry*, 134 Ia. 675, 11 L. R. A. (N.S.) 1191, 112 N. W. 184.

upon an implied contract or upon a liability imposed by statute, the question of the contractual nature of such liability is immaterial.¹⁴ Even if a tax is made a debt by statute, it is not to be regarded as within the meaning of a prior statute of limitations which fixed a certain period for actions on account or for debt.¹⁵

§ 1501. Statutes conferring jurisdiction. Under statutes which confer jurisdiction upon certain courts, jurisdiction in cases arising out of "contract" is frequently conferred. Whether such a statute confers jurisdiction in quasi-contract is a question upon which there is again a divergence of authority which can be reconciled only in part by considering the nature of the quasi-contractual right and the general context of the statute in question. Statutes which confer upon the United States Court of Claims, or upon District Courts, jurisdiction to hear and determine cases upon any contract, express or implied, with the government of the United States, confer upon such court jurisdiction to hear cases which arise out of genuine contract, whether express or implied, and jurisdiction to hear and determine cases arising in quasi-contract, except those in which it is sought to waive the tort and to sue in quasi-contract for reasonable compensation. The evident policy of the statutes of the United States to prevent actions in tort from being brought against the United States prevents the person who is injured by a tort from bringing such action by resorting to assumpsit on the theory that he has waived the tort.¹

The liability of a stockholder of a foreign corporation under a statute which makes each stockholder individually and personally liable for his proportion of the debt and liabilities of the corporation, is so far contractual that such liability may be enforced outside of such state in the courts of the United States.² A statutory lien under a mechanic's lien law is a contract within the meaning of the statute which gives jurisdiction to a court of "all actions on contracts, express or implied," excepting a specific amount.³ Conversely, an action by the owner of a patent against a licensee for the violation of his license contract is not a patent case under federal statutes if the owner of the patent has waived the tort

¹⁴ *Mount v. Lakeman*, 21 O. S. 643;
Perry County v. Railroad, 43 O. S. 451,
2 N. E. 854.

¹⁵ *Cromwell v. Savage*, 85 Conn. 376,
82 Atl. 972.

¹ See § 1861.

² *Thomas v. Matthiessen*, 232 U. S.
221, 58 L. ed. 577.

³ *Harty Bros. & Harty Co. v. Polakow*, 237 Ill. 559, 86 N. E. 1085.

for the violation thereof and has brought an action upon the breach of such contract.⁴

§ 1502. Set-off and counterclaim. Statutes which provide for set-off or counterclaim frequently restrict such right to a case in which the defendant in an action upon contract wishes to file a set-off or counterclaim upon a contract right against the plaintiff. Under such statute it is held by the great weight of authority that the defendant may file a set-off or a counterclaim upon any quasi-contractual right which he has against the plaintiff, including a right which arises out of a tort, but which the defendant may enforce against the plaintiff by waiving the tort and suing in *assumpsit*.¹ In some jurisdictions, however, the right of set-off or counterclaim is denied, under the local statutes there in force, upon quasi-contractual claims.²

§ 1503. Classification of quasi-contracts. In attempting to construct a classification of quasi-contracts, we are met with the difficulty that in the development of quasi-contract rights they were grouped on the basis of the form of action which lay to protect such rights; and that when we attempt to separate the general notion of quasi-contract from its special relation to the separate forms of action, we are destroying the historical basis for classifying it with contracts at all. In analyzing quasi-contractual rights a double problem arises. In the first place, care must be taken to determine whether any cause of action exists without regard to its form. If it is found that a right of action exists, it must then be determined whether under common-law procedure such right can be protected and enforced by a contract action; and in solving this question it must be noted that the fact that an action in tort might be brought is not of itself conclusive, since in some

⁴ *Henry v. Dick Co.*, 224 U. S. 1, 56 L. ed. 645.

¹ *United States. Allen v. United States*, 84 U. S. (17 Wall.) 207, 21 L. ed. 553.

Kansas. Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438.

Missouri. Gordon v. Bruner, 49 Mo. 570.

Oregon. Casner v. Hoskins, 64 Or. 254, 128 Pac. 841, 130 Pac. 55.

Texas. Cato v. Philips, 28 Tex. 101.

Virginia. Tidewater Quarry Co. v. Scott, 105 Va. 160, 115 Am. St. Rep. 864, 8 Ann. Cas. 736, 52 S. E. 835.

Wisconsin. Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

² *Richey v. Bly*, 115 Ind. 232, 17 N. E. 296; *Woods v. Ayres*, 39 Mich. 345.

cases the injured party might elect between tort and contract.¹ To outline quasi-contractual rights, as they exist at modern law, is not easy, since modern law in many jurisdictions has abolished the form of action upon which the peculiar character of quasi-contract at common law depended. To analyze and classify quasi-contractual rights in connection with a discussion of contracts brings into relief the fact that in many cases quasi-contract is a mere appendage to contract and that it is a special and convenient remedy in many cases in which the right of the parties originates in contract. Quasi-contract includes rights which are based on the so-called contracts of record,² on various customary³ and statutory⁴ duties, independent of the actual agreement of the parties and on the broad and vague principle of unjust enrichment. The quasi-contractual rights which are explained by the general maxim that no one should be enriched at the loss of another and to the wrong of such other, "*Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiores*," which is so broad as to include almost any case in which unfair dealing appears and so vague as to give no help in solving cases as they arise, may be divided into three general classes: Some of these rights arise out of contract, but they are not measured by contract. Other rights arise out of tort, but at common law could be protected and enforced by an action *ex contractu*. A third class of rights did not arise from contract and did not arise from tort. These are the true quasi-contractual rights. The other rights which are explained by the doctrine of unjust enrichment, so called, are really remedies given for other kinds of rights. In the last class, the very nature of the right as well as the nature of the remedy therefor, depends upon doctrines of quasi-contract. The quasi-contractual rights which arise out of a contract, but which are not measured thereby, may arise out of a contract which is void, voidable or unenforceable for some reason, *ab initio*. Contracts which are either void or voidable because of facts which affect the offer and acceptance, such as attempted contracts which are so uncertain that they can not be enforced as contracts,⁵ or apparent contracts which are either void or voidable because of mistake,⁶ misrepresentation,⁷ fraud,⁸ duress,⁹ or undue influence,¹⁰

¹ See §§ 1504 et seq.

² See § 1149.

³ See §§ 56 et seq.

⁴ See §§ 66 et seq.

⁵ See § 107.

⁶ See § 278.

⁷ See § 372.

⁸ See § 342.

⁹ See §§ 504 et seq.

¹⁰ See §§ 477 et seq.

create rights which are grouped with quasi-contracts. Under the classification of common law, contract is the only place for such rights. They are not true contractual rights because in most of the cases the intention of the parties is ignored and in many cases it is defied by the courts. They are rights which must, however, be enforced and protected to avoid injustice, and as the remedy for these rights is, as a rule, some form of assumpsit, they are classed with quasi-contract. If the attempted contract lacks valuable consideration, quasi-contractual rights do not ordinarily arise. If the contract is defective because of its subject-matter, quasi-contractual rights often arise if the subject-matter is void, but not illegal.¹¹ If, on the other hand, the subject-matter is illegal, quasi-contractual rights do not arise if the parties are equally at fault, since the law would leave such parties in the position in which they had placed themselves,¹² except where the legislature gives a statutory right of action as a means of preventing the formation and performance of such contract.¹³ In some jurisdictions an additional exception is made in cases in which the illegal act is not performed and in which it is thought that illegality can be prevented better by allowing a recovery in quasi-contract than by denying such right. If the parties are not equally at fault, a quasi-contractual right is usually recognized in contracts of this sort.¹⁴ If a contract is unenforceable by reason of the statute of frauds, the party who has performed can recover the value of his performance on the theory of quasi-contracts since otherwise he will be left without a remedy.¹⁵ Whether the party who is in default can recover on the theory of quasi-contract depends in part on whether such a contract is regarded as absolutely void or as merely unenforceable, and in part upon the question whether a party to an enforceable contract who is in default can recover on the theory of quasi-contract.¹⁶ If a contract is invalid because one of the parties thereto lacks capacity to make a binding contract, a remedy in quasi-contract is often given to allow recovery of the value of the performance under such a contract. Rights of this sort are considered in connection with the effect of genuine

¹¹ See § 1071.

¹² See §§ 1061 et seq.

¹³ See §§ 1072 et seq.

¹⁴ See § 1090.

¹⁵ See § 1413.

¹⁶ For the effect of the Statute of

Frauds upon cases of this sort, see § 1414.

For a discussion of the right of a party in default to recover on the theory of quasi-contract in enforceable contracts, see ch. LXXXVIII.

contracts of such parties, such as infants,¹⁷ the insane and the imbecile,¹⁸ the drunkards,¹⁹ the married women,²⁰ partnerships,²¹ principals with reference to the transactions of their agents,²² parties in fiduciary capacities,²³ private corporations,²⁴ public corporations,²⁵ and governments.²⁶ On the other hand, quasi-contractual rights may arise out of a contract which was originally valid, but which has in some way been discharged by subsequent facts, such as impossibility,²⁷ breach,²⁸ and alteration.²⁹ Other forms of discharge, such as performance, payment, new contract, merger, and the like, or other facts which give to one of the parties a defense which he may interpose against the other if he wishes, such as bankruptcy or the lapse of time fixed by the period of limitations, do not from their nature give rise to quasi-contractual rights. In many cases the common law permitted one who had been injured by the tort of another whereby the wrongdoer acquired money, other property, the benefit of services, and the like, from the injured party, to treat such wrong as a contract and to maintain a contract action thereon.³⁰ The remaining class of quasi-contractual rights does not arise out of contract or out of tort. It consists of cases in which payment and the like has been obtained without the assistance of a prior contract by mistake, fraud, misrepresentation, duress and the like.³¹ In other cases, as in the burial of the dead, considerations of public decency require the performance of the duties imposed by law without necessarily waiting to obtain the consent of the person upon whom such duty is imposed.³²

II

WAIVER OF TORT

§ 1504. Waiver of tort—Nature and theory of doctrine. At the original English common law, an injured person who brought suit in a contract, action was not allowed to show an injury which really amounted to a tort as a means of proving the allegations

¹⁷ See §§ 1617 et seq.

¹⁸ See §§ 1637 et seq.

¹⁹ See § 1653.

²⁰ See § 1683.

²¹ See §§ 1710 et seq.

²² See § 1764 et seq.

²³ See §§ 1811, 1816, 1821, 1827, and 1831.

²⁴ See § 2002.

²⁵ See § 1958.

²⁶ See §§ 1860 et seq., and 1876.

²⁷ See ch. LXXVIII.

²⁸ See ch. LXXXIV.

²⁹ See ch. LXXXV.

³⁰ See §§ 1504 et seq.

³¹ See §§ 1530 et seq.

³² See §§ 1521 et seq.

of his complaint.¹ In the early part of the eighteenth century the English courts began to hold that in some cases it was possible for the injured party to maintain an action in implied contract on an injury which really amounted to a tort.² This principle has been extended and developed at modern law.³

The doctrine of the waiver of tort carries us beyond the limits of genuine contracts. It is really not one of substantive law at all, but one of adjective law. It determines the right of an injured party to elect between the remedies given by the action in tort and in contract. The exact limits of the extent of this doctrine at modern law, are very indefinite. Different jurisdictions have very different views on the question of what cases fall within it. In discussing the various classes of cases brought under this doctrine, we will therefore begin with those on which there is the least divergence of authority.

The extent to which it has been developed has depended to a large extent upon the common count which it was sought to use. Although no logical reason can appear for distinguishing between them, the courts at a rather early period were quite willing to extend the money counts, such as the count for money had and received, to cases in which money had been obtained by means of a tort. They have been less willing to extend the count for goods

¹ Phillips v. Thompson, 3 Lev. 101.

² Lamine v. Dorrell, 2 Ld. Raym. 1216 [decided 1705 A. D.].

"It is clear the plaintiff might have maintained detinue or trover for the debentures; but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reason of assumpsits. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use." Lamine v. Dorrell, 2 Ld. Raym. 1216.

³ United States. Reynolds v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N.S.) 391.

California. Hoare v. Glann (Cal.), 168 Pac. 346.

Iowa. Jewell v. Nuhn, 173 Ia. 112, Ann. Cas. 1918D, 356, 155 N. W. 174.

Kansas. Garrity v. State Board of Administration, 99 Kan. 695, 162 Pac. 1167.

Michigan. McDonald v. Young, 198 Mich. 620, 165 N. W. 678.

Montana. Young v. Bray, 54 Mont. 415, 170 Pac. 1044.

New Hampshire. Seavey v. Dana, 61 N. H. 339; Smith v. Smith, 43 N. H. 536.

Oregon. La Grande National Bank v. Oliver, 84 Or. 582, 165 Pac. 682.

Washington. Wylde v. Schoening, 96 Wash. 86, 164 Pac. 752.

Vermont. First National Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600. An allegation that the action is brought "on the theory of a breach of contract" while novel, does not prevent the application of the doctrine of waiver of tort, if the facts justify it. Katz v. Mathews, 216 N. Y. 701, 110 N. E. 425.

sold and delivered, to cases in which goods have been obtained by means of a tort. They have been apparently still less willing to allow the count for work and labor to be extended to cases of this sort; and they have absolutely refused to permit the count for use and occupation to be used in cases in which the possession of realty was taken wrongfully.⁴

Since the doctrine of suing in implied contract upon a tort is really a case of election of remedies, the election of one remedy when complete bars the other.⁵ Where A converted B's lumber and B sued A in the United States court in assumpsit and lost, since both were aliens, it was held that B could not sue A in the state court in trespass, since the first action was an election to waive the tort and to treat the transaction as a contract.⁶ Where several persons detach machinery, and carry it away, and an action is subsequently brought against two of such persons in assumpsit, and judgment is obtained, the injured party can not subsequently sue the remaining wrongdoers in tort.⁷ If B entices A's son, X, away from home and induces X to work for B, and A brings an action against B in assumpsit, A can not dismiss such action after the jury has disagreed and bring an action against B in tort, since the original action was a final election.⁸ The action against a wrongdoer on an implied contract, lies to recover the value of property taken wrongfully from the real owner and received by the wrongdoer.⁹ One of several joint wrongdoers is liable in tort, but he can not be held in implied contract if he did not receive the property converted, or the proceeds thereof.¹⁰ Even where the injured party may recover for the value of property which has been appropriated by the wrongdoer, he can recover only the value of such property and not the value of property which has been injured by the wrongdoer, but which has not been converted to the use of the wrongdoer;¹¹ nor can he recover from the wrongdoer money which by the fraud of such wrong-

⁴ See §§ 1512 et seq.

⁵ *Thompson v. Howard*, 31 Mich. 309; *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, 8 L. R. A. 216, 24 N. E. 272.

⁶ *Nield v. Burton*, 49 Mich. 53, 12 N. W. 906.

⁷ *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, 8 L. R. A. 216, 24 N. E. 272.

⁸ *Thompson v. Howard*, 31 Mich. 309.

⁹ *Kyle v. Chester*, 42 Mont. 522, 37 L. R. A. (N.S.) 230, 113 Pac. 749.

¹⁰ *Ward v. Hood*, 124 Ala. 570, 82 Am. St. Rep. 205, 27 So. 245; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175.

¹¹ *Kyle v. Chester*, 42 Mont. 522, 37 L. R. A. (N.S.) 230, 113 Pac. 749.

doer the injured party has paid to a third person.¹² If A negligently drives B's animals upon a railway track, where they are killed by a train, B can not waive the tort and maintain a contract action against A in order that an attachment may issue.¹³ If A by fraud induces B to sell property to C, A is not liable to B in assumpsit.¹⁴

So the amount of recovery is limited to the value of the property appropriated by the wrongdoer and not by the damage done to the owner of the property. If A removed sand from B's land with B's acquiescence, both parties, however, laboring under a mistake of fact and thinking that the land came within the limits of the property sold by A to B, B may recover from A in assumpsit for the value of the sand thus converted.¹⁵

The right to waive tort and to sue in contract is complicated by the provisions of the Code of Civil Procedure and of the Practice Acts to the effect that the declaration or petition must set forth the facts which constitute plaintiff's cause of action. A provision of this sort undoubtedly permits plaintiff to allege the facts upon which he relies for his right to recover without alleging the fictitious promise.¹⁶ Whether such provisions permit plaintiff to make use of the common counts without setting forth all the facts of the tort upon which he bases his right to recover, is a question upon which there is a conflict of authority. In some jurisdictions it is said that the receipt of money and the like is the essential fact which must be alleged and it is not necessary to go into the details of the method by which it was received. In such jurisdictions a petition or declaration which in effect uses the language of the common counts is sufficient to justify the admission of evidence showing that the defendant received money and the like which belonged to the plaintiff through fraud or other tort.¹⁷ In other jurisdictions it is held that such allegations do not advise the defendant of the facts upon which the plaintiff's cause of action is based and do not give him such information as

¹² *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

¹³ *Kyle v. Chester*, 42 Mont. 522, 37 L. R. A. (N.S.) 230, 113 Pac. 749.

¹⁴ *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

¹⁵ *Merriwether v. Bell* (Ky.), 58 S. W. 987. The measure of damages will

not be the injury done to the property; but the value of the sand taken.

¹⁶ *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86; *Farron v. Sherwood*, 17 N. Y. 227; *Potter v. Van Norman*, 73 Wis. 339, 41 N. W. 524.

¹⁷ *Minor v. Baldridge*, 123 Cal. 187, 55 Pac. 783; *Grannis v. Hooker*, 29 Wis. 65.

will enable him to prepare his case. For this reason it is held in these jurisdictions that the common counts can not be used where the plaintiff wishes to waive the tort.¹⁸

¹⁸ *Moser v. Pugh-Jenkins Furniture Co.* (Ida.), L. R. A. 1918F, 437, 173 Pac. 639; *Truro v. Passmore*, 38 Mont. 544, 100 Pac. 966; *Buchanan v. Beck*, 15 Or. 563, 16 Pac. 422.

"The general rule is well settled that, where a party seeks to recover on the ground of fraud, the particular facts constituting the fraud must be definitely and positively alleged. *Brown v. Bledsoe*, 1 Ida. 746; *Abrams v. White*, 11 Ida. 497, 83 Pac. 602; *Kemmerer v. Pollard*, 15 Ida. 34, 96 Pac. 206; *Breshers v. Callender*, 23 Ida. 348, 131 Pac. 15; *Kerns v. Washington Water Power Co.*, 24 Ida. 525, 135 Pac. 70; *Wilson v. Baker Clothing Co.*, 25 Ida. 378, 50 L. R. A. (N.S.) 239, 137 Pac. 896.

"The right, if any, of respondent to recover is predicated upon fraud which she failed to allege. But it is contended that the above rule has no application to this form of action, and that proof that the money was obtained by fraud is admissible under a simple common-law count for money had and received. Two of the cases relied upon by respondent, while containing some language that seems to bear this construction, are not in point, for in those cases the facts constituting the fraud were set forth in the complaint. *Stout v. Caruthersville Hardware Co.*, 131 Mo. App. 520, 110 S. W. 619; *Humbird v. Davis*, 210 Pa. St. 311, 59 Atl. 1082.

"The case of *Grannis v. Hooker*, 29 Wis. 65, also relied upon by respondent and which appears to be in point, has been ably criticised by the supreme court of Montana in the case of *Truro v. Passmore*, 38 Mont. 544, 100 Pac. 966. The California decisions sustaining causes of action set forth by the common-law counts are also criticized

in the latter case, wherein it is pointed out that some of the most able judges of the California court, while feeling bound by the precedents established in that court, have not hesitated to criticize the reasoning of the precedents. The following language, used by the supreme court of Montana, is particularly in point: 'The common counts have been superseded by our system of code pleading. A complaint, under this latter system, must contain a statement of the facts constituting the cause of action in ordinary and concise language. Rev. Codes, § 6532. If the phraseology of any common count is adequate in the particular case to bring the pleader within the code rule, then his pleading is sufficient; otherwise, it is not. Where a pleader elects to employ the language of a common count, he subjects himself to the rules governing the construction and sufficiency of complaints under the codes; that is to say, if a common count will, in fact, state his cause of action in ordinary and concise language, it is good. If it will not, it is bad.' *Truro v. Passmore*, supra.

"It should be noticed that § 6532, Revised Codes of Montana, referred to in the latter case, contains the same requirement as our own Revised Codes, § 4168, namely, that the complaint must contain 'a statement of the facts constituting the cause of action, in ordinary and concise language.'

"In the case at bar, from the evidence, it appears that the respondent's right, if any, to recover depends wholly upon proof of fraudulent representations. The particular facts constituting the fraud should have been specifically alleged. A defendant who is to be

§ 1505. Conversion of money. If B converts A's money to his own use, A may sue B therefor in an action for money had and received.¹ This action may be brought even if B's conversion was a tort in connection with a contract,² and even if it amounted to larceny,³ or embezzlement.⁴ If X, who is A's agent, has made a secret profit on a transaction between A and B, A may recover from X on assumpsit for the amount of such profit.⁵ A patient may show that his physician had a contract with the surgeon by whom the operation was performed for dividing the fee of the surgeon for the purpose of reducing the amount to be recovered by such surgeon to the amount charged by him for his own services.⁶ If B has induced A to advance money to B by fraud, A may recover as for money lent.⁷

§ 1506. Conversion of personalty which is then converted into money. If B has converted A's chattels, other than money, to his own use, and B has sold them and received the money therefor,

called upon to meet a cause of action based upon his alleged fraud has a right to know in advance the particular acts and things giving rise to the fraud. A common count for money had and received is silent as to every such fact, and can not operate to put a defendant upon notice as to what he is expected to meet, and is not sufficient to state a cause of action based wholly upon the defendant's alleged fraud." Moser v. Pugh-Jenkins Furniture Co. (Ida.), L. R. A. 1918F, 437, 173 Pac. 639.

¹ England. Hassar v. Wallis, 1 Salk. 28.

Indiana. State v. Mutual Life Ins. Co., 175 Ind. 59, 42 L. R. A. (N.S.) 256, 93 N. E. 213.

Kansas. Lipcomb v. Citizens' Bank, 66 Kan. 243, 71 Pac. 583.

Oregon. La Grande National Bank v. Oliver, 84 Or. 582, 165 Pac. 682.

Pennsylvania. Humbird v. Davis, 210 Pa. St. 311, 59 Atl. 1082. See §§ 1473 et seq.

² England. Howard v. Wood, 2 Lev. 245; Neate v. Harding, 6 Exch. 349.

United States. Burgoyne v. Mc-Killip, 182 Fed. 452, 104 C. C. A. 590.

Indiana. State v. Mutual Life Ins. Co., 175 Ind. 59, 42 L. R. A. (N.S.) 256, 93 N. E. 213.

Iowa. Craig v. Craig Estate, 167 Ia. 340, 149 N. W. 454.

Michigan. Billig v. Goodrich (Mich.), 165 N. W. 647.

Virginia. Lawson's Ex'r v. Lawson, 57 Va. (16 Gratt.) 230, 80 Am. Dec. 702.

³ Guernsey v. Davis, 67 Kan. 378, 73 Pac. 101; Howe v. Clancey, 53 Me. 130.

Contra, Drury v. Douglas, 35 Vt. 474. In this case B delivered money to A to carry to X. A appropriated it. It was held that assumpsit would not lie.

⁴ Lipcomb v. Citizens' Bank, 66 Kan. 243, 71 Pac. 583.

⁵ Humbird v. Davis, 210 Pa. St. 311, 59 Atl. 1082.

⁶ McNair v. Parr, 177 Mich. 327, 143 N. W. 42.

⁷ Sanders v. Ragan, 172 N. Car. 612, L. R. A. 1917B, 681, 90 S. E. 777.

A may maintain an action against him for money had and received,¹ even if the original conversion amounted to larceny.² If B has converted A's personalty other than money and has sold it to X, A may maintain an action against B for money had and received, but not for goods sold.³

A's right to maintain an action against B for money had and received has been explained upon the theory of ratification; and it has been said that A ratifies B's sale to X and thus makes B A's agent to effect such sale and to receive the money therefor which B is then bound to pay over to A.⁴ This theory of ratification is unnecessary fiction. B's liability is absolutely independent of his action as A's agent; and in most cases B is not attempting to act as A's agent. The fact that B has received the proceeds of

¹ **England.** Longchamp v. Kenney, 1 Dougl. 137.

United States. Reed v. Weule, 176 Fed. 660, 100 C. C. A. 212.

Alabama. Griel v. Pollak, 105 Ala. 249, 16 So. 704; Bettis v. McNider, 137 Ala. 588, 97 Am. St. Rep. 59, 34 So. 813; Howton v. Mathias, 197 Ala. 457, 73 So. 92.

California. Halleck v. Mixer, 16 Cal. 574.

Georgia. Woodruff v. Zaban, 133 Ga. 24, 134 Am. St. Rep. 186, 17 Am. & Eng. Ann. Cas. 974, 65 S. E. 123.

Idaho. Dittmore v. Cable Milling Co., 16 Ida. 298, 133 Am. St. Rep. 98, 101 Pac. 593; Davidson Grocery Co. v. Johnston, 24 Ida. 336, Ann. Cas. 1915C, 1129, 133 Pac. 929.

Illinois. Cushman v. Hayes, 46 Ill. 145.

Iowa. Moses v. Arnold, 43 Ia. 187, 22 Am. Rep. 239; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co., 149 Ia. 272, 30 L. R. A. (N.S.) 1184, 128 N. W. 389.

Massachusetts. Robinson v. Bird, 158 Mass. 357, 35 Am. St. Rep. 495, 33 N. E. 391.

Michigan. Tolan v. Hodgeboom, 38 Mich. 625; Nelson v. Kilbride, 113 Mich. 637, 71 N. W. 1089; Brown v. Foster, 137 Mich. 35, 100 N. W. 167.

Missouri. Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324.

New Jersey. Dallas v. Koehler Sporting Goods Co., 86 N. J. L. 651, 92 Atl. 356.

North Carolina. Scottish, etc., Co. v. Brooks, 109 N. Car. 698, 14 S. E. 315; White v. Boyd, 124 N. Car. 177, 32 S. E. 499.

Pennsylvania. Pryor v. Morgan, 170 Pa. St. 568, 33 Atl. 98.

Rhode Island. Whipple v. Stephens, 25 R. I. 563, 57 Atl. 375.

Tennessee. Huffman v. Hughlett, 79 Tenn. (11 Lea) 549.

Vermont. Hutchinson v. Ford, 62 Vt. 97, 18 Atl. 1044. Question not decided in French v. Robbins, 172 Cal. 670, 158 Pac. 188.

² Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290.

³ Jones v. Hoar, 22 Mass. (5 Pick.) 285; Allen v. Ford, 36 Mass. (19 Pick.) 217; Brown v. Holbrook, 70 Mass. (4 Gray) 102; Nield v. Burton, 49 Mich. 53, 12 N. W. 906; Winchell v. Noyes, 23 Vt. 303.

⁴ Lamine v. Dorrell, 2 Ld. Raym. 1216; Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046; Elliott v. Jackson, 3 Wis. 649.

A's property should impose upon B the duty of paying it over to A upon demand; and this is enough to enable A to maintain an action for money had and received.

Where X delivers to A, as his agent, to sell upon commission, certain tobacco which really belongs to B, and A sells this tobacco at auction, delivers it to the purchaser, collects the money, and pays it to X, with full knowledge of B's rights in such tobacco, B may maintain an action against A for money had and received.⁵ So, if A, a treasurer of a corporation, B, fraudulently issues certificates of B's stock in excess of his authority, and such certificates are so intermingled with the genuine stock that they can not be distinguished from it, and A appropriates the money thus received for his own use, B may recover from A in an action for money had and received.⁶ So, if B cuts timber from A's land and sells it, B may recover from A for money had and received, if the question of the title to the realty is not involved.⁷ B, a creditor of Y, secured an attachment and seized certain property as Y's. X, claiming as vendee from Y, maintained an action against B in trespass for the value of the property, and recovered a judgment against him, which B satisfied. A, a subsequent attaching creditor, had the property sold under the attachments, and received the money therefor. B may recover such amount from A.⁸ If A sells B's property on credit, it has been held that B may recover from him for money had and received after the term of credit has expired.⁹ If one who has received the property of another and has held it for so long a time that a presumption may arise that he has sold it, he may be liable in an action for money had and received; but within a shorter period of time the action will not lie.¹⁰ If A, who is already married, represents himself to B as a single man, and thus induces B to marry him and A receives the rent of B's realty, B may recover such rent from A on learning of his fraud.¹¹

§ 1507. Conversion of personalty which is not converted into money—Original taking wrongful—Assumpsit denied. If A has

⁵ White v. Boyd, 124 N. Car. 177, 32 S. E. 495.

⁶ Rutland Ry. Co. v. Haven, 62 Vt. 39, 19 Atl. 769.

⁷ Guarantee, etc., Co. v. Investment Co., 107 La. 251, 31 So. 736; Nelson v. Kilbride, 113 Mich. 637, 71 N. W. 1089.

⁸ Griel v. Pollak, 105 Ala. 249, 16 So. 704.

⁹ Burton Lumber Co. v. Wilder, 108 Ala. 669, 18 So. 552.

¹⁰ Moody v. Walker, 89 Ala. 619, 7 So. 246.

¹¹ Hasser v. Wallis, 1 Salk. 28.

converted B's property to his own use, but has kept the property in his possession, and has not sold it, there is a divergence of authority upon the question of whether he can recover from A upon an implied contract. Some authorities hold that B can not maintain an action in *assumpsit* against A.¹ If the wrongdoer has not sold the goods which he has converted, an action for money had and received can not be brought.²

This view is probably correct enough if we consider the nature of averments in an action for money had and received, and the total failure of proof that must follow in such cases. When we consider, however, that the entire action is brought upon a fiction, there seems no good reason for restricting the fiction arbitrarily in cases of this sort. In some jurisdictions this distinction seems to be recognized, and while an action for money had and received will not lie where the party converting the property to its own use still retains it, an action in account will lie.³ "The owner of goods in the possession of another party, who without legal excuse refuses to deliver them to the owner on demand, may sue in tort for a conversion, or he may waive the tort and treat the wrongdoer as a purchaser and sue and recover upon account for their value."⁴ In these cases, however, possession of the property in question passed with the consent of the owner; a fact which in many jurisdictions gives a right to maintain *assumpsit*.⁵

In many jurisdictions, however, it is held that the real owner of the property converted can not recover from the wrongdoer in any form of action in implied contract, if the wrongdoer has not sold the property and received the proceeds thereof, and the original taking is unlawful.⁶ The count for goods sold and delivered can

¹ *Ball Engineering Co. v. White*, — U. S. —, 63 L. ed. —, 39 Sup. Ct. 393; *Castelo v. United States*, 51 Ct. Cl. 221; *Snodgrass v. Coulson*, 90 Ala. 347, 7 So. 736; *Southern Ry. Co. v. Attalla*, 147 Ala. 653, 41 So. 664; *Woodruff v. Zaban*, 133 Ga. 24, 17 Am. & Eng. Ann. Cas. 974, 65 S. E. 123; *Southern Ry. Co. v. Roberson*, 136 Ga. 146, 71 S. E. 129.

² *Pritchard v. Ford*, 24 Ky. (1 J. J. Mar.) 543; *Quimby v. Lowell*, 89 Me. 547, 36 Atl. 902; *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073.

³ *Pharr v. Bachelor*, 3 Ala. 237; *Bradfield v. Patterson*, 106 Ala. 397, 17 So. 536.

⁴ *Bradfield v. Patterson*, 106 Ala. 397, 401, 17 So. 536.

⁵ See § 1508.

⁶ *United States v. Castelo*, 51 Ct. Cl. 221.

Alabama. *Miller v. King*, 67 Ala. 575; *Smith v. Jernigan*, 83 Ala. 256, 3 So. 515; *Southern Ry. Co. v. Attalla*, 147 Ala. 653, 41 So. 664; *Calhoun County v. Art Metal Construction Co.*, 152 Ala. 607, 44 So. 876.

not, in these jurisdictions, be used where the taking was wrongful.⁷ Thus, if the wrongdoer has the property in his possession, as where he converted wood to his own use and made a fence out of it,⁸ or if he has bartered it for other personal property,⁹ assumpsit will not lie. On this theory, in an action for money had and received, the real owner can not recover if he can not show the amount received by the wrongdoer on such sale.¹⁰ It has been said that to allow assumpsit in such cases would abolish all distinctions between actions *ex contractu* and those *ex delicto*.¹¹

But even where this theory obtains it is not necessary that payment should be actually received in money. If the property converted has been sold at a value estimated in money, he is liable in an action for money had and received even if he subsequently receives something other than money in discharge of the obligation due to him by reason of such sale.¹² A wrongdoer who has taken a negotiable instrument for goods which he has wrongfully converted and which he has sold, is liable for money had and received.¹³

Arkansas. *Chamblee v. McKenzie*, 31 Ark. 155.

Georgia. *Barlow v. Stalworth*, 27 Ga. 517; *Woodruff v. Zaban*, 133 Ga. 24, 17 Ann. Cas. 974, 65 S. E. 123; *Southern Ry. Co. v. Roberson*, 136 Ga. 146, 71 S. E. 129.

Illinois. *Johnston v. Salisbury*, 61 Ill. 316; *Kellogg v. Turpie*, 93 Ill. 265, 34 Am. Rep. 163.

Iowa. *Moses v. Arnold*, 43 Ia. 187, 22 Am. Rep. 239.

Maine. *Androscoggin Water Power Co. v. Metcalf*, 65 Me. 40; *Quimby v. Lowell*, 89 Me. 547, 36 Atl. 902.

Massachusetts. *Allen v. Ford*, 36 Mass. (19 Pick.) 217.

Michigan. *Tolan v. Hodgeboom*, 38 Mich. 624; *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384; *St. John v. Iron Co.*, 122 Mich. 68, 80 N. W. 998; *McCormick Harvesting Machine Co. v. Waldo*, 128 Mich. 135, 87 N. W. 55.

Nevada. *Carson River Lumber Co. v. Bassett*, 2 Nev. 249.

New Hampshire. *Allen v. Woodward*, 22 N. H. 544; *Smith v. Smith*, 43 N. H. 536.

Pennsylvania. *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445; *Willett v. Willett*, 3 Watts (Pa.) 277.

Vermont. *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595.

Wisconsin. *Elliott v. Jackson*, 3 Wis. 649.

⁷ *Berkshire Glass Co. v. Wolcott*, 84 Mass. (2 All.) 227, 79 Am. Dec. 781.

⁸ *Folsom v. Cornell*, 150 Mass. 115, 22 N. E. 705.

⁹ *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595.

¹⁰ *Glasscock v. Hazell*, 109 N. Car. 145, 13 S. E. 789.

¹¹ *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595.

¹² *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Miller v. Miller*, 24 Mass. (7 Pick.) 133, 19 Am. Dec. 264.

¹³ *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449, 16 Am. Dec. 355.

§ 1508. Original taking rightful. A different rule prevails in some states where the original taking is lawful, and with the consent of the real owner, and there is a subsequent unlawful conversion. If A obtains possession rightfully, as where B delivers property to A voluntarily, and A subsequently refuses to return it, or pay for it, B may maintain *assumpsit*.¹ In such cases the owner who waives tort has been allowed to use the count for goods sold and delivered.² If a bailee converts property to his own use, the bailor may waive tort, and sue in *assumpsit*.³ If A's property is sold with A's consent, and the price therefor is paid to B, B must account therefor to A in an action for money had and received. Thus, where certain stock was sold and the money was received by B, it was held a question of fact for the jury whose stock it was; and if the stock belonged to A, B would have to account to A for such money.⁴ So, where A forwarded butter to a certain commission merchant, B, in the regular course of business, and B sold the same and received payment therefor, A may compel B to pay over such money to him after deducting commissions.⁵ So, if A, the owner of one-half of a patent right, has sold his entire patent right to a stranger, and received the money therefor, B, the owner of the other half, may maintain an action against A for one-half of such proceeds.⁶ So, a tenant in common who collects more than his share of the rents and profits of the realty owned in common, is liable to the other tenant in common in *assumpsit*.⁷ So, if one tenant in common mines and sells coal,

¹ **United States.** *Reynolds v. New York Trust Co.*, 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N.S.) 391.

Georgia. *De Loach Mill Manufacturing Co. v. Standard Sawmill Co.*, 125 Ga. 377, 54 S. E. 157.

Indiana. *State v. Beck*, 175 Ind. 312, 93 N. E. 664.

Michigan. *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384; *Ginsburg v. Lumber Co.*, 85 Mich. 439, 48 N. W. 952; *Newman v. Olney*, 118 Mich. 545, 77 N. W. 9; *Grinnell v. Anderson*, 122 Mich. 533, 81 N. W. 329; *McDonald v. Young*, 198 Mich. 620, 165 N. W. 678.

Ohio. *Barker v. Cory*, 15 Ohio 9.

² *Woodward v. Suydam*, 11 Ohio 360.

³ **United States.** *Reynolds v. New York Trust Co.*, 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N.S.) 391.

Georgia. *Ford v. Atlantic Compress Co.*, 138 Ga. 496, Ann. Cas. 1913D, 226, 75 S. E. 609.

Indiana. *State v. Beck*, 175 Ind. 312, 93 N. E. 664.

Michigan. *Newman v. Olney*, 118 Mich. 545, 77 N. W. 9.

Ohio. *Barker v. Cory*, 15 Ohio 9.

⁴ *Shouldice v. McLeod's Estate*, 130 Mich. 444, 90 N. W. 288.

⁵ *Tucker v. Utley*, 168 Mass. 415, 47 N. E. 198.

⁶ *Currier v. Hallowell*, 158 Mass. 254, 33 N. E. 497.

⁷ *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249.

and there is no dispute as to his right to do so, as to the amount of the coal mined, or as to his right to sell it at that price, but the only dispute is as to the amount which the other co-tenant is entitled to receive, the latter may maintain an action against the former.⁸ If A quarries stone on B's land, and takes it away, and either sells it or uses it, A is liable to B in assumpsit, not for the amount of the damage done to B's property, but for the value of the property thus converted by A.⁹ Where a commission merchant sold goods contrary to orders, the principal was allowed to treat the commission merchant as the purchaser and to sue for goods sold.¹⁰ In this case, however, the original possession of the goods was taken rightfully under a contract. If possession has been taken under a contract, a wrongdoer who has converted such personalty is entitled to such deductions as the contract gave him; and the owner of the property can not prevent the wrongdoer from deducting such items by suing in tort.¹¹ If A stored oil with B, B is entitled to storage charges and certain allowances for evaporation provided for by the contract; and if B converts such oil he is entitled to deduct such items from the value of the oil and A can not prevent him from making such deductions by suing in trover.¹²

§ 1509. Assumpsit allowed without regard to nature of original taking. Another line of authorities, greater numerically, and treating the fiction of implied contract more rationally, allow the real owner to recover from the wrongdoer, even where the wrongdoer has not sold the property, and without reference to the original acquisition of possession, whether with or without the consent of the rightful owner.¹ Where this theory obtains it is, of course, immaterial whether the property has been bartered or sold on credit, since the liability on the common counts in assumpsit exists

⁸ *Winton Coal Co. v. Coal Co.*, 170 Pa. St. 437, 33 Atl. 110.

⁹ *Downs v. Finnegan*, 58 Minn. 112, 49 Am. St. Rep. 488, 59 N. W. 981.

¹⁰ *Woodward v. Suydam*, 11 Ohio 360.

¹¹ *Cow Run Co. v. Lehmer*, 41 O. S. 384.

¹² *Cow Run Co. v. Lehmer*, 41 O. S. 384.

¹ *United States. Reed v. Weule*, 176 Fed. 660, 100 C. C. A. 212; *Reynolds*

v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N.S.) 391.

California. Roberts v. Evans, 43 Cal. 380; *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81; *Hoare v. Glann (Cal.)*, 168 Pac. 346.

Illinois. Toledo, etc., Ry. v. Chew, 67 Ill. 378.

Indiana. Jones v. Gregg, 17 Ind. 84; *Morford v. White*, 53 Ind. 547.

even if the property converted has not been sold at all. Under this theory assumpsit will lie where the wrongful act consists in making use of property, and not in attempting to deprive the owner of it permanently. Thus, A was to work for B for a year, giving B his entire time. Instead, A used B's team on A's business. It was held that B could recover a reasonable compensation for such use from A, on the theory of an implied promise, even if A in fact did not intend to pay therefor.² Where X, who was the manager of one gas company and the president of another, wrongfully turned the gas from the pipes of one of such companies into the pipes of the other, it was held that the company whose gas was thus taken could maintain assumpsit against the company by which it was thus taken.³

If the taking was rightful, the person who takes such property can not be compelled to pay therefor on the theory of contract.⁴ If A delivered to B a picture of A's wife under a contract by which B was to paint a portrait and B without authority paints two portraits, A is not liable to B for the value of the second portrait of which he takes possession.⁵

If a licensee of a patent has violated the conditions of his license, the owner of the patent may waive the tort and bring an

Kansas. Washbon v. Linscott State Bank, 87 Kan. 698, 125 Pac. 17; Garrity v. State Board of Administration, 99 Kan. 695, 162 Pac. 1167.

Kentucky. Eversole v. Moore, 66 Ky. (3 Bush.) 49.

Missouri. Gordon v. Bruner, 49 Mo. 570.

Montana. Galvin v. Mill Co., 14 Mont. 508, 37 Pac. 366; Yancey v. Northern Pacific Ry., 42 Mont. 342, 112 Pac. 533; Ivey v. La France Copper Co., 45 Mont. 71, 121 Pac. 1061.

New Jersey. Moore v. Richardson, 68 N. J. L. 305, 53 Atl. 1032.

New York. Terry v. Munger, 121 N. Y. 161, 18 Am. St. Rep. 803, 8 L. R. A. 216, 24 N. E. 272.

Ohio. Barker v. Cory, 15 Ohio 9.

Oregon. Crown Cycle Co. v. Brown, 39 Or. 285, 64 Pac. 451.

Pennsylvania. McCullough v. Ford

Natural Gas Co., 213 Pa. St. 110, 62 Atl. 521.

Tennessee. Kirkman v. Philips, 54 Tenn. (7 Heisk.) 222; McCombs v. Guild, 77 Tenn. (9 Lea) 81.

Washington. Wyld v. Schoening, 96 Wash. 86, 164 Pac. 752.

West Virginia. Maloney v. Barr, 27 W. Va. 381.

Wisconsin. Walker v. Duncan, 68 Wis. 624, 32 N. W. 689; Heber v. Heber's Estate, 139 Wis. 472, 121 N. W. 328.

²Stebbins v. Waterhouse, 58 Conn. 370, 20 Atl. 480.

³McCullough v. Ford Natural Gas Co., 213 Pa. St. 110, 62 Atl. 521.

⁴Klug v. Sheriffs, 129 Wis. 468, 116 Am. St. Rep. 967, 7 L. R. A. (N.S.) 362, 9 Ann. Cas. 1013, 109 N. W. 656.

⁵Klug v. Sheriffs, 129 Wis. 468, 116 Am. St. Rep. 967, 7 L. R. A. (N.S.) 362, 9 Ann. Cas. 1013, 109 N. W. 656.

action upon the contract under which the licensee was permitted to use such article;⁶ but such waiver prevents the case from being a patent case under the federal statutes which regulate patent cases.⁷ The fact that a patented article is used does not create a liability to pay royalties on the theory of contract,⁸ even if the patentee knows of such use.⁹ The fact that the United States has made use of an invention which was patented by a treasury employe does not impose a liability upon the United States which, in the absence of specific statute, can be enforced in the court of claims;¹⁰ at least if the United States officials in charge of such department and bureau did not understand that the inventor expected payment for such use of his invention.¹¹ Since a United States official could not be restrained from making use of an invention in connection with the discharge of his public duties,¹² on the ground that such restraint would not be affected by a suit against the United States,¹³ an employe of the United States whose invention was thus appropriated by the United States had no practical redress.

In some cases it has been said that the owner of personalty may waive the tort and sue in assumpsit if the wrongdoer has appropriated to his own use the property which he has converted,¹⁴ but that he can not waive the tort and sue in assumpsit if the wrongdoer has merely withheld the property which he has converted.¹⁵

§ 1510. Wrongful sale of realty. If a mortgagor has a right to redeem realty he may maintain an action for money had and received against the mortgagee to recover the difference between the mortgage debt and the amount which the mortgagee has received from the sale of such mortgaged realty.¹

⁶ *Henry v. Dick Co.*, 224 U. S. 1, 56 L. ed. 645.

⁷ *Henry v. Dick, Co.*, 224 U. S. 1, 56 L. ed. 645.

⁸ *May v. Western Lime Co.*, 65 Wash. 696, 44 L. R. A. (N.S.) 333, 118 Pac. 895.

⁹ *May v. Western Lime Co.*, 65 Wash. 696, 44 L. R. A. (N.S.) 333, 118 Pac. 895.

¹⁰ *Harley v. United States*, 198 U. S. 229, 49 L. ed. 1029.

¹¹ *Harley v. United States*, 198 U. S. 229, 49 L. ed. 1029.

¹² *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134.

¹³ *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134.

¹⁴ *Roberts v. Moss*, 127 Ky. 657, 17 L. R. A. (N.S.) 280, 106 S. W. 297; *Downs v. Finnegan*, 58 Minn. 112, 49 Am. St. Rep. 488, 59 N. W. 981.

¹⁵ *Reynolds v. Padgett*, 94 Ga. 347, 21 S. E. 570.

¹ *Dow v. Bradbury*, 110 Me. 249, 44 L. R. A. (N.S.) 1041, 85 Atl. 806.

If an action may be brought for money had and received to cover the value of land which has been sold by another, such right of action accrues when the money is paid to the person who makes such sale and not from the time when such property is taken wrongfully or when the sale is made.² Accordingly the period of limitations runs from the time of such payment and not from the time of the sale.³

§ 1511. Appropriation of realty without compensation. If land has been taken by a corporation which has authority to appropriate it by proceedings in eminent domain, and the owner of such land can not recover possession thereof by ejectment or any similar action, he may assume that such corporation has acquired the land in eminent domain and may sue on the theory of an implied contract to pay the reasonable value of the land thus taken.¹ Such an action may lie against a railway corporation,² or against the United States in the court of claims.³ If land has not been appropriated so as to exclude the original owner thereof from possession, he can not maintain an action on the theory of an implied contract on the ground that the government contemplates making some use of such realty.⁴ The fact that the United States has built a battery which can fire guns over A's land, does not entitle A to maintain an action in the court of claims on the theory of an implied contract by the United States to take such land and to pay for it if the United States has not fired guns across A's land for several years and will rarely do so except in case of war.⁵ If by statute the executor has a right to possession of realty without regard to the sufficiency of the personal property to pay the debts, the executor may maintain an action for money had and received to recover from one who has taken from the court the

² *Perry v. Smith*, 31 Kan. 423, 2 Pac. 784.

³ *Perry v. Smith*, 31 Kan. 423, 2 Pac. 784.

¹ *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645, 28 L. ed. 846; *Boise Valley Constr. Co. v. Kroeger*, 17 Ida. 384, 28 L. R. A. (N.S.) 968, 105 Pac. 1070; *Eyre v. Faribault*, 121 Minn. 233, L. R. A. 1917A, 685, 141 N. W. 170.

² *Boise Valley Constr. Co. v. Kroeger*,

17 Ida. 384, 28 L. R. A. (N.S.) 968, 105 Pac. 1070.

³ *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645, 28 L. ed. 846.

⁴ *Peabody v. United States*, 231 U. S. 530, 58 L. ed. 351; *Portsmouth Harbor Land & Hotel Co. v. United States*, — U. S. —, 63 L. ed. —, 39 Sup. Ct. 399.

⁵ *Peabody v. United States*, 231 U. S. 530, 58 L. ed. 351; *Portsmouth Harbor Land & Hotel Co. v. United States*, — U. S. —, 63 L. ed. —, 39 Sup. Ct. 399.

proceeds of realty belonging to the decedent of such administrator which has been paid into court in eminent domain proceedings.⁶ If a railroad company enters upon B's land and permanently appropriates it as a part of its right of way, and B acquiesces therein, B may recover against the railroad company in indebitatus assumpsit.⁷

§ 1512. Wrongful occupancy of real property. If the tort complained of consisted in adverse possession of real property, or any form of possession thereof without the consent of the true owner, the common law did not allow such tort to be waived and an action in assumpsit for use and occupation to be brought. Assumpsit could not be made the means of trying the title to land.¹ Accordingly, an action in assumpsit could not be brought unless there was either an express or an implied contract between the owner and the possessor creating the relation of landlord and tenant.² Where decedent's widow occupies the homestead after the period fixed by statute for her occupancy had expired, the heir can not recover from her in an action for the rent thereof.³ One who holds wrongful possession, adverse to that of the real owner, can not be held liable in an action for use and occupation.⁴

⁶ *Eyre v. Faribault*, 121 Minn. 233, L. R. A. 1917A, 685, 141 N. W. 170.

⁷ *Chattanooga, etc., Ry. v. Town Co.*, 89 Ga. 732, 16 S. E. 308; *Boise Valley Constr. Co. v. Kroeger*, 17 Ida. 384, 28 L. R. A. (N.S.) 968, 105 Pac. 1070.

¹ *Burdin v. Ordway*, 88 Me. 375, 34 Atl. 175; *Boston v. Binney*, 28 Mass. (11 Pick.) 1, 22 Am. Dec. 353.

² *Alabama*. *Grady v. Ibach*, 94 Ala. 152, 10 So. 287.

California. *O'Conner v. Corbitt*, 3 Cal. 370.

Georgia. *Atlanta, etc., Ry. v. McHan*, 110 Ga. 543, 35 S. E. 634.

Kentucky. *Waller v. Morgan*, 57 Ky. (18 B. Mon.) 136.

Maine. *Emery v. Emery*, 87 Me. 281, 32 Atl. 900.

Nebraska. *Phoenix Ins. Co. v. Hoyt* (Neb.), 91 N. W. 186; *Janouch v. Pence* (Neb.), 93 N. W. 217.

New York. *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114.

North Carolina. *Faulcon v. Johnston*, 102 N. Car. 264, 11 Am. St. Rep. 737, 9 S. E. 394.

Ohio. *Butler v. Cowles*, 4 Ohio 205, 19 Am. Dec. 612; *Richey v. Hinde*, 6 Ohio 371; *Cincinnati v. Walls*, 1 O. S. 222; *Mitchell v. Pendleton*, 21 O. S. 664.

Vermont. *Blake v. Preston*, 67 Vt. 613, 32 Atl. 491.

Wisconsin. *Ackerman v. Lyman*, 20 Wis. 454.

See Assumpsit for Use and Occupation, by James Barr Ames, 2 Harvard Law Review, 377; 3 Select Essays in Anglo-American Legal History, 259 (299).

³ *Emery v. Emery*, 87 Me. 281, 32 Atl. 900.

⁴ *Georgia*. *Williams v. Hollis*, 19 Ga. 313; *Atlanta, etc., Ry. v. McHan*, 110 Ga. 543, 35 S. E. 634.

Maine. *Richardson v. Richardson*, 72 Me. 403.

Massachusetts. *Bigelow v. Jones*, 27 Mass. (10 Pick.) 161.

Michigan. *Henderson v. Detroit*, 61 Mich. 378, 28 N. W. 133.

Minnesota. *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815.

In some cases in which the owner of realty has been denied the right to waive tort and sue in *assumpsit* emphasis has been placed upon the fact that he has elected to treat the possessor as a wrongdoer by bringing ejectment against him as a trespasser.⁵ It has been said that use and occupation for mesne profits would lie for a period preceding the demise laid in the declaration in the action of ejectment,⁶ but not for a period subsequent to such demise.⁷ One who has elected to treat another in possession of his land as a wrongdoer for the purpose of bringing an action of ejectment, can not treat him as in possession during the same period of time under an implied contract for use and occupation.⁸ One who has had adverse possession of a ferry which belongs to another, is not liable to the true owner in *assumpsit* for use and occupation.⁹

Where the person in wrongful adverse possession collects rents of the property, it has been held that he is not liable to the real owner for money had and received. Thus, one in possession under an invalid tax deed has been held not to be liable in this form of action.¹⁰ A railroad company took some of A's land for a right of way. Subsequently, A sold his property to B. It was held that B could not maintain an action against the railroad company for use and occupation.¹¹ Neither could B in this case sue as A's assignee in trespass, since such a claim could not be assigned. A vendee in possession under a contract of sale is not, on breach of such contract, liable for use and occupation,¹² even if

New Hampshire. *Barron v. Marsh*, 63 N. H. 107.

New York. *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710.

Ohio. *Butler v. Cowles*, 4 Ohio 205; *Richey v. Hinde*, 6 Ohio 371; *Cincinnati v. Walls*, 1 O. S. 222; *Mitchell v. Pendleton*, 21 O. S. 664.

Vermont. *Watson v. Brainard*, 33 Vt. 88.

"The disseizor is a trespasser and can not be treated as a tenant. The tort can not be waived for the purpose of trying the title to lands in an action of *assumpsit*." *Richardson v. Richardson*, 72 Me. 403, 408 [quoted in *Phoenix Ins. Co. v. Hoyt* (Neb.), 91 N. W. 186].

⁵ *Sinnard v. McBride*, 3 Ohio 264.

⁶ *Sinnard v. McBride*, 3 Ohio 264.

⁷ *Sinnard v. McBride*, 3 Ohio 264.

⁸ *Sinnard v. McBride*, 3 Ohio 264; *Butler v. Cowles*, 4 Ohio 205.

⁹ *Cincinnati v. Walls*, 1 O. S. 222.

¹⁰ *Phoenix Ins. Co. v. Hoyt* (Neb.), 91 N. W. 186.

¹¹ *Allen v. R. R.*, 107 Ga. 838, 33 S. E. 696.

¹² *Indiana. Nance v. Alexander*, 49 Ind. 516.

Kentucky. Jones v. Tipton, 32 Ky. (2 Dana) 295.

Maine. Bishop v. Clark, 82 Me. 532, 20 Atl. 88.

Massachusetts. Little v. Pearson, 24 Mass. (7 Pick.) 301, 19 Am. Dec. 289.

Vermont. Hough v. Birge, 11 Vt. 190, 34 Am. Dec. 682.

the contract is subsequently rescinded.¹³ If a person in possession, who has made a contract to purchase the land, did not enter into possession under such contract of purchase, this principle does not apply. Thus A, the owner and mortgagor of a piece of land, and B, A's son, were living together on the mortgaged premises. C, the owner of the mortgage, agreed with B that C should foreclose the mortgage, buy the property in, and convey it to B. C performed the contract as far as foreclosure and buying in were concerned. B remained in possession, but did not perform the contract on his part and it was subsequently rescinded. It was held that B was liable to C in an action for use and occupation.¹⁴ So, if the person in possession under a contract of sale has agreed to pay rent in case of rescission, this principle has no application. A transferred property to B under an agreement made between their respective husbands, by which A was to take the property back or obtain a purchaser therefor if B was dissatisfied with the purchase; and in such case B was to pay for the use and occupation of the land. B, after accepting the deed, became dissatisfied, and reconveyed the property to A. It was held that B could not take advantage of the contract made on her behalf by her husband for reconveyance, and avoid liability for use and occupation.¹⁵ If the vendor under a contract of sale retains possession, the vendee can not recover from him in an action for use and occupation.¹⁶ By statute in some jurisdictions an action for use and occupation may be brought where the premises are wrongfully occupied, even though there is no agreement, express or implied, for the payment of rent.¹⁷ Under the code of civil procedure, the court sometimes does not attempt to say whether the action in which relief is given would have been at common law an action for rent or for use and occupation.¹⁸

The true owner of realty can not bring assumpsit against one who has bought crops from a holder by adverse possession.¹⁹

§ 1513. Liability of trespasser in assumpsit. One who enters upon land, not as an adverse claimant thereof, but as a mere tres-

¹³ *Belger v. Sanchez*, 137 Cal. 614, 70 Pac. 738.

¹⁴ *Lynch v. Pearson*, 125 Cal. 21, 57 Pac. 676.

¹⁵ *Van Brunt v. Calder*, 167 N. Y. 458, 60 N. E. 755.

¹⁶ *Greenup v. Vernor*, 16 Ill. 26.

¹⁷ *Parkinson v. Shew*, 12 S. D. 171, 80 N. W. 189.

¹⁸ *Van Brunt v. Calder*, 167 N. Y. 458, 60 N. E. 755.

¹⁹ *Faulcon v. Johnston*, 102 N. Car. 264, 11 Am. St. Rep. 737, 9 S. E. 394.

passer, and who severs something of value from the realty and converts it into personalty, may be held liable in assumpsit whenever he could have been held in assumpsit had the property thus converted been personalty originally.¹ The title to realty is not involved under such a state of facts; and, accordingly, if assumpsit could have been brought in case the property, which has thus been converted by the wrongdoer to his own use, had been personalty in the first instance, the fact that it was realty originally does not prevent the owner from resorting to assumpsit. If a trespasser, not under claim of right and not holding by adverse possession, has removed coal² or timber³ or a valuable fossil⁴ from the realty, the owner of such realty may maintain assumpsit for its value. One whose property has been occupied by another, may recover therefor, even after conveying such property to a third person.⁵

If the acts of such trespasser amount to adverse possession, or are under a claim of right, the question of title is involved and assumpsit will not lie.⁶

¹ England. *Powell v. Rees*, 7 Ad. & El. 426.

United States. *Phelps v. Church*, 90 Fed. 683, 40 C. C. A. 72.

California. *Halleck v. Mixer*, 16 Cal. 574.

Kansas. *Garrity v. State Board of Administration*, 99 Kan. 695, 162 Pac. 1167.

Kentucky. *Roberts v. Moss*, 127 Ky. 657, 17 L. R. A. (N.S.) 280, 106 S. W. 297.

Maine. *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661 (obiter).

Minnesota. *Downs v. Finnegan*, 58 Minn. 112, 49 Am. St. Rep. 488, 59 N. W. 981.

North Carolina. *Brady v. Brady*, 161 N. Car. 324, 44 L. R. A. (N.S.) 279, 77 S. E. 235.

West Virginia. *Parks v. Morris*, 63 W. Va. 51, 59 S. E. 753; *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

² *Powell v. Rees*, 7 Ad. & El. 426; *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

³ California. *Halleck v. Mixer*, 16 Cal. 574 (obiter, as the relief which was sought was replevin).

Kentucky. *Roberts v. Moss*, 127 Ky. 657, 17 L. R. A. (N.S.) 280, 106 S. W. 297.

Maine. *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661 (obiter, as trover was brought).

North Carolina. *Brady v. Brady*, 161 N. Car. 324, 44 L. R. A. (N.S.) 279, 77 S. E. 235.

West Virginia. *Parks v. Morris*, 63 W. Va. 51, 59 S. E. 753.

⁴ Assumpsit will lie for the value of "an eighteen million year old lizard." *Garrity v. State Board of Administration*, 99 Kan. 695, 162 Pac. 1167 (obiter in part, as the action failed because it was brought against a branch of the state; see §§ 1877 et seq.

⁵ *Bowie v. Herring*, 116 Ia. 209, 89 N. W. 976.

⁶ *Downs v. Finnegan*, 58 Minn. 112, 49 Am. St. Rep. 488, 59 N. W. 981; *Parks v. Morris*, 63 W. Va. 51, 59 S. E. 753. See § 1512.

§ 1514. Other forms of occupancy excluding liability in contract. One who is in possession under a contract by which he is to have the use of the premises in question gratuitously, can not be held liable in an action for use and occupation.¹ An action of assumpsit for use and occupation will not lie against one who does not sustain the relation of tenant, even though such person may have lived upon such real property in a subordinate relation to the tenant. Thus, where A had made a lease to B, and B's granddaughter, X, lived with B on the premises, not paying rent or board, it was held that A could not recover from X in an action for use and occupation.² Under a statute providing that the expenses of the family shall be chargeable on the property of the husband and wife, or either of them, and permitting either joint or several actions to be brought against them, it has been held that where a lease is made to the husband a joint action for use and occupation may be brought against husband and wife.³

§ 1515. Work and labor obtained by tort. Upon the question of the right of one the benefit of whose labor has been obtained by another through a tort to waive his right of action in tort and to sue in assumpsit, making use of the count for work and labor, we find a conflict of authority. In some jurisdictions it seems that the right to waive tort and sue in assumpsit is limited to cases in which one party is enriched by receiving property or the proceeds thereof which in equity and good conscience belong to another, and that the doctrine of waiver of tort has no application to benefits of any other sort. In these jurisdictions, if A has obtained the benefit of B's services by means of some tort, B can not maintain an action of assumpsit on the count for work and labor against A.¹ Where this theory obtains A is not liable to B in assumpsit for work and labor if he has compelled B to work for him by duress.² A convict who has been compelled

¹ *Chicago v. Milling Co.*, 196 Ill. 580, 63 N. E. 1043 [affirming, 97 Ill. App. 651]. (Even if such contract is invalid.)

² *Austin v. Whipple*, 178 Mass. 155, 59 N. E. 636.

³ *Walker v. Houghteling*, 107 Fed. 619, 46 C. C. A. 512.

¹ *Sloss Iron and Steel Co. v. Harvey*, 116 Ala. 656, 22 So. 994; *Patterson v.*

Prior, 18 Ind. 440, 81 Am. Dec. 367 (see *Patterson v. Crawford*, 12 Ind. 241, to the effect that the remedy is in tort); *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023; *Thompson v. Bronk*, 126 Mich. 455, 85 N. W. 1084.

² *Sloss Iron and Steel Co. v. Harvey*, 116 Ala. 656, 22 So. 994; *Patterson v.*

to work contrary to the statutes which fix his rights and duties, can not recover in assumpsit from the contractor for whom he was compelled to work.³ His remedy is in tort.⁴ A convict who has been compelled to work on Sundays and holidays for the person hiring him has been denied the right to recover from such person on an implied contract, even though the statute specifically provided that a convict should not be compelled to work on Sundays and holidays.⁵ One who has been imprisoned under a void sentence can not recover in assumpsit from a contractor for whom he was compelled to work.⁶ The denial of the right of the convict to recover from the contractor may be justified in some of the cases on the theory that the contractor did not himself exercise the compulsion, but that the compulsion was exercised by the state with whom the contractor had an agreement for the service of such convict and to whom the contractor had paid compensation. The right of one the benefit of whose services has been obtained through tort, is not limited, however, to cases for which an explanation can be offered. In cases in which A has procured B's services by fraud, B has not been allowed to recover reasonable compensation from A in an action in assumpsit for work and labor.⁷

A represented to B that he had adopted her as his daughter, and thus he induced her to render domestic services for him. It was held that she could not recover for work and labor.⁸ If a man represents himself as single and thus induces a woman to marry him, live with him, and perform domestic services for him, it has been held that she can not recover in assumpsit for such services, and that her remedy is in tort.⁹

The reasons which have led the courts to refuse to permit tort to be waived and assumpsit to be brought in cases in which the plaintiff seeks to use the count for work and labor, are not logical, but as far as they exist are historical. The money counts were

Prior, 18 Ind. 440, 81 Am. Dec. 367; Thompson v. Bronk, 126 Mich. 455, 85 N. W. 1084.

³ Sloss Iron and Steel Co. v. Harvey, 116 Ala. 656, 22 So. 994; Patterson v. Prior, 18 Ind. 440, 81 Am. Dec. 367; Thompson v. Bronk, 126 Mich. 455, 85 N. W. 1084.

⁴ Patterson v. Crawford, 12 Ind. 241.

⁵ Sloss Iron and Steel Co. v. Harvey, 116 Ala. 656, 22 So. 994.

⁶ Thompson v. Bronk, 126 Mich. 455, 85 N. W. 1084.

⁷ Graham v. Stanton, 177 Mass. 321, 58 N. E. 1023.

⁸ Graham v. Stanton, 177 Mass. 321, 58 N. E. 1023.

⁹ Cooper v. Cooper, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.

the first to be used, and subsequently the counts for goods sold and delivered were allowed in many jurisdictions.¹⁰ The count for work and labor is from the nature of things less frequently used than the other counts, and accordingly it appeared somewhat later in time and has been treated in a more unfriendly manner than the counts for money or for goods sold. In a number of jurisdictions, however, courts have refused to be bound by such inadequate historical consideration; and they have applied logically the theory that a tort may be waived and assumpsit may be brought wherever the defendant is unjustly enriched at the plaintiff's expense by reason of his wrong.¹¹ A convict who has been compelled to work in a manner not authorized by law has been permitted to recover in assumpsit from the contractor who received the benefit of his labor.¹² If A has induced B to perform services for him by fraudulently inducing her to believe that she was treated as a member of the family and that no charge was being made for board and lodging, B, on discovering that A has made a charge against her for board and lodging, may recover in assumpsit for the value of her services.¹³ If a man represents himself as single and induces a woman to marry him, it is held in many jurisdictions that on discovering his fraud she may waive the tort and sue in assumpsit to recover the reasonable value of the services which she rendered for him in such relation.¹⁴ If B has enticed A's son, X, away from home and induced X to work for B, it seems that A may waive the tort and sue in assumpsit,¹⁵ since it has been held that if A sues in assumpsit and the jury

¹⁰ See §§ 1441 et seq., and §§ 1509 et seq.

¹¹ Arkansas. Greer v. Critz, 53 Ark. 247, 13 S. W. 764.

Georgia. Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145.

Louisiana. Fox v. Dawson, 8 Mart. (La.) 94.

Minnesota. Boardman v. Ward, 40 Minn. 399, 12 Am. St. Rep. 749, 42 N. W. 202.

Missouri. Higgins v. Breen, 9 Mo. 497.

North Carolina. Sanders v. Ragan, 172 N. Car. 612, L. R. A. 1917B, 681, 90 S. E. 777.

New Jersey. Knott v. Knott (N. J. Eq.), 51 Atl. 15.

¹² Greer v. Critz, 53 Ark. 247, 13 S. W. 764.

¹³ Boardman v. Ward, 40 Minn. 399, 12 Am. St. Rep. 749, 42 N. W. 202.

¹⁴ Georgia. Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145.

Louisiana. Fox v. Dawson, 8 Mart. (La.) 94.

Missouri. Higgins v. Breen, 9 Mo. 497.

New Jersey. Knott v. Knott (N. J. Eq.), 51 Atl. 15.

North Carolina. Sanders v. Ragan, 172 N. Car. 612, L. R. A. 1917B, 681, 90 S. E. 777.

¹⁵ Thompson v. Howard, 31 Mich. 309.

disagrees, he can not dismiss such action and sue in tort, since his action in assumpsit was a final election as between tort and contract.¹⁶

III

QUASI-CONTRACTUAL RIGHTS ARISING NEITHER FROM CONTRACT NOR FROM TORT

A. VOLUNTARY PAYMENTS, SERVICES, ETC.

§ 1516. Services rendered voluntarily without request. In the absence of an emergency which makes immediate action necessary to preserve life or to preserve public decency and the like, one who has performed services for another can not recover for such services in the absence of a genuine contract even if such services prove beneficial to the person for whom they are rendered, and although he accepts such benefits, at least if he has no choice between accepting and rejecting such benefits.¹ If A renders services in preserving or protecting B's property, without B's request or assent, either express or implied, A can not recover for the value of such services from B.² If A renders legal services for B, under a contract with B, he can not recover compensation for such services from the United States, although as a result of his services the United States acquired title to public land which had been conveyed by fraud or mistake.³ If A renders legal

¹⁶ *Thompson v. Howard*, 31 Mich. 309.

¹ *United States v. Coleman*, 152 U. S. 96, 38 L. ed. 368.

Arkansas. *Bercher v. Gunter*, 95 Ark. 155, 128 S. W. 1036.

Maine. *Wadleigh v. Katahdin Pulp & Paper Co.*, 116 Me. 107, 100 Atl. 150.

Michigan. *Lange v. Kaiser*, 34 Mich. 317.

New Hampshire. *Stavrelis v. Zacharias*, — N. H. —, 106 Atl. 306.

New Jersey. *Force v. Haines*, 17 N. J. (2 Harr.) 385.

New York. *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

Oklahoma. *Watts v. Houston* (Okla.), 165 Pac. 128.

Pennsylvania. *Mayer v. Rhoades*, 135 Pa. St. 601, 20 Atl. 158.

Texas. *Willis v. Jones*, 11 Tex. 594.

Vermont. *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

If a co-tenant constructed an improvement upon the realty owned in common, full compensation is ordinarily made to him if, on partition, the land on which such improvements are located is set off to him, and if the improvements do not increase the value of the residue. *Farley v. Stacey*, 177 Ky. 109, 1 A. L. R. 1181, 197 S. W. 636.

² *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

³ *Coleman v. United States*, 152 U. S. 96, 38 L. ed. 368.

services for some of testator's heirs in contesting a will and as a result of his services the will is refused admission to probate, A can not recover compensation from the heirs who did not assent to the agreement between A and the remaining heirs, even if they have received the share of testator's estate which they would not have received if such will had not been contested.⁴

The rule that voluntary acceptance of benefits shows an implied promise to pay therefor,⁵ applies only where the party for whom the services are rendered is free to take their benefit or to reject it. If the services are of such nature that he has no choice but to accept them, he can not be said to accept them voluntarily. Such acceptance, therefore, creates no liability.⁶ If A recovers from X a fund which belongs to B, A can not compel B to compensate him for such services.⁷ If an attorney is retained by unauthorized agents of a church to prefer charges against a clergyman, and he prefers such charges and prosecutes the case and procures the suspension of such clergyman from the ministry by reason of such charges, his services are not so accepted by the church as to make it liable to him, by a resolution that by reason of such suspension such clergyman should be required to leave the parsonage owned by the church.⁸ So one who voluntarily acts as janitor can not recover though the occupant of the building is benefited thereby.⁹ So if work is done in putting a heating plant in a building under a special contract, and the contract is not performed and what has been done can not be removed without injury to the building, no recovery can be had for such work.¹⁰ So if a building has been repaired,¹¹ or painted,¹² or if a stone base has been built under an iron fence, and the fence has been painted,¹³ or a bridge has been constructed,¹⁴ or a street laid down,¹⁵ and the contract under which

⁴ *Watts v. Houston (Okla.)*, 165 Pac. 128.

⁵ See §§ 1442 et seq.

⁶ *Houston Oil Co. v. Texas*, 250 Fed. 572; *Parshley v. Church*, 147 N. Y. 583, 30 L. R. A. 574, 42 N. E. 15; *Riddell v. Ventilating Co.*, 27 Mont. 44, 69 Pac. 241. (Decided under a statute which substantially reenacts the common law rule as far as the particular case is concerned.)

⁷ *Houston Oil Co. v. Texas*, 250 Fed. 572.

⁸ *Parshley v. Church*, 147 N. Y. 583, 30 L. R. A. 574, 42 N. E. 15.

⁹ *Cleveland County v. Seawell*, 3 Okla. 281, 41 Pac. 592.

¹⁰ *Riddell v. Ventilating Co.*, 27 Mont. 44, 69 Pac. 241.

¹¹ *Davis v. School District*, 24 Me. 349.

¹² *Ginther v. Shultz*, 40 O. S. 104.

¹³ *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

¹⁴ *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406, 54 N. E. 372.

¹⁵ *Detroit v. Paving Co.*, 36 Mich. 335.

the services have been rendered is either unenforceable,¹⁶ or has not been performed,¹⁷ the owner of such real property has no choice but to make use of the property upon which such work has been done, and therefore his making use of such property is not an acceptance of such services so as to create a liability to pay therefor. Some cases, however, do not seem to enforce this distinction. Thus where A placed a bathtub, washbowl and other plumbing in B's house under a contract with whose terms he did not comply, and A makes use of the house with such plumbing in it, A is liable for such plumbing in quantum meruit.¹⁸ So where A constructs a system of waterworks for a city under a contract to furnish one with a capacity of two hundred and fifty thousand gallons a day and the system actually furnished has a capacity of only fifty thousand gallons a day, and the city makes use of the system actually constructed, it is liable therefor.¹⁹ But in these last cases it may be that under the particular facts the party accepting the services may be held to have had the option to accept or not.

If A renders services in saving B's property without B's knowledge or assent, A can not recover therefor; and the fact that B retains and uses the property thus saved is not such an acceptance of A's services as to make B liable therefor.²⁰ Thus where A voluntarily repaired a broken levee on B's land without B's request, A can not recover from B for such work.²¹ In a leading case, A was about to burn over some stubble, and he notified B, whose wheat was stacked near the field to be burned over, to remove such wheat. B promised to do so, but neglected it. While the stubble was burning the wind changed, and B's wheat was threatened with destruction. A saved it, B knowing nothing of the matter until afterwards. It was held that A could not recover from B for his services.²²

§ 1517. Services rendered by finder of lost property. One who finds lost property is not entitled to a reward therefor in the

¹⁶ *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406, 54 N. E. 672.

¹⁷ *Ginther v. Shultz*, 40 O. S. 104.

¹⁸ *Gross v. Creyts*, 139 Mich. 672, 90 N. W. 689.

¹⁹ *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

²⁰ *Watson v. Ledoux*, 8 La. Ann. 68.

²¹ *New Orleans, etc., Ry. v. Turcan*, 46 La. Ann. 155, 15 So. 187.

²² *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

absence of a specific agreement for such reward.¹ On the other hand, he is said not to be liable for negligence in caring for the thing which he has found.² If the finder has expended time or money in reclaiming lost property, it has been said that he may recover compensation therefor.³ It has been held that one who recovers a runaway slave for another may recover compensation for his expenditure of time and money which contributed to the recovery of such slave.⁴ If A finds B's boat adrift and takes it ashore and makes necessary repairs, and B then replevins such boat, A may recover reasonable compensation for repairing such boat and for keeping it.⁵ The finder can not assert a lien for expenses.⁶ The correctness of the result reached in some of these cases seems very doubtful. The act of the finder in taking the lost property may prevent the owner from finding it himself; and in some of these cases the owner is obliged to pay for services which have been rendered in preserving the property which he could have performed himself if the property had not been taken into the possession of the finder. On the other hand, a modification of the common-law rules with reference to rewards for lost property and with reference to the duty of the finder to take affirmative steps to ascertain the owner, would prevent considerable economic waste and would furnish inducements to the finder to refrain from wrongful appropriation of the property thus found.

§ 1518. Services rendered to preserve animals. If A feeds and cares for an animal belonging to B, it is held in some jurisdictions that A can not recover from B in assumpsit unless the circumstances show a real understanding between A and B that B should pay therefor,¹ or, at least, unless it is shown that no one else would take care of the animal.² If B has declared that he does not own such animal and will not be responsible for its expenses, A can not recover.³ The result of such decisions is, in

¹ *Watts v. Ward*, 1 Or. 86, 62 Am. Dec. 299.

² *Mulgrave v. Ogden*, Cro. Eliz. 219.

³ *Reeder v. Anderson*, 34 Ky. (4 Dana) 193; *Chase v. Corcoran*, 106 Mass. 286. See to the same effect, obiter in *Nicholson v. Chapman*, 2 H. Bl. 234, and *Amory v. Flynn*, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316.

⁴ *Reeder v. Anderson*, 34 Ky. (4 Dana) 193.

⁵ *Chase v. Corcoran*, 106 Mass. 286.

⁶ *Nicholson v. Chapman*, 2 H. Bl. 234; *Henly v. Walsh*, 2 Salk. 686.

¹ *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

² *Mathie v. Hancock*, 78 Vt. 414, 63 Atl. 143.

³ *Earle v. Coburn*, 130 Mass. 596; *Keith v. De Bussigney*, 179 Mass. 253, 60 N. E. 614; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

many cases, to give to B the choice between letting the animal starve to death or feeding it at his own expense. In the case of the wife and children of one who is charged with their support, recovery for the value of such support can be had by one who has furnished it when the husband or father has failed to do so.⁴ Should the case of animals be controlled by the principles which apply to the preservation of inanimate property, or should the fact that animals suffer from want of food, as well as deteriorate in value, be sufficient to justify a departure from the ordinary rules of law? If provision were made generally for feeding deserted animals by some public officer at the expense of their owner, it might be proper to hold that the duty of A, on finding that B has left his animals without food, is to report that fact to the proper officer, and not to feed them at B's expense. If no such provision is made, the only humane rule is to permit A to feed them, and to allow him to recover the expense thereof from B, and this rule has been adopted in some jurisdictions,⁵ even where B has denied such liability in advance.⁶

§ 1519. Receipt of money from real owner—Voluntary payments. If A, a person of full legal capacity, pays money to B with the intent that it should become B's property, and no operative facts, such as mistake, misrepresentation, fraud, non-disclosure, duress, or undue influence exist, which might make the transaction voidable, A can not recover such payment from B. Another and more common form of stating the same principle is that a voluntary payment made with full knowledge of the facts can not be recovered.¹ The same principle applies where money is paid by

⁴ See §§ 1523 et seq.

⁵ *Great Northern Railway v. Swaffield*, L. R. 9 Exch. 132; *Todd v. Martin*, 4 Cal. (unrep.) 805, 37 Pac. 872.

⁶ *Great Northern Railway v. Swaffield*, L. R. 9 Exch. 132.

¹ *United States*. *Little v. Bowers*, 134 U. S. 547; 33 L. ed. 1016; *United States v. Edmondston*, 181 U. S. 500, 45 L. ed. 971; *Camden Iron Works v. United States*, 50 Ct. Cl. 191; *The Nicanor*, 40 Fed. 361; *The Agathe*, 71 Fed. 528.

Alabama. *Prichard v. Sweeney*, 109 Ala. 651, 19 So. 730.

Arkansas. *Crenshaw v. Collier*, 70 Ark. 5, 65 S. W. 709.

California. *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220; *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342; *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

Connecticut. *Skelly v. Bank*, 63 Conn. 83, 38 Am. St. Rep. 340, 19 L. R. A. 599, 26 Atl. 474.

Florida. *Jefferson County v. Hawkins*, 23 Fla. 223, 2 So. 362.

Illinois. *Macon County v. Foster*, 133 Ill. 496, 23 N. E. 615; *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 18 L. R. A. (N.S.) 124, 85 N. E. 200; *Burlock v. Cook*, 20 Ill. App. 154.

X to B for A, and in A's presence.² The fact that a formal protest is made when the payment is made does not prevent it from being voluntary.³ If A has voluntarily paid an illegal tax to a county and subsequently the county has voluntarily repaid the amount of such tax to A, the county can not recover from A the amount

Indiana. Connecticut, etc., Ins. Co. v. Stewart, 95 Ind. 588.

Iowa. Bailey v. Paullina, 69 Ia. 463, 29 N. W. 418; Manning v. Poling, 114 Ia. 20, 83 N. W. 895, 86 N. W. 30; Adair County v. Johnston, 160 Ia. 683, 45 L. R. A. (N.S.) 753, 142 N. W. 210.

Kansas. Cumming Harvester Co. v. Sigerson, 63 Kan. 340, 65 Pac. 639.

Kentucky. Tyler v. Smith, 57 Ky. (18 B. Mon.) 793; Williams v. Sheldbourne, 102 Ky. 579, 44 S. W. 110.

Louisiana. New Orleans, etc., Co. v. Improvement Co., 109 La. 13, 94 Am. St. Rep. 395, 33 So. 51.

Massachusetts. Regan v. Baldwin, 126 Mass. 485, 30 Am. Rep. 689; Massachusetts Mutual Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202.

Michigan. Tompkins v. Hollister, 60 Mich. 485, 34 N. W. 551; Francis v. Hurd, 113 Mich. 250, 71 N. W. 582; Warren v. Federal Life Insurance Co., 198 Mich. 342, 164 N. W. 449.

Minnesota. Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

Missouri. Morley v. Carlson, 27 Mo. App. 5.

Nebraska. Nebraska, etc., Ins. Co. v. Segard, 29 Neb. 354, 45 N. W. 681.

New Jersey. Koewing v. West Orange, 89 N. J. L. 539, 99 Atl. 203.

New York. Flynn v. Hurd, 118 N. Y. 19, 22 N. E. 1109; Redmond v. New York, 125 N. Y. 632, 26 N. E. 727.

North Carolina. Howard v. Life Association, 125 N. Car. 49, 45 L. R. A. 853, 34 S. E. 199; Pardue v. Abscher, 174 N. Car. 676, 94 S. E. 414.

North Dakota. Rising v. Tollerud, 34 N. D. 88, 157 N. W. 696; Jacobson v. Mohall Telephone Co., 34 N. D. 213,

L. R. A. 1916F, 532, 157 N. W. 1033.

Ohio. Brumbaugh v. Chapman, 45 O. S. 368, 13 N. E. 584.

Oregon. Gabel v. Armstrong, 88 Or. 84, 171 Pac. 190.

Pennsylvania. Oil Well Supply Co. v. Bank, 131 Pa. St. 100, 18 Atl. 935.

Tennessee. Hubbard v. Martin, 14 Tenn. (8 Yerg.) 498.

Texas. Ladd v. Mfg. Co., 53 Tex. 172.

Vermont. Gibson v. Bingham, 43 Vt. 410, 5 Am. Rep. 289.

West Virginia. Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219.

Wisconsin. Gage v. Allen, 89 Wis. 98, 61 N. W. 361. "The ultimate fact to be reached in this case is the state of mind under which the payments were made. If they were made voluntarily, with a full knowledge of all the facts and without fraud or imposition, they are beyond reclamation. If, on the other hand, the money was extorted from the appellee * * * or if fraud or imposition was practiced upon him, he is entitled to recover his money back for the plain reason that the payment was involuntary." Ligonier (Town of) v. Ackerman, 46 Ind. 552, 558, 15 Am. Rep. 323 [quoted, Hollingsworth v. Stone, 90 Ind. 244].

²Rogers v. Garland, 8 Mackey (D. C.) 24.

³United States. Little v. Bowers, 134 U. S. 547, 34 L. ed. 1016.

California. McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

Indiana. Patterson v. Cox, 25 Ind. 261.

Iowa. Anderson v. Cameron, 122 Ia. 183, 97 N. W. 1085.

of such payment.⁴ A mortgagee who has redeemed property which has been sold at an auction sale to satisfy a prior judgment, can not recover the amount thus paid in if the title fails because of facts which such mortgagee knew when he redeemed the property,⁵ even if, by reason of such failure of title, the property passes to the purchaser at such judicial sale to whom the mortgagee has paid such redemption money.⁶ If A, with full knowledge of all the facts, pays excessive assessments to an insurance company, he can not recover such assessments.⁷ An insurance company which pays the amount of insurance after loss with full knowledge of all the material facts, can not recover the money thus paid, as on the ground that the loss was on property not covered by the policy;⁸ nor can they maintain an action against a vessel on which the cargo insured was carried, for damages, on the theory that the loss was due to the negligence of those in charge, after paying the amount apportioned as the insurance-company's share due for salvage.⁹ A was a stockholder in a corporation which was about to increase its capital stock, and had a legal right to subscribe for a certain amount of such new stock at par. The corporation refused to receive his subscription unless he paid a bonus for the right to subscribe. It was held that he could not recover the amount thus paid in, since he had an adequate remedy.¹⁰ He could have tendered the true value of the stock, and on refusal of the corporation to deliver the stock to him, he could maintain the action against the corporation for the difference between the par value and the market value of such stock. Where the statute provides for arbitration to estimate the value of improvements made

Kansas. (Commissioners of) Wabaunsee County v. Walker, 8 Kan. 431.

Michigan. Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512.

Nebraska. McBride v. Lathrop, 24 Neb. 93, 38 N. W. 32.

North Dakota. Wessel v. Mortgage Co., 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922.

Ohio. Marietta v. Slocumb, 6 O. S. 471.

Pennsylvania. De La Cuesta v. Ins. Co., 136 Pa. St. 62, 658, 9 L. R. A. 631, 20 Atl. 505.

⁴ Adair County v. Johnston, 160 Ia.

683, 45 L. R. A. (N.S.) 753, 142 N. W. 210.

⁵ Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 48 L. R. A. (N.S.) 481, 134 Pac. 285.

⁶ Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 48 L. R. A. (N.S.) 481, 134 Pac. 285.

⁷ Howard v. Ins. Association, 125 N. Car. 49, 45 L. R. A. 853, 34 S. E. 199.

⁸ Nebraska, etc., Ins. Co. v. Segard, 29 Neb. 354, 45 N. W. 681.

⁹ The Nicanor, 40 Fed. 341.

¹⁰ De La Cuesta v. Ins. Co., 136 Pa. St. 62, 658, 9 L. R. A. 631, 20 Atl. 505.

upon realty, to be paid for by one who is redeeming the land from an execution sale, the voluntary payment of an excessive amount for improvements by such redemptioner without arbitration, can not be recovered.¹¹ If a wife pays a debt of her husband's after his death out of money which she receives on an insurance policy on his life, payable to her, she can not recover such payment.¹² An inmate of a soldiers' and sailors' home, who agrees to pay over a part of his pension to such home, and does pay it over, can not subsequently recover, though the home could not have compelled such payment.¹³ A owes B a note on which the interest is payable in advance, and A pays such interest in advance; and subsequently A voluntarily pays the note before maturity. A can not recover the proportionate part of such interest paid by him.¹⁴ So where B has executed a mortgage which contains a provision that the mortgagor shall pay the tax on the mortgage debt, and under the law he is thereby relieved from liability to pay interest upon such mortgage debt, he can not recover the amount of interest from the mortgagee after paying it voluntarily.¹⁵ If taxes unlawfully assessed are paid with full knowledge of the facts, and without duress, or legal compulsion, the money thus paid can not be recovered,¹⁶ unless there is a statutory provision therefor.¹⁷ If a public officer voluntarily pays over to the public treasurer fees which he has a legal right to retain for his personal benefit, he can not recover such payments.¹⁸ If A is the agent of B to sell stock, and A as such agent makes a sale to X, and takes the check of X in payment, and sends B his personal check, A can not recover from B, although the check which A receives from X proves to be worthless.¹⁹

§ 1520. Money paid for use of another—Voluntary payment.
Money paid voluntarily to the use of another can not be recovered

¹¹ *Pritchard v. Sweeney*, 109 Ala. 651, 19 So. 730.

¹² *Tompkins v. Hollister*, 60 Mich. 485, 34 N. W. 551.

¹³ *Bryson v. Home, etc.*, 168 Pa. St. 352, 31 Atl. 1008; *Brooks v. Hastings*, 192 Pa. St. 378, 43 Atl. 1075.

¹⁴ *Skelly v. Bank*, 63 Conn. 83, 38 Am. St. Rep. 340, 19 L. R. A. 599, 26 Atl. 474.

¹⁵ *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342.

¹⁶ *Durham v. Board*, 95 Ind. 182; *Indianapolis v. Vajen*, 111 Ind. 240, 12 N. E. 311.

¹⁷ *Donch v. Lake County*, 4 Ind. App. 374, 30 N. E. 204.

¹⁸ *Selby v. United States*, 47 Fed. 800.

¹⁹ *Pepperday v. Bank*, 183 Pa. St. 519, 63 Am. St. Rep. 769, 39 L. R. A. 529, 38 Atl. 1030.

unless there is a promise, either express or implied, to repay it.¹ If A voluntarily pays B's debt to C, with full knowledge of the facts, under no compulsion, and without B's previous request or subsequent ratification, A can not recover the money thus paid from B as money paid to B's use.² If an agent pays a note of his principals out of his own money, without their authority, he can not collect from one of the makers who does not assent to such payment.³ If without compulsion or to protect his own interests A has paid taxes upon B's property, A can not recover such payment from B.⁴ The fact that B promised to repay to A the amount of taxes thus paid by A upon learning of the fact of such payment, does not impose any liability upon B, since no consideration

¹ **England.** *Jenkins v. Tucker*, 1 H. Bl. 90.

Alabama. *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Murphree Ins. Agency v. Pinnington* (Ala.), 78 So. 854.

Kentucky. *Noble v. Williams*, 150 Ky. 439, 42 L. R. A. (N.S.) 1177, 150 S. W. 507; *Maryland Casualty Co. v. Givens*, 177 Ky. 131, 197 S. W. 497.

Massachusetts. *Massachusetts Mutual Life Ins. Co., v. Green*, 185 Mass. 306, 70 N. E. 202.

Minnesota. *Helm v. Smith Fee Co.*, 76 Minn. 328, 79 N. W. 313.

New Hampshire. *Contocook Fire Precinct v. Hopkinton*, 71 N. H. 574, 53 Atl. 797.

New York. *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109; *Pittsburgh-Westmoreland Coal Co. v. Kerr*, 220 N. Y. 137, 115 N. E. 465.

Ohio. *People's, etc., Bank v. Craig*, 63 O. S. 374, 52 L. R. A. 872, 59 N. E. 102.

Vermont. *Lamonda v. Parizo*, 90 Vt. 381, 98 Atl. 980.

West Virginia. *Crumlish v. Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.

Wisconsin. *Sanderson v. Cream City Brick Co.*, 110 Wis. 618, 86 N. W. 169.

² **Alabama.** *Murphree Ins. Agency v. Pinnington* (Ala.), 78 So. 854.

Arkansas. *Donaghey v. Williams*, 123 Ark. 411, 185 S. W. 778.

Kentucky. *Noble v. Williams*, 150 Ky. 439, 42 L. R. A. (N.S.) 1177, 150 S. W. 507; *Maryland Casualty Co. v. Givens*, 177 Ky. 131, 197 S. W. 497.

Minnesota. *Kosanke v. Kosanke*, 137 Minn. 115, 162 N. W. 1060.

New York. *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109; *Pittsburgh-Westmoreland Coal Co. v. Kerr*, 220 N. Y. 137, 115 N. E. 465.

Ohio. *People's and Drivers' Bank v. Craig*, 63 O. S. 374, 52 L. R. A. 872, 59 N. E. 102.

South Carolina. *Kershaw County v. Camden*, 33 S. Car. 140, 11 S. E. 635.

Vermont. *Lamonda v. Parizo*, 90 Vt. 381, 98 Atl. 980.

West Virginia. *Crumlish v. Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456. The right of a married woman to recover payments for family necessities from her husband's estate is said to depend on whether she made such payments as a contribution or whether she made it expecting her husband to repay her. *Kosanke v. Kosanke*, 137 Minn. 115, 162 N. W. 1060.

³ *People's, etc., Bank v. Craig*, 63 O. S. 374, 52 L. R. A. 872, 59 N. E. 102.

⁴ *Massachusetts Mutual Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202.

for such promise existed.⁵ If A through a mistake of fact pays taxes upon B's land, A may recover from B the amount of the taxes thus paid.⁶ A lessee who has paid taxes on the leased property which the lessor should have paid, but has not done so at lessor's request nor because lessor has refused to pay such taxes, can not recover for such taxes from lessor where he has for years paid the full amount of the rent without demanding repayment for such taxes, or deducting the amount thus paid from the rent.⁷ So a remainderman who has the property assessed to him instead of to the life tenant and has paid taxes thereon with the knowledge of the life tenant, but not at his request, can not recover from him the amounts thus paid.⁸ One having no interest in realty which could be affected by a tax is a volunteer as to taxes paid by him and can not recover.⁹

If taxes on B's land are paid by A under mistake of fact, A may recover from B. Thus where B had acquired title by adverse possession, and A, the original owner, not knowing of such adverse possession, continues to pay taxes on such realty, B may recover from A the amount thus paid.¹⁰ If A who is in possession of realty pays taxes thereon believing that he is the owner and such realty is subsequently adjudged to be B's, A may recover from B the amount of taxes thus paid.¹¹ A grantee under a forged deed who has paid taxes upon the realty described therein, believing that he is the true owner, may recover the amount of such taxes from the true owner, at least if he was not negligent in the transaction.¹² So if A is legally liable for taxes which as between B and A it is B's duty to pay, A may recover from B the amounts so paid.¹³

A teacher who has paid the rent of the school building and who has furnished supplies for the school without the request of

⁵ Massachusetts Mutual Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202.

⁶ Goodnow v. Stryker, 61 Ia. 261, 16 N. W. 486 [no federal question involved, Wells v. Goodnow's Administrator, 150 U. S. 84, 37 L. ed. 1007]; Merrill v. Tobin, 82 Ia. 529, 48 N. W. 1044; Govern v. Russ, 125 Ia. 188, 100 N. W. 325.

⁷ Western, etc., Ry v. State (Ga.), 14 L. R. A. 438.

⁸ Huddleson v. Washington, 136 Cal. 514, 69 Pac. 146.

⁹ Rushton v. Burke, 6 Dak. 478, 43 N. W. 815.

¹⁰ Merrill v. Tobin, 82 Ia. 529, 48 N. W. 1044.

¹¹ Goodnow v. Stryker, 61 Ia. 261, 16 N. W. 486 [no federal question involved, Wells v. Goodnow, 150 U. S. 84, 37 L. ed. 1007].

¹² Govern v. Russ, 125 Ia. 188, 100 N. W. 325.

¹³ See § 1542.

the board of education in order to prevent the school from being closed, can not recover from the board of education the amount thus paid.¹⁴

If the claim which A pays to C is not one which could have been enforced against B legally, it is still clearer that A has no right to recover from B in the absence of previous request or subsequent ratification. Thus B had ordered cabbages to be shipped to A by C, a common carrier, in a ventilated fruit car not to be iced. The car was not iced when forwarded from the place of shipment; but at some time in the transit it was iced, probably by C's agents, without authority from B. A paid to C the charges for icing the car. It was held that A could not recover from B for such payment.¹⁵ B had agreed to deliver four hundred cords of wood to A, to be transported by A to Milwaukee. When B came to deliver such wood to be loaded, he found that about sixty cords of wood, of such grade that it did not comply with the terms of the contract, was piled in front of the wood which he intended to ship under his contract. In order to save the cost of handling this sixty-cord load twice, B agreed with C, the captain of the vessel, to transport this load of wood to B's dock at Milwaukee. C, however, instead of doing this, delivered this sixty-cord load of other wood to A at A's yard. A refused to accept this load of wood under the contract, but paid to C the freight for such transportation. It was held that A could not recover such amount from B.¹⁶

If A voluntarily pays B's debt to C, and B refuses to reimburse A, A can not recover such payment from C.¹⁷ Thus, where a married woman voluntarily delivers notes which belong to her separate estate in payment of her husband's debt, she can not subsequently recover the notes or the proceeds thereof from the person to whom they are delivered in payment.¹⁸

The rule that one who voluntarily pays the debt of another, can not recover from such other, has no application where, instead of paying the debt, the person who advances the money takes the assignment of the claim. A trust company, B, had arranged with

¹⁴ Noble v. Williams, 150 Ky. 439, 42 L. R. A. (N.S.) 1177, 150 S. W. 507.

¹⁵ Earl v. Commission Co., 70 Ark. 61, 66 S. W. 148.

¹⁶ Sanderson v. Brick Co., 110 Wis. 618, 86 N. W. 169.

¹⁷ Boyer v. Richardson, 52 Neb. 156, 71 N. W. 981.

¹⁸ Gillespie v. Simpson (Ark.), 18 S. W. 1050.

a packing company, C, that C should keep a certain deposit with B, and that B should pay for tickets which were issued for the payment of live stock bought by C. C's deposit with B was not to be used in payment of such advances, but B was to forward to C a statement of the money thus advanced, and C was to remit the amount thereof to B. Subsequently, the trust company asked A, a bank, to advance money to pay these tickets. A did so, taking the assignment of the tickets. B subsequently became insolvent. It was held, as between A and C, that A had a right to recover from C the amount advanced by A upon such tickets which were assigned over to A.¹⁹

Money which is paid for the use of another without previous request and not under circumstances which would entitle the party making such payment to recover from the person for whose benefit it was paid without an express promise, may be recovered if such payment was ratified after it was made.²⁰

Equity denies the right of subrogation to one who has paid another's debt, not under compulsion and without prior request or subsequent ratification.²¹ One who has paid the promissory note of another by mistake can not be subrogated to the rights of the payee;²² and he can not secure title thereto after such payment by having the payee endorse such note to him.²³

B. PAYMENTS, SERVICES, ETC.—SPECIAL CASES OF HUMANITY, DECENCY, ETC.

§ 1521. Services rendered in emergency to preserve human life. A case in which considerations of humanity control, and enable one who has rendered services without request to recover therefor, is found where medical or surgical attention is rendered to one who is injured or taken ill so that he is unconscious and unable either to request or forbid the rendition of such services. In cases of this sort, the courts are confronted with the alternative of requiring the injured person to pay reasonable compensation for services rendered to him, or of saying that all who render services do so as a matter of charity or in reliance upon the gen-

¹⁹ *Sioux National Bank v. Packing Co.*, 63 Fed. 805.

²⁰ *Donaghey v. Williams*, 123 Ark. 411, 185 S. W. 778.

²¹ *Bouton v. Cameron*, 205 Ill. 50, 68 N. E. 800; *Matteson v. Dent*, 112 Ia. 551, 84 N. W. 710; *Good v. Golden*, 73

Miss. 91, 55 Am. St. Rep. 486, 19 So. 100; *Charnock v. Jones*, 22 S. D. 132,

16 L. R. A. (N.S.) 233, 115 N. W. 1072.

²² *Charnock v. Jones*, 22 S. D. 132, 16 L. R. A. (N.S.) 233, 115 N. W. 1072.

²³ *Charnock v. Jones*, 22 S. D. 132, 16 L. R. A. (N.S.) 233, 115 N. W. 1072.

erosity of the person for whom such services are rendered. While there is little authority upon this question, from the nature of the case it is held that the interest of the person who is injured requires the law to impose a liability upon him for reasonable compensation for such medical and surgical services.¹ The fact that the surgical operation which is necessary under the circumstances does not result in saving his life, does not prevent the surgeon from recovering reasonable compensation.² Like considerations apply where A is chargeable with B's support and B is injured or taken ill under circumstances which make it apparently necessary to furnish medical or surgical attention at once without notifying A or obtaining his consent. Under such circumstances it is held that if X furnishes medical or surgical services to B he may recover from A.³ Where A refused to support his slave, B, and X supported such slave, it was held that X could not recover—but on the theory that it was X's duty to give notice to the public authorities who were charged with the support of paupers.⁴ The principles which permit recovery in cases of this sort seem to have no application to services which are rendered for the preservation of property,⁵ even if such services prevent suffering of domestic animals.⁶

§ 1522. Funeral expenses. Certain duties imposed by law are of such character as to be easily evaded contrary to the policy of the law, if the general principles forbidding recovery in cases of voluntary payments, services or furnishing goods are applied. These cases form an exception to these general principles. The common feature of these exceptional cases is that from their nature strong reasons of public policy demand prompt action, and to secure this action in cases of the neglect or omission of the person primarily liable, any other person taking such action may recover therefor from the person or fund primarily liable. In cases of the latter class, the person to whom support is furnished often would perish or hold his existence only on the precarious tenure of charity if obliged to await the result of a direct action

¹ *Cotnam v. Wisdom*, 83 Ark. 601, 119 Am. St. Rep. 157, 12 L. R. A. (N.S.) 1090, 13 Ann. Cas. 25, 104 S. W. 164.

² *Cotnam v. Wisdom*, 83 Ark. 601, 119 Am. St. Rep. 157, 12 L. R. A. (N.S.) 1090, 13 Ann. Cas. 25, 104 S. W. 164.

³ *Tryon v. Dornfeld (Benson Hospital Association v. Dornfeld)*, 130 Minn. 198, L. R. A. 1915E, 844, 153 N. W. 307.

⁴ *Force v. Haines*, 17 N. J. L. 385.

⁵ See §§ 1516 et seq.

⁶ See § 1518.

to compel the person legally liable for such support to perform his legal duty even if an appropriate action existed in every case. While the common law was strongly inclined to treat one who had made payments on behalf of another as an intermeddler and to deny him the right to recover from the person on whose behalf he made such payments unless he could show that he was authorized by such person, or that he had been compelled in some way to make such payments in order to protect his own interests, the considerations of humanity and decency in cases of this sort overcome this strong tendency of the common law and permit recovery. A right of action in implied assumpsit is given to the person furnishing such support. Since the common-law remedy in such cases was an action in general assumpsit, these rights of action are classed with implied contract, though there is usually no genuine agreement. Funeral expenses form a prominent class of cases illustrating this general principle. In the absence of an executor or administrator, or his omission to act, a third person who pays for funeral expenses or renders them because of the necessities of the particular case and not as an officious intermeddler, may recover from the decedent's estate a reasonable compensation therefor.¹ Thus the widow may recover the amount expended by her for grave clothes and undertaker's expenses for the burial of her husband.² So a son of the deceased, who not knowing that the latter had any property, bought a cemetery lot which was larger than necessary, but there was nothing to show that a smaller lot could have been bought, may be reimbursed out of his parent's estate.³ So one who furnishes a reasonable amount of flowers at decedent's funeral, at the request of the decedent's sister-in-law, who had been acting as his housekeeper, may recover therefor out of decedent's estate.⁴ Funeral expenses paid by one before ap-

¹ England. *Jenkins v. Tucker*, 1 H. Bl. 90.

Iowa. *Foley v. Brocksmitt*, 119 Ia. 457, 97 Am. St. Rep. 324, 60 L. R. A. 571, 93 N. W. 344.

Maine. *Fogg v. Holbrook*, 88 Me. 169, 33 L. R. A. 660, 33 Atl. 792.

Massachusetts. *Marple v. Morse*, 180 Mass. 508, 62 N. E. 966.

Michigan. *Booth v. Radford*, 57 Mich. 357, 24 N. W. 102.

New Jersey. *Sullivan v. Horner*, 41 N. J. Eq. 299, 7 Atl. 411.

North Carolina. *Ray v. Honeycutt*, 119 N. Car. 510, 26 S. E. 127.

Ohio. *McClellan v. Filson*, 44 O. S. 184, 5 N. E. 861.

Rhode Island. *O'Reilly v. Kelly*, 22 R. I. 151, 50 L. R. A. 483, 46 Atl. 681.

² *France's Estate*, 75 Pa. St. 220.

³ *Marple v. Morse*, 180 Mass. 508, 62 N. E. 966.

⁴ *O'Reilly v. Kelly*, 22 R. I. 151, 50 L. R. A. 483, 46 Atl. 681.

pointment of an administrator should be credited upon his debt due to decedent, and may be set off against such debt in a subsequent suit by the administrator.⁵ So if A, an executor of B's will, pays the funeral expenses of C, a legatee under C's will, who dies in poverty, A may credit such payment on C's legacy.⁶ A different question arises where a husband pays his wife's funeral expenses and seeks reimbursement out of her estate. At common law the husband was liable for these expenses, and in paying them he was discharging his own legal obligation. Accordingly, he could not be reimbursed out of his wife's estate;⁷ and if her executor has paid such expenses he may deduct them from the husband's share of his wife's estate,⁸ as money paid out to the husband's use.⁹

In some states statutes have made funeral expenses a debt of the decedent's estate, and have provided for their payment. Under such statutes some courts have held that a husband who pays the funeral expenses of his wife is entitled to reimbursement out of her estate.⁹ Without deciding this question, it has been held that a son who pays his mother's funeral expenses and who is afterwards appointed her executor, may credit himself with such expenses in his account as against the objection of his sister that such expenses should have been paid by the husband of the decedent.¹⁰ In other jurisdictions it has been held that the statute which made funeral expenses a debt of the estate was not intended to modify the common-law duty of the husband to pay the funeral expenses of his wife out of his own estate; and accordingly if he pays her funeral expenses out of his own estate, he can not be reimbursed out of her estate.¹¹

The estate of the deceased wife is liable by such statute even if the ultimate liability rests upon her husband.¹² If the corpse were

⁵ Phillips v. Phillips, 87 Me. 324, 32 Atl. 963.

⁶ Wilson v. Staats, 33 N. J. Eq. 524.

⁷ Matter of Weringer, 100 Cal. 345, 34 Pac. 825; Staple's Appeal, 52 Conn. 425; Waesch's Estate, 166 Pa. St. 204, 30 Atl. 1124.

⁸ Brand's Executor v. Brand, 109 Ky. 721, 60 S. W. 704.

⁹ Skillman v. Wilson, 146 Ia. 601, 140 Am. St. Rep. 295, 125 N. W. 343; Constantinides v. Walsh, 146 Mass. 281, 4 Am. St. Rep. 311, 15 N. E. 631; Morrissey v. Mulhern, 168 Mass. 412, 47 N. E.

407; Moulton v. Smith, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891.

¹⁰ McClelland v. Filson, 44 O. S. 184, 58 Am. Rep. 814, 5 N. E. 861.

¹¹ Ketterer v. Nelson, 146 Ky. 7, 37 L. R. A. (N.S.) 754, 141 S. W. 409; Phillips v. Tolerton, 9 O. N. P. (N.S.) 565, 20 O. D. (N.P.) 249 [affirmed by circuit court in memorandum opinion, which was affirmed by supreme court without report, Phillips v. Tolerton, 82 O. S. 403, 92 N. E. 1121].

¹² Gould v. Moulahan, 53 N. J. Eq. 341, 33 Atl. 483.

to remain unburied until the person primarily liable for funeral expenses were compelled to do his duty, it would be an outrage to public decency even if an appropriate action for that purpose existed. Hence a right of action in assumpsit is given to the person who buries the corpse or pays for the funeral expenses. This right of action is accordingly limited to cases where the person primarily liable either omits to act voluntarily or is so situated that he has no opportunity to act. One who intermeddles officiously can not recover. Thus where a stranger took possession of money of the decedent and out of that fund paid the funeral expenses, he can not set off such expenses as a credit in an action against him by the executor of the decedent.¹³

§ 1523. Liability of husband for wife's necessities. Another class of cases illustrating this general principle exists where one who furnishes necessities to a wife whose husband refuses or omits to supply them may recover from him.¹ While the liability of the husband for his wife's necessities is often explained on the theory of the wife's implied agency as if it were a genuine implied contract, it is wider than that. A husband who does not furnish his wife with necessities in consequence of which she becomes a public charge, is liable to the public corporation which furnishes her support as a pauper.² If the husband does not supply his wife with necessities, he is liable even if the circumstances negative his assent, as where he deserts her,³ or drives her away,⁴ or if she has become insane and he fails to support her.⁵

¹³ *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628.

¹ *California*. *St. Vincent's Hospital v. Davis*, 129 Cal. 20, 61 Pac. 477.

Connecticut. *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17.

Idaho. *Edminston v. Smith*, 13 Ida. 645, 121 Am. St. Rep. 294, 14 L. R. A. (N.S.) 871, 92 Pac. 842.

Indiana. *Rariden v. Mason*, 30 Ind. App. 425, 65 N. E. 554.

Maine. *Thorpe v. Shapleigh*, 67 Me. 235; *Beaudette v. Martin*, 113 Me. 310, 93 Atl. 758.

Massachusetts. *Eames v. Sweetser*, 101 Mass. 78.

Missouri. *Dorrance v. Dorrance*, 257 Mo. 317, 165 S. W. 783.

New York. *Frank v. Carter*, 219 N.

Y. 35, L. R. A. 1917B, 1288, 113 N. E. 549.

Ohio. *Howard v. Whetstone Township*, 10 Ohio 365; *Trustees of Springfield v. Demott*, 13 Ohio 104.

West Virginia. *Martin v. Beuter*, 79 W. Va. 604, 91 S. E. 452.

² *Howard v. Whetstone Township*, 10 Ohio 365; *Trustees of Springfield v. Demott*, 13 Ohio 104.

³ *Prescott v. Webster*, 175 Mass. 316, 56 N. E. 577; *East v. King*, 77 Miss. 738, 27 So. 608; *Trustees of Springfield v. Demott*, 13 Ohio 104.

⁴ *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Howard v. Whetstone Township*, 10 Ohio 365.

⁵ *Martin v. Beuter*, 79 W. Va. 604, 91 S. E. 452.

The fact that necessities are furnished to the wife against the husband's will does not affect his liability therefor.⁶ He is liable even if she is incapable of acting as agent, as where she is insane.⁷ The husband is liable where the circumstances show that the party furnishing the necessities had no intention of contracting with the husband, as where he does not know that the woman is married, as long as he does not furnish necessities on the exclusive credit of the woman.⁸ The liability of the husband is therefore quasi-contractual; and while in many cases there is no doubt a genuine understanding between the husband and the person who furnishes the necessities for the wife, that the husband shall pay for them, his liability exists in the absence of any such mutual understanding.

The fact that a married woman has made an express promise to pay for necessities which are furnished to her, does not relieve the husband from liability;⁹ and under such facts both are liable if a married woman has capacity to bind herself by an express contract.¹⁰ The fact that the married woman has property of her own does not defeat her husband's liability for her necessities as long as such necessities are not furnished on her credit alone.¹¹ The husband is not liable unless he has refused to furnish his wife with necessities,¹² and to make provision therefor. A husband who has furnished his wife with an adequate allowance in money, is not liable for goods which she has bought upon his credit, even if such goods would have been necessities for which he would have been liable if he had not furnished her with money.¹³

Even if the husband and wife have separated, he is not liable to third persons for her support as long as he has made a reasonable provision therefor.¹⁴ So if a husband is willing to support

⁶ Raynes v. Bennett, 114 Mass. 424; Sodowsky v. Sodowsky, 51 Okla. 689, 152 Pac. 390.

⁷ St. Vincent's Institution v. Davis, 129 Cal. 20, 61 Pac. 477.

⁸ St. Vincent's Institution v. Davis, 129 Cal. 20, 61 Pac. 477.

⁹ Edminston v. Smith, 13 Ida. 645, 121 Am. St. Rep. 294, 14 L. R. A. (N.S.) 871, 92 Pac. 842.

¹⁰ Edminston v. Smith, 13 Ida. 645, 121 Am. St. Rep. 294, 14 L. R. A. (N.S.) 871, 92 Pac. 842.

¹¹ Ott v. Hentall, 70 N. H. 231, 51 L. R. A. 226, 47 Atl. 80.

¹² Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77; S. E. Olson Co. v. Youngquist, 76 Minn. 26, 78 N. W. 870; McCreery v. Martin, 84 N. J. L. 626, 47 L. R. A. (N.S.) 279, Ann. Cas. 1915A, 1, 87 Atl. 433.

¹³ McCreery v. Martin, 84 N. J. L. 626, 47 L. R. A. (N.S.) 279, Ann. Cas. 1915A, 1, 87 Atl. 433.

¹⁴ Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Harshaw

an insane wife, and demands her custody in good faith, the authorities of an asylum who refuse to surrender her can not thereafter recover from him.¹⁵ However, if the husband refuses to allow his wife to live with him, she is not bound to receive support at a place indicated by him, but may select any reasonable place where the expense of her support is not disproportionate to her husband's income and he is bound to support her there.¹⁶ A common-law husband will not be liable for his wife's necessities if she left him without his aggression or if he excluded her from his dwelling because of her aggression.¹⁷ The opposite result, however, has been reached under a statute which provides that the wife can not be excluded from the homestead. Under such a statute it has been held that a husband who, even on justifiable ground, excludes his wife from the homestead, is liable for her necessities.¹⁸ Many states have similar statutes with reference to the right of the husband or wife to dwell in the homestead even if owned by the other; and if this decision is followed the general common-law rule will be abrogated.

The common-law rules as to the right of persons who have furnished a wife with necessities to recover from the husband, do not apply in proceedings for divorce and alimony; and in many cases an allowance may be given to a wife for alimony under circumstances which would preclude third persons who had furnished her with necessities from recovering the value thereof from the husband.

The husband is not liable unless the goods furnished are necessities.¹⁹ What are necessities is in many cases a relative term, depending on the social standing, financial condition and style of

v. Merryman, 18 Mo. 106; Cory v. Cook, 24 R. I. 421, 53 Atl. 315; Hunt v. Hayes, 64 Vt. 89, 33 Am. St. Rep. 917, 15 L. R. A. 661, 23 Atl. 920.

¹⁵ St. Vincent's Institution v. Davis, 129 Cal. 17, 61 Pac. 476.

¹⁶ Kirk v. Chinstrand, 85 Minn. 108, 56 L. R. A. 333, 88 N. W. 422.

¹⁷ Colorado. Denver Dry Goods Co. v. Jester, 60 Colo. 290, L. R. A. 1917A, 957, 152 Pac. 903.

Maine. Peaks v. Mayhew, 94 Me. 571, 48 Atl. 172.

Michigan. Middlebrook v. Slocum, 152 Mich. 286, 116 N. W. 422.

Nebraska. Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. 881.

Wisconsin. Morgenroth v. Spencer, 124 Wis. 564, 102 N. W. 1086.

¹⁸ Baker v. Oughton, 130 Ia. 35, 106 N. W. 272.

¹⁹ S. E. Olson Co. v. Youngquist, 72 Minn. 432, 75 N. W. 727 [affirmed, 76 Minn. 26, 78 N. W. 870]; Bush & Lane Piano Co. v. Woodard (Wash.), 175 Pac. 329; Shuman v. Steinel, 129 Wis. 422, 116 Am. St. Rep. 961, 7 L. R. A. (N.S.) 1048, 109 N. W. 74.

living of the parties. It undoubtedly includes board, lodging and necessary clothing,²⁰ medical attendance of a regular physician,²¹ services of a dentist,²² and in proper cases, services of an attorney where necessary for her protection, especially where her husband prefers unfounded charges against her.²³ Legal services in a divorce suit, however, are in many jurisdictions fixed by the court before which the divorce is pending and are provided for by an allowance of alimony.²⁴ Reasonable funeral services for burying the body of a married woman are necessities chargeable against her husband.²⁵ A set of books is not a necessary for which the husband may be held liable unless he authorized his wife to purchase the books or ratified the sale subsequently.²⁶ A piano is not a necessary,²⁷ especially if it is not received by the family or used by them.²⁸

Money loaned to a married woman and by her expended for necessities is not treated as a necessary at common law and her husband is not liable therefor.²⁹ But in equity one who has loaned money to a married woman may recover from her husband so much thereof as has been actually expended by her for necessities at a reasonable price, if the circumstances are such that he could have recovered for the necessities had he furnished them directly to her.³⁰ But this rule has been held not to apply where the husband has by reason of sickness been unable to furnish necessities to his wife;³¹ and has been denied altogether.³² The principle here involved is analogous to that controlling in loans to an infant.³³

²⁰ *Oltman v. Yost*, 62 Minn. 261, 64 N. W. 564.

²¹ *Bevier v. Galloway*, 71 Ill. 517; *Tebbetts v. Hapgood*, 34 N. H. 420.

²² *Freeman v. Holmes*, 62 Ga. 556.

²³ *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

²⁴ *Williams v. Monroe*, 57 Ky. (18 B. Mon.) 514; *Wolcott v. Patterson*, 100 Mich. 227, 43 Am. St. Rep. 456, 24 L. R. A. 629, 58 N. W. 1006; *Wescott v. Hinckley*, 56 N. J. L. 343, 29 Atl. 154.

²⁵ *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168, 2 N. W. 917; *Gleason v. Warner*, 78 Minn. 405, 81 N. W. 206.

²⁶ *Shuman v. Steinel*, 129 Wis. 422, 116 Am. St. Rep. 961, 7 L. R. A. (N.S.) 1048, 109 N. W. 74.

²⁷ *Bush & Lane Piano Co. v. Woodard* (Wash.), 175 Pac. 329.

²⁸ *Jones-Rosquist-Killen Co. v. Nelson*, 98 Wash. 539, 167 Pac. 1130.

²⁹ *Knox v. Bushnell*, 3 C. B. N. S. 334; *Zeigler v. David*, 23 Ala. 127; *Marshall v. Perkins*, 20 R. I. 34, 78 Am. St. Rep. 841, 37 Atl. 301.

³⁰ *Harris v. Lee*, 1 P. Wms. 482; *Kenny v. Farris*, 47 Conn. 510, 36 Am. Rep. 86.

³¹ *Leuppie v. Osborn*, 52 N. J. Eq. 637, 29 Atl. 433.

³² *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447, 21 L. R. A. 673, 34 N. E. 692.

³³ See § 1592.

Where alimony has been allowed and paid a husband is not liable to persons who thereafter furnish his wife with necessities.³⁴

As long as they are living together as husband and wife, a man is liable for the necessities of a woman whom he holds out to the world as his wife.³⁵ Differing from the liability of a husband for necessities furnished to his wife, the liability of the man under the circumstances ceases with his separation from his reputed wife.³⁶

§ 1524. Liability of parent for necessities of minor child. Another class of cases in which a volunteer may recover for reasons of humanity exists where one who supplies necessities to a minor child whose parent refuses or omits to supply them, is permitted to recover from such parent.¹

If the child is living with his parent, such parent has a wide discretion as to the style of living to be adopted by his family. He is, therefore, liable only in a very clear case of omission to supply necessities, unless he has authorized his child to buy the goods for which suit is brought or has expressly or impliedly agreed to pay therefor.² A father who is confined in the penitentiary for life is still liable for the support of his minor child.³ The fact that a parent has "emancipated" his child by permitting him to keep his wages, does not relieve the parent from liability

³⁴ *Bennett v. O'Fallon*, 2 Mo. 69, 22 Am. Dec. 440; *Hare v. Gibson*, 32 O. S. 33, 30 Am. Rep. 568.

³⁵ *Watson v. Threlkeld*, 2 Esp. 637; *Frank v. Carter*, 219 N. Y. 35, L. R. A. 1917B, 1288, 113 N. E. 549.

³⁶ *Munro v. De Chemant*, 4 Campb. 215.

¹ *Kentucky*. *Hamilton v. Preston*, 166 Ky. 61, 178 S. W. 1146; *Huffman v. Hatcher*, 178 Ky. 8, L. R. A. 1918B, 484, 198 S. W. 236.

Michigan. *Finn v. Adams*, 138 Mich. 258, 4 Am. & Eng. Ann. Cas. 1186, 101 N. W. 533.

Minnesota. *Lufkin v. Harvey*, 131 Minn. 238, L. R. A. 1916B, 1111, Ann. Cas. 1917D, 583, 154 N. W. 1097; *Beigler v. Chamberlin*, 138 Minn. 377, L. R. A. 1918B, 215, 165 N. W. 128.

New York. *De Brauwere v. De Brauwere*, 203 N. Y. 460, 38 L. R. A. (N.S.) 508, 96 N. E. 722.

Ohio. *Pretzinger v. Pretzinger*, 45 O. S. 452, 15 N. E. 471.

² *Connecticut*. *Copboy v. Howe*, 59 Conn. 112, 22 Atl. 35.

Illinois. *Gotts v. Clark*, 78 Ill. 229.

Minnesota. *Lufkin v. Harvey*, 131 Minn. 238, L. R. A. 1916B, 1111, Ann. Cas. 1917D, 583, 154 N. W. 1097.

New Hampshire. *Farmington v. Jones*, 36 N. H. 271.

New York. *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395.

Pennsylvania. *McLaughlin v. McLaughlin*, 159 Pa. St. 489, 28 Atl. 302.

³ *Finn v. Adams*, 138 Mich. 258, 4 Am. & Eng. Ann. Cas. 1186, 101 N. W. 533.

for necessities with which the child is not furnished.⁴ If the child has left his parent's home with the consent of such parent, necessities furnished such child constitute a liability against the parent if the child is not in fact provided with them.⁵ Thus, A's minor daughter, B, was by A's permission living apart from A and supporting herself. She fell sick and X attended her as a physician. B did not know of her illness and the circumstances were such as to make it impracticable to notify him. It was held that X could recover from B.⁶ If the child has left his father's home, without the consent of the father, the question of the latter's liability turns on whether the father's wrongful act caused the child to leave, or whether such child left without legal excuse. If a minor abandons his father's home without his father's being at fault, the father is not liable to third persons who furnish such child with necessities.⁷ If the child is compelled to leave home by the wrongful act of the parent, the latter is liable to third persons who furnish such child with necessities.⁸

If a decree of divorce does not in terms provide for maintenance for minor children, and the father does not support them, it is held in many jurisdictions that if the mother supports the children after the decree of divorce, she may recover reasonable compensation from the father,⁹ especially if he has abandoned the children.¹⁰ In some jurisdictions it is held that if the custody of the children is given to the wife and the decree of divorce makes no provision for the maintenance of the children, she can not

⁴ *Cooper v. McNamara*, 92 Ia. 243, 60 N. W. 522; *Lufkin v. Harvey*, 131 Minn. 238, L. R. A. 1916B, 1111, Ann. Cas. 1917D, 583, 154 N. W. 1097; *Hunycutt v. Thompson*, 159 N. Car. 29, 40 L. R. A. (N.S.) 488, Ann. Cas. 1913E, 428, 74 S. E. 628.

⁵ *Cooper v. McNamara*, 92 Ia. 243, 60 N. W. 522.

⁶ *Porter v. Powell*, 79 Ia. 151, 18 Am. St. Rep. 353, 7 L. R. A. 176, 44 N. W. 295.

⁷ *Hunt v. Thompson*, 4 Ill. 179, 36 Am. Dec. 538; *Glynn v. Glynn*, 94 Me. 465, 48 Atl. 105; *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118.

⁸ *Stanton v. Willson*, 3 Day. (Conn.) 37, 3 Am. Dec. 255.

⁹ *Colorado. Desch v. Desch*, 55 Colo. 79, 132 Pac. 60.

Kansas. Rogers v. Rogers, 93 Kan. 114, L. R. A. 1915A, 1137, 143 Pac. 410.

Minnesota. Beigler v. Chamberlin, 138 Minn. 377, L. R. A. 1918B, 215, 165 N. W. 128.

Maryland. Alvey v. Hartwig, 106 Md. 254, 11 L. R. A. (N.S.) 678, 14 Ann. Cas. 250, 67 Atl. 132.

Vermont. Stockwell v. Stockwell, 87 Vt. 424, 89 Atl. 478.

Washington. Schoennauer v. Schoennauer, 77 Wash. 132, 137 Pac. 325.

¹⁰ *Beigler v. Chamberlin*, 138 Minn. 377, L. R. A. 1918B, 215, 165 N. W. 128.

recover reasonable compensation for their support from their father;¹¹ her remedy, if any, being to apply to the court which rendered the decree of divorce for an order compelling the father to support the children. It has been suggested that the mother may recover compensation for the support of the children after a decree of divorce which awarded their custody to her if she was not the aggressor;¹² but that if she was the aggressor and if the father is willing to support the children, she can not compel him to pay for their necessary support even if the custody of such children was awarded to the mother.¹³ If the father is found to be an improper person to have custody of the child and the maternal grandfather is accordingly appointed guardian of the child, the maternal grandfather may recover from the father for necessities which are furnished to the child if the father omits to furnish such necessities.¹⁴

What are necessities depends on the financial ability, social standing and style of living assumed by the parents of the child. In clear cases it may be a matter of law that certain things are or are not necessities. Thus a father was held not liable for services rendered without his knowledge in tutoring his son during vacation, the son living at home.¹⁵ If dependent on surrounding facts it is for the jury to determine, as whether a commercial education furnished to a child whose father had abandoned his family without cause¹⁶ was a necessity. A parent is liable for reasonable funeral expenses of his child, even if such child leaves an estate.¹⁷

In some cases the liability of a father to third persons for the support of his minor children has been said not to exist in any case in the absence of statutory provision therefor.¹⁸

In all jurisdictions the liability of the parent is limited in the absence of contract on his part, express or implied, or some stat-

¹¹ *Stone v. Duffy*, 219 Mass. 178, 106 N. E. 595; *Bondies v. Bondies*, 40 Okla. 164, 136 Pac. 1089.

¹² *Pretzinger v. Pretzinger*, 45 O. S. 452, 15 N. E. 471.

¹³ *Fulton v. Fulton*, 52 O. S. 229, 29 L. R. A. 678, 39 N. E. 729.

¹⁴ *Huffman v. Hatcher*, 178 Ky. 8, L. R. A. 1918B, 484, 198 S. W. 236.

¹⁵ *Peacock v. Linton*, 22 R. I. 328, 53 L. R. A. 192, 47 Atl. 887.

¹⁶ *Cory v. Cook*, 24 R. I. 421, 53 Atl. 315.

¹⁷ *Rowe v. Raper*, 23 Ind. App. 27, 77 Am. St. Rep. 411, 54 N. E. 770.

¹⁸ *Murphy v. Ottenheimer*, 84 Ill. 39, 25 Am. Rep. 424; *Holt v. Baldwin*, 46 Mo. 285, 2 Am. Rep. 515; *Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399; *Jackson v. Mull*, 6 Wyom. 55, 42 Pac. 603.

utory provision, to the support of his minor children, and he is not liable for necessities furnished to his adult children.¹⁰

Where slavery existed a master was liable for necessities furnished to a slave whom such master had not furnished with necessities. Thus a master who drives his slave away is liable to a physician who cares for such slave while sick, even if the master forbids him to care for such slave.²³

§ 1525. Liability to third person of one who has contracted to furnish support. Cases sometimes arise in which A is bound to support B by reason of a contract between A and B and not because of any relation existing between A and B outside of such contract. In cases of this sort, A fails to support B and X thereupon supports B and seeks to recover from A reasonable compensation for such support. Upon the question of X's right to recover, there is a conflict of authority. It has been held that X may recover under such circumstances,¹ on the theory that since A was bound to provide for B, the services and supplies furnished to B by X were advantageous to A and might be considered in law as having been rendered at his request.² In other jurisdictions, however, the opposite result has been reached and X has been denied a right of action against A,³ on the theory that A's liability is exclusively upon his contract to B and that X can not assume the performance of such contract and thus become A's creditor against A's will.⁴

§ 1526. Support of paupers. The duty of supporting paupers which rests upon public corporations and quasi-corporations is a creature of statute. In passing such statutes the legislature intended to set forth fully and completely the duty and liability of such public organizations. Accordingly, in the absence of statutory provision therefor, no recovery can be had from the public corporation which is liable for such support, but neglects to furnish it,

¹⁰ *White v. Mann*, 110 Ind. 74, 10 N. E. 629; *Blachley v. Laba*, 63 Ia. 22, 50 Am. Rep. 724, 18 N. W. 658.

²³ *Fairchild v. Bell*, 2 Brev. (S. Car.) 129, 3 Am. Dec. 702.

¹ *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241.

² *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241.

³ *Matheny v. Chester*, 141 Ky. 790, 133 S. W. 754; *Moody v. Moody*, 14 Me. 307; *Savage v. McCorkle*, 17 Or. 42, 21 Pac. 444.

⁴ *Moody v. Moody*, 14 Me. 307.

by any person furnishing such support,¹ whether a natural person,² or another public corporation.³ While many statutes give such right of recovery, either to a private person,⁴ or to a public corporation,⁵ such right of action is limited by the terms of the statute giving it, and does not exist unless such terms are complied with.⁶ Thus where the remedy given by statute is an action for money laid out and expended, this means an action in assumpsit, not in case, and a pleading will be construed to be in assumpsit if it states facts sufficient to show such liability, even if no express promise is alleged.⁷ Where a town is given a right to recover for support which it furnishes, no recovery can be had

¹ *Gilligan v. Grattan*, 63 Neb. 242, 88 N. W. 477; *Patrick v. Baldwin*, 109 Wis. 342, 53 L. R. A. 613, 85 N. W. 274 [overruling in effect *Mappes v. Iowa County*, 47 Wis. 31, 1 N. W. 359].

² *Indiana*. *Morgan County v. Seaton*, 122 Ind. 521, 24 N. E. 213.

Massachusetts. *O'Keefe v. Northampton*, 145 Mass. 115, 13 N. E. 382.

Rhode Island. *Caswell v. Hazard*, 10 R. I. 490.

Vermont. *Maccoon v. Berlin*, 49 Vt. 13.

Wisconsin. *Patrick v. Baldwin*, 109 Wis. 342, 53 L. R. A. 613, 85 N. W. 274 [overruling in effect *Mappes v. Iowa County*, 47 Wis. 31, 1 N. W. 359].

³ *Bristol v. New Britain*, 71 Conn. 201, 41 Atl. 548; *Marlborough v. Framingham*, 54 Mass. (13 Met.) 328; *Strafford County v. Rockingham County*, 71 N. H. 37, 51 Atl. 677; *Millcreek Township v. Miami*, 10 Ohio 375.

⁴ *Wile v. Southbury*, 43 Conn. 53; *Wing v. Chesterfield*, 116 Mass. 353; *Blodgett v. Lowell*, 33 Vt. 174; *Trustees v. Ogden*, 5 Ohio 23.

⁵ *Illinois*. *Bristol v. Fox*, 159 Ill. 500, 42 N. E. 887.

Iowa. *Clay County v. Palo Alto County*, 82 Ia. 626, 48 N. W. 1053.

Maine. *Auburn v. Lewiston*, 85 Me. 282, 27 Atl. 159.

Massachusetts. *Reading v. Malden*, 141 Mass. 580, 7 N. E. 21.

Ohio. *Trustees of Williamsburg v. Trustees of Jackson*, 11 Ohio 37; *Commissioners of Ashland Co. v. Directors of Richland County Infirmary*, 7 O. S. 65.

Pennsylvania. *Taylor Township v. Shenango Township*, 114 Pa. St. 394, 6 Atl. 475.

Utah. *Ogden City v. Weber County*, 26 Utah 129, 72 Pac. 433.

Vermont. *Charleston v. Lunenburg*, 23 Vt. 525; *Chittenden v. Stockbridge*, 63 Vt. 308, 21 Atl. 1102.

Wisconsin. *Portage County v. Neshkoro*, 109 Wis. 520, 85 N. W. 414.

⁶ *Massachusetts*. *Palmer v. Hampden*, 182 Mass. 511, 65 N. E. 817.

Nebraska. *Newark Township v. Kearney County*, 99 Neb. 142, 155 N. W. 797.

New Hampshire. *Louden v. Merrimack County*, 71 N. H. 573, 53 Atl. 906.

Ohio. *Millcreek Township v. Miami Township*, 10 Ohio 375; *Commissioners of Ashland Co. v. Directors of Richland County Infirmary*, 7 O. S. 65.

Vermont. *Topham v. Waterbury*, 73 Vt. 185, 50 Atl. 860; *Danville v. Hartford*, 73 Vt. 300, 50 Atl. 1082; *Rutland v. Chittenden*, 74 Vt. 219, 52 Atl. 426.

⁷ *Woodstock v. Hancock*, 62 Vt. 348, 19 Atl. 991.

for support furnished through the voluntary subscription of private individuals.⁸ In some few states, however, it seems to be held that a statute providing that a pauper is to be supported at the expense of a public corporation, imposes a liability on such corporation in favor of persons furnishing necessities to a pauper at least after the public corporation has notice of the needs of such pauper and thereafter omits to furnish such necessities.⁹ The statute which imposes liability upon a public corporation for the support of a pauper usually makes such liability depend upon notice to such public corporation of the fact that the person for whose support it is sought to recover is a pauper and is destitute. Under such statutes no recovery can be had for support furnished before such notice was given.¹⁰ Under a statute which requires notice to the public corporation in order to impose a liability upon it for the support or care of a pauper, a question is sometimes presented as to the rights of the parties where a sudden emergency arises which makes it impracticable to give such notice. Upon this point there is a conflict of authority. The weight of authority seems to be that if the statute itself contains no exception, the courts can not create an exception because of such emergency.¹¹ On the other hand, it has been held that a fair construction of such a statute requires notice only where it is practicable to give notice; and that where the emergency is such that great suffering or possible death will follow if the parties wait to give notice, recovery may be had for services rendered without giving notice.¹²

Under some statutes the allowance of the claim is in the discretion of certain specified public authorities,¹³ and the courts will not review their exercise of such discretion.¹⁴

§ 1527. Support of persons under quarantine, etc. The power of public bodies which are charged with the duty of protecting

⁸ *Orland v. Penobscot*, 97 Me. 29, 53 Atl. 830.

⁹ *Eckman v. Brady Township*, 81 Mich. 70, 45 N. W. 502. To the same effect see *Perry County v. Du Quoin*, 99 Ill. 479.

¹⁰ *Millcreek Township v. Miami Township*, 10 Ohio 375; *Commissioners of Ashland County v. Directors of Richland County Infirmary*, 7 O. S. 65.

¹¹ *Cantrell v. Clark County*, 47 Ark. 239, 1 S. W. 200; *French v. Benton*, 44 N. H. 28.

¹² *Board of Commissioners of Sheridan County v. Denebrink*, 15 Wyom. 342, 9 L. R. A. (N.S.) 1234, 89 Pac. 7.

¹³ *Trustees v. White*, 48 O. S. 577, 29 N. E. 47.

¹⁴ *Trustees v. White*, 48 O. S. 577, 29 N. E. 47.

public health to pay for the expenses of physicians, support of persons under quarantine, and the like, depends upon the authority conferred upon them by statute; and for the same reason the liability of such public body to pay reasonable compensation for such services and support depends on statutory provisions. If no contract has been made for the services of a physician, the public body is not liable therefor in quasi-contract in the absence of a statute imposing such liability.¹ Such public body is not liable for the support of a person who is quarantined outside of the pest-house,² unless such person is a pauper and the public body is liable for his support in any event by statutory provisions³ or unless liability therefor is imposed by statute.⁴ If a servant at a hotel is taken ill with smallpox and is quarantined, the hotel can not recover from the city for the expense of nursing and caring for her or for the destruction of infected goods with the consent of the owner.⁵ If the patient is confined in the pest-house, the primary liability for his care rests on the public body.⁶

C. INVOLUNTARY PAYMENTS IN GENERAL

§ 1528. Involuntary payments. The general doctrine forbidding recovery of voluntary payments has, of course, no application to payments which are not voluntary. The general rule is, that if A receives money belonging to B, which is not paid voluntarily by B, A is bound in law to repay it.¹ Thus, where A was arrested upon a charge of stealing, and brought before B, a trial justice, and B took from A the money which A had upon his person and which was alleged to be the stolen money, and A is discharged upon a preliminary hearing, A can recover such money from B.² So, if an agent of an express company induces a bank to send money by express to a fictitious firm, which money the agent receives as agent for the express company, and which he em-

¹ *Dykes v. Commissioners of Stafford County*, 86 Kan. 697, 121 Pac. 1112; *Kellogg v. St. George*, 28 Me. 256; *Pettengill v. Amherst*, 72 N. H. 103, 54 Atl. 944.

² *Creier v. Fitzwilliam*, 76 N. H. 382, 83 Atl. 128.

³ See § 1526.

⁴ *Clinton v. Clinton County*, 61 Ia. 205, 16 N. W. 87.

⁵ *Kollock v. Stevens Point*, 37 Wis. 348.

⁶ *Labrie v. Manchester*, 59 N. H. 120, 47 Am. Rep. 179.

¹ *Pemberton v. Williams*, 87 Ill. 15; *Carter v. Riggs*, 112 Ia. 246, 83 N. W. 905; *Mason v. Prendergast*, 120 N. Y. 536, 24 N. E. 806; *Motz v. Mitchell*, 91 Pa. St. 114.

² *Welch v. Gleason*, 28 S. Car. 247, 5 S. E. 599.

bezzles, the bank can recover from the express company in an action for money had and received.³ The classes of payments which are not voluntary may for the most part be grouped under two general heads: payment by mistake, and payment by duress or compulsion of law. These topics will be discussed in the following sections.

§ 1529. Payment by one not beneficial owner. If one person has in his hands money of which another person is the beneficial owner, a payment by the holder of such money to a third person is not such a voluntary payment by the real owner thereof as to prevent him from recovering it if it is made without his authority and if not in payment of a claim justly due from him.¹ The principle of voluntary payments does not apply where the recovery is sought by one having a beneficial interest in the money paid, and the payment was not made by him, but by some one acting as his trustee, agent, and the like, and acting in excess of his authority, and the person receiving the money knew that the person paying it was acting in such capacity. Thus, where an assignee for the benefit of creditors pays debts out of priority, the creditor who receives the money and notes out of the trust estate is liable to the creditors to whom such money should have been paid.² Money of a principal, paid by his agent without authority, may be recovered by his principal from the person to whom it was paid.³ Thus if a bank cashier pays his own debt by entering the amount thereof as a credit on the pass-book of his creditor, and such creditor draws checks against such credits and the checks are paid, the bank may recover the amount of such checks from such creditor;⁴ so if the cashier of a bank gives the draft of the bank in payment of his own debt, the receiver of the bank may

³ *Southern Express Co. v. Bank*, 108 Ala. 517, 54 Am. St. Rep. 191, 18 So. 664. In order to recover, it is not necessary that the bank surrender a draft which purports to be signed by such fictitious and non-existent firm with a bill of lading attached thereto.

¹ *Independent School District v. Collins*, 15 Ida. 536, 98 Pac. 857; *Smith v. Tilton*, 116 Me. 311, 101 Atl. 722; *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520; *Franklin*

National Bank v. Newark, 96 O. S. 453, L. R. A. 1918E, 676, 118 N. E. 117.

² *Dickie v. Northup*, 24 N. S. 121.

³ *Rogers v. Batchelor*, 37 U. S. (12 Pet.) 221, 9 L. ed. 1063; *Dob v. Halscy*, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; *Ulbrand v. Bennett*, 83 Or. 557, 163 Pac. 445; *Mt. Verd Mills Co. v. McElwee* (Tenn. Ch. App.), 42 S. W. 465.

⁴ *Hier v. Miller*, 68 Kan. 258, 63 L. R. A. 952, 75 Pac. 77.

recover from such creditor.⁵ Accordingly, payments of public money form an exception to the ordinary rules as to voluntary payments and payments made under mistake of law, since the payments are always made by public officers, and not by the public, which is really beneficially interested in such money. Thus, money which is paid out by public officers in violation of the law, may be recovered from the person to whom it is paid.⁶ The fact that the payment was voluntary on the part of the officer does not prevent the public from recovering.⁷ A government may recover money paid by a public officer under an erroneous construction of the law, and without any legal authority therefor.⁸ So if money is paid out by a public officer upon a contract, which the corporation represented by him had no power whatever to make,⁹ or if money is paid upon a contract in excess of the amount due thereon,¹⁰ or upon a claim which the corporation had no power under

⁵ *Campbell v. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497.

⁶ *Arkansas. Weeks v. Texarkana*, 50 Ark. 81, 6 S. W. 504.

Idaho. Independent School District v. Collins, 15 Ida. 535, 98 Pac. 857.

Illinois. McLean v. Montgomery County, 32 Ill. App. 131.

Indiana. Snelson v. State, 16 Ind. 29.

Iowa. Heath v. Albrook, 123 Ia. 559, 98 N. W. 619.

Minnesota. Stone v. Bevens, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520.

Mississippi. Adams v. Power Co., 78 Miss. 887, 30 So. 58.

Missouri. State, ex rel., Barker v. Scott, 270 Mo. 146, 192 S. W. 90.

New Jersey. Demarest v. New Barbadoes, 40 N. J. L. 604.

New York. People v. Fields, 58 N. Y. 491; (*Board, etc., of Richmond County v. Ellis*, 59 N. Y. 620).

Ohio. Vindicator Printing Co. v. State, 68 O. S. 362, 67 N. E. 733; *State, ex rel., v. Baker*, 88 O. S. 165, 102 N. E. 732; *State, ex rel., v. Maharry*, 97 O. S. 272, 119 N. E. 822.

Virginia. Commonwealth v. Field, 84 Va. 26, 3 S. E. 882.

Washington. Tacoma v. Lillis, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

Wisconsin. Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 798.

⁷ *Alabama. Demopolis v. Marengo County*, 195 Ala. 214, 70 So. 275.

Idaho. Independent School District v. Collins, 15 Ida. 535, 98 Pac. 857.

Minnesota. Stone v. Bevens, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520.

Missouri. State, ex rel., Barker v. Scott, 270 Mo. 146, 192 S. W. 90.

New York. Ft. Edward v. Fish, 156 N. Y. 363, 50 N. E. 973.

⁸ *United States v. Bank*, 40 U. S. (15 Pet.) 377, 10 L. ed. 774; *McElrath v. United States*, 102 U. S. 426, 26 L. ed. 189; *Wisconsin, etc., R. R. v. United States*, 164 U. S. 190, 41 L. ed. 399.

⁹ *Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737; *Griffin v. Shakopee*, 53 Minn. 528, 55 N. W. 738.

¹⁰ *State, ex rel., v. Baker*, 88 O. S. 165, 102 N. E. 732; *State, ex rel., v. Maharry*, 97 O. S. 272, 119 N. E. 822.

any circumstances to allow,¹¹ such payment may be recovered. Accordingly, if a public officer draws money from the public treasury,¹² as his compensation,¹³ such as his salary,¹⁴ or fees collected by him from the public treasury without authority of law,¹⁵ such payments may be recovered in an action for money had and received. The fact that money paid to a state officer as compensation for services was paid upon the advice of the attorney general, does not prevent the recovery thereof, if unauthorized by law;¹⁶ nor does the fact that the payment was made voluntarily, with full knowledge of the facts and without fraud,¹⁷ or under a mistake of law,¹⁸ even if such mistake is shared by the officer to whom payment is made, who takes in good faith.¹⁹ The right to recover public money is especially clear where the officers who have ordered payment of the claim, have done so fraudulently, and in order to convert the money to their own benefit,²⁰ or have otherwise acted fraudulently.²¹ Even an order of court authorizing the payment of such illegal fees is no defense to an action to recover them if made in a proceeding to which the public corporation is not a party.²² A public corporation may recover interest from a bank upon an illegal deposit of public funds in such bank.²³

If a public officer renders services to the corporation which he represents, outside of those appropriate to his official position, and which could have been rendered as well by a private individual, money paid him for such services can not be recovered in

¹¹ *Ward v. Barnum*, 10 Colo. App. 496, 52 Pac. 412.

¹² *Ada County v. Gess*, 4 Ida. 611, 43 Pac. 71; *Huntington County v. Heaston*, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651; *St. Croix County v. Webster*, 111 Wis. 270, 87 N. W. 302.

¹³ *Weeks v. Texarkana*, 50 Ark. 81, 6 S. W. 504; *Council Bluffs v. Waterman*, 86 Ia. 688, 53 N. W. 289; *Union County v. Hyde*, 26 Or. 24, 37 Pac. 76.

¹⁴ *Ellis v. Board, etc.*, 107 Mich. 528, 65 N. W. 577; *Allegheny County v. Grier*, 179 Pa. St. 639, 36 Atl. 353; *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

¹⁵ *Camden v. Varney*, 63 N. J. L. 325, 43 Atl. 889; *Union County v. Hyde*, 26 Or. 24, 37 Pac. 76.

¹⁶ *Commonwealth v. Norman (Ky.)*, 50 S. W. 225.

¹⁷ *Camden v. Varney*, 63 N. J. L. 325, 43 Atl. 889.

¹⁸ *Ellis v. Board, etc.*, 107 Mich. 528, 65 N. W. 577.

¹⁹ *Allegheny County v. Grier*, 179 Pa. St. 639, 36 Atl. 353.

²⁰ *Land, etc., Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964.

²¹ *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798.

²² *Union County v. Hyde*, 26 Or. 24, 37 Pac. 76.

²³ *Franklin National Bank v. Newark*, 96 O. S. 453, L. R. A. 1918E, 676, 118 N. E. 117.

the absence of a statute, provided the transaction is free from fraud.²⁴ If a statute specifically forbids a contract between a public corporation and a trustee thereof, money which is paid under an illegal contract to a trustee may be recovered by the corporation.²⁵

The right to recover public money is especially clear in cases where payment is made under a mistake of fact.²⁶ Thus, where an excessive bill is presented for public printing, and printers appointed pursuant to the statute to examine the account certify to its correctness under a mistake of fact, such payment may be recovered.²⁷ Public money, however, can be recovered only from one to whom it was paid, or for whose benefit it was paid. Thus, a county can not recover from one who holds county bonds, which constitute an over-issue, interest paid upon such bonds to a prior holder thereof.²⁸ So where town officers acting for the public at large and not for the town alone, collected school taxes and paid them disproportionately, the school district which was entitled to a part of such taxes can not maintain assumpsit against the town.²⁹ In some jurisdictions, however, it is held that payments of public money to public officers made under a mutual mistake of law can not be recovered.³⁰

If an agent is acting within the scope of his authority in making the payment, such payment can not be recovered unless it could have been recovered if made by the principal in person.³¹

D. PAYMENTS UNDER COMPULSION

§ 1530. Payment under duress and undue influence—General nature. The nature of duress as affecting the validity of contracts

²⁴ *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 31 Pac. 321.

²⁵ *Independent School District v. Collins*, 15 Ida. 535, 98 Pac. 857.

²⁶ *Haralson County v. Golden*, 104 Ga. 19, 30 S. E. 380.

²⁷ *Worth v. Stewart*, 122 N. Car. 258, 29 S. E. 579.

²⁸ *Taylor v. Daviess County (Ky.)*, 32 S. W. 416.

²⁹ *Weybridge School District v. Bridgeport*, 63 Vt. 383, 22 Atl. 570.

³⁰ *Painter v. Polk County*, 81 Ia. 242, 25 Am. St. Rep. 489, 47 N. W. 65. A

similar view seems to be guardedly entertained in *Lasalle County v. Milligan*, 34 Ill. App. 346, decided partly on a question of fact and partly with the expectation of review by the supreme court. This has been said to be the common law rule; but recovery was allowed under a specific statutory provision therefor in *Vindicator Printing Co. v. State*, 68 O. S. 362, 67 N. E. 733.

³¹ *Petty v. United Fuel Gas Co.*, 76 W. Va. 268, 85 S. E. 523.

entered into by reason thereof has already been discussed.¹ The nature of duress as determining the right of a party making payments to recover them is largely governed by the same rules as those by which the right to avoid contracts is determined, but for historical reasons the law is more ready to give relief against duress in case of recovery of payments than in executory contracts. If payments are made under what the law regards as duress, they are not within the doctrine of voluntary payments, and may be recovered in the absence of special circumstances.² In some respects, however, as we shall see later, the right to recover payments was broader at common law than the right to avoid contracts and by some authorities the right to recover payments made under compulsion of law has been treated as a ground of recovery distinct from any form of duress. The principles of equity which control in the action for money had and received and in other remedies in case of quasi-contract, permitted recovery of money paid under compulsion when such compulsion would not have been regarded as technical duress.³ The payment can be recovered only if it is contrary to equity and good conscience for the defendant to retain the money.⁴

No reason appears, however, for continuing at modern law a distinction between these three forms of duress, the basis of which was purely historical. As our law develops, fundamental ideas

¹ See ch. XVIII.

² *United States*. *Swift Co. v. United States*, 111 U. S. 22, 28 L. ed. 341.

Colorado. *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21.

Indiana. *Stanley v. Dunn*, 143 Ind. 405, 42 N. E. 908.

Iowa. *Carter v. Riggs*, 112 Ia. 245, 83 N. W. 905; *Anderson v. Cameron*, 122 Ia. 183, 97 N. W. 1085.

Massachusetts. *Sweet v. Kimball*, 166 Mass. 332, 55 Am. St. Rep. 406, 44 N. E. 243; *Silabee v. Webber*, 171 Mass. 378, 50 N. E. 555.

Michigan. *Cribbs v. Sowle*, 87 Mich. 340, 24 Am. St. Rep. 166, 49 N. W. 587.

Minnesota. *Joannin v. Ogilvie*, 49 Minn. 564, 32 Am. St. Rep. 581, 16 L. R. A. 376, 52 N. W. 217.

New York. *Briggs v. Boyd*, 56 N. Y. 289.

North Carolina. *Adams v. Reeves*, 68 N. Car. 134, 12 Am. Rep. 627.

Ohio. *Reinhard v. Columbus*, 49 O. S. 257, 31 N. E. 35.

Pennsylvania. *Fillman v. Ryon*, 168 Pa. St. 484, 32 Atl. 89.

Washington. *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977.

Wisconsin. *Guetzkow v. Breese*, 96 Wis. 591, 65 Am. St. Rep. 83, 72 N. W. 45; *Coon v. Metzler*, 161 Wis. 328, L. R. A. 1916B, 667, 154 N. W. 377.

³ *Nelson v. Nelson*, 99 Neb. 456, 156 N. W. 1036.

⁴ *Wilbur v. Blanchard*, 22 Ida. 517, 126 Pac. 1069.

should be treated in the same way, whether they originated at law or in equity.

Historically, the doctrine of duress began developing at three different points: Duress was invoked at law in order to avoid liability upon an executory contract.⁵ Duress was invoked in equity as a means of avoiding executory contracts and executed transactions.⁶ Duress was also invoked at common law as a fact which showed that the payment of money not justly due was not voluntary. Accordingly, it was invoked as a means of recovering a payment of money which was not justly due. The fact that the doctrine of duress appeared in different tribunals and at different periods of time caused it to assume different forms when it first appeared. The rigid nature of the common law made it difficult to escape liability except for the most extreme forms of duress. The tendency of equity was rather to regard the justice of the transaction rather than its outward form and to give relief wherever an unfair advantage was taken.

The right to recover payments made under compulsion was not recognized at early common law. Like other quasi-contractual rights, its recognition at common law came at a later period when under the influence of equity the courts were recognizing and enforcing rights which had hitherto been unrecognized or which at most had served as a foundation by way of consideration for an express promise. The theory that payments made under compulsion could be recovered appeared in the common law at so late a period that from the very outset the ideas of equity had enormous influence upon the idea of duress or compulsion as a ground for recovering payments. Equitable principles control, therefore, rather than technical common-law notions, as in other cases where the action for money had and received is brought.⁷ The adoption of the test of the effect of duress upon the mind of the party who is subjected thereto,⁸ is obliterating the distinction between duress and undue influence in the law of quasi-contract, just as it is obliterating it in the law of contract. A payment made under undue influence may be recovered,⁹ even though the circumstances fall short of technical duress or compulsion. Payment made under threat of a civil action may be recovered where the person

⁵ See §§ 481 et seq.

⁶ See §§ 437 et seq., and 1480 et seq.

⁷ See § 1480.

⁸ See § 1531.

⁹ *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995.

making the payment is aged, illiterate and weak-minded, and his mind is in fact overpowered by such threats.¹⁰

The special classes of cases which involve the question of what is, and what is not, such duress as to permit of recovery of payments, will be discussed in the following sections.

§ 1531. Elements of compulsion. As in the case of duress which is relied upon as a ground for avoiding a contract,¹ the question of the standard by which the existence of duress is to be determined has been a troublesome one. The original common-law theory that the external standard of the brave and courageous man, and subsequently of the ordinarily brave man, must determine the existence of duress, has been repeated in cases in which it has been sought to recover money paid under duress or compulsion.² It has been said that a payment can not be recovered unless the threat was such as would create a fear which was sufficient to overcome the will of a man of ordinary firmness and constancy.³

In other jurisdictions, and probably by the great weight of modern authority, the external standard is ignored for practical purposes, however much it may be asserted by the courts in obiter; and the test for the existence of duress for which a payment may be recovered is the effect of the wrongful act or the threat upon the mind of the person from whom such payment has been extorted wrongfully.⁴ As in many cases of duress for which it is sought to avoid a contract, there is frequently no practical difference between these two standards, since there is no evidence to

¹⁰ *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995.

¹ See § 482.

² *Campbell v. Chabot*, 115 Me. 247, 98 Atl. 746.

³ *Campbell v. Chabot*, 115 Me. 247, 98 Atl. 746.

⁴ *Coon v. Metzler*, 161 Wis. 328, L. R. A. 1916B, 667, 154 N. W. 377.

"Duress is a relative, rather than a positive, term. Much depends on the situation of the parties, their relations to each other, physical and mental strength, and all the surrounding circumstances. Acts which might fall far short of duress under certain

conditions might be ample under other conditions. There are no arbitrary and unbending rules which can be applied in every case to determine the question. True, the person claiming duress must be so strongly influenced that his acts are not the result of his own will, but the threats which would accomplish that result in one case might be entirely insufficient in another." *Coon v. Metzler*, 161 Wis. 328, L. R. A. 1916B, 667, 154 N. W. 377.

See also, *Galusha v. Sherman*, 105 Wis. 263, 47 L. R. A. 417, 81 N. W. 495.

show that the person who was subjected to such duress or compulsion was below the normal in courage, firmness and constancy; and accordingly the courts have a right to assume that he is a normal person of ordinary courage.

A payment can not be recovered on the ground that it was made under duress or compulsion unless the duress or compulsion is exerted by the person to whom the payment is made or unless he knowingly takes advantage of duress or compulsion.⁵

If A makes a payment to B because of fear of C, A can not recover such payment from B if B and C were not acting in collusion.⁶ A payment made with full knowledge of the facts by an employe to an employer to reimburse the employer for a shortage in the accounts of the employe which was due to a subordinate of such employe, can not be recovered as having been made through duress, although such employe may have made such payment because of fear that if such payment were not made the bonding company would prosecute criminally.⁷

A payment can not be recovered on the ground that it was made by duress unless the duress actually exists when the payment is made.⁸ The fact that the duress or compulsion was exerted at some period before the time that the payment was made, does not prevent the recovery of such payment if such duress or compulsion continued to exist at the time that the payment was made.⁹ The fact that the person upon whom such duress has been exercised has had an opportunity to obtain legal advice and to think over the transaction, does not show as a matter of law that such duress had ceased to exist.¹⁰

If the party who made such payment was subject to compulsion and duress at one time, but he was not subject thereto at the time that he made such payment, he can not recover such payment by reason of such compulsion or duress.¹¹ If a note is ob-

⁵ *Brumagim v. Tillingham*, 18 Cal. 265, 79 Am. Dec. 176; *Taylor v. Kelleher*, 43 Colo. 424, 97 Pac. 253.

⁶ *Jacobson v. Mohall Telephone Co.*, 34 N. D. 213, L. R. A. 1916F, 532, 157 N. W. 1033.

⁷ *Jacobson v. Mohall Telephone Co.*, 34 N. D. 213, L. R. A. 1916F, 532, 157 N. W. 1033.

⁸ *Baldwin Co. v. Savage*, 81 Or. 379, 159 Pac. 80; *Schultz v. Culbertson*, 49 Wis. 122, 4 N. W. 1070.

⁹ *Nelson v. Leszczynski-Clark Co.*, 177 Mich. 517, 143 N. W. 606; *Heckman v. Swartz*, 64 Wis. 48, 24 N. W. 473.

¹⁰ *Coon v. Metzler*, 161 Wis. 328, L. R. A. 1916B, 667, 154 N. W. 377.

¹¹ *Campbell v. Chabot*, 115 Me. 247, 98 Atl. 746; *Baldwin Co. v. Savage*, 81 Or. 379, 159 Pac. 80; *Wolff v. Bluhm*, 95 Wis. 257, 60 Am. St. Rep. 115, 70 N. W. 73; *Bennett v. Luby*, 112 Wis. 118, 88 N. W. 37.

tained by duress and such note is paid voluntarily after such duress has ceased to operate, such payment can not be recovered.¹²

Voluntary payments after duress has ceased to exist are said to operate as a ratification of the entire transaction.¹³

Since one can not be compelled to repay money which in equity and good conscience he is entitled to retain,¹⁴ a payment of money which is justly due and owing from the person who makes the payment to the person to whom such payment is made, can not be recovered, although such payment was made under compulsion.¹⁵ If an appeal bond in a criminal proceeding is enforceable, although such criminal proceeding is based upon a void ordinance, one who has been fined under such a void ordinance can not recover from the municipal corporation to which such money was paid by the surety on the appeal bond, although such surety has compelled the accused to reimburse him.¹⁶ If, however, one who owes a just debt is compelled to deliver something of value in excess of the amount justly due, he may recover the difference between the reasonable value of the property which he is compelled to surrender and the amount which is justly due.¹⁷

§ 1532. What compulsion justifies recovery—In general. In cases in which the standard of the ordinarily firm man has been assumed, it has been said that to constitute duress there must in general be at least apparent liability of person or property to seizure,¹ and in the absence thereof mere protest against paying can not make it payment under duress.² It is said that a payment is not under duress unless there is an immediate or urgent necessity therefor, or unless such payment is made to release person or

¹² Baldwin Co. v. Savage, 81 Or. 379, 159 Pac. 80.

¹³ Campbell v. Chabot, 115 Me. 247, 98 Atl. 746.

¹⁴ See § 1480.

¹⁵ Colorado. Curley v. Marble, 61 Colo. 6, 155 Pac. 334.

Connecticut. McVane v. Williams, 50 Conn. 548.

Idaho. Wilbur v. Blanchard, 22 Ida. 517, 126 Pac. 1069.

New Jersey. Mee v. Montclair, 84 N. J. L. 400, 86 Atl. 281.

New York. Richmond v. Union Steamboat Co., 87 N. Y. 240.

¹⁶ Curley v. Marble, 61 Colo. 6, 155 Pac. 334.

¹⁷ Wilbur v. Blanchard, 22 Ida. 517, 126 Pac. 1069.

¹ Lamson v. Boyden, 57 Ill. App. 232; Minneapolis, etc., Co. v. Cunningham, 59 Minn. 325, 61 N. W. 329; De la Cuesta v. Ins. Co., 136 Pa. St. 62, 658, 9 L. R. A. 631, 20 Atl. 505.

² See § 1546.

property from detention or to prevent immediate seizure of person or property.³

A threat of imprisonment which is made by a public officer who has authority, or apparent authority, to enforce such threats, is duress if a payment is induced thereby.⁴ A threat of criminal prosecution which will result in imprisonment may amount to duress.⁵

§ 1533. Payment extorted by imprisonment. The elements of duress of imprisonment are substantially the same for purposes of recovering payments as for avoiding contracts.¹ Money unlawfully extorted by imprisonment, used as a means of extortion, whether such imprisonment² was lawful or not, or by threats of immediate imprisonment,³ may be recovered. Thus money paid by one wrongfully arrested to secure his release,⁴ or where an officer without authority of law takes a cash deposit to secure the appearance of a prisoner,⁵ may be recovered. So property surrendered by one under threat of imprisonment if he does not surrender such property, may be recovered.⁶ Even if the arrest or threatened arrest is itself lawful, money paid thereunder may be recovered if such

³ *Union Pacific Railroad Co. v. Commissioners*, 98 U. S. 541, 25 L. ed. 196; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016; *United States v. New York & Cuba Mail Steamship Co.*, 200 U. S. 488, 50 L. ed. 569.

⁴ *Coon v. Metzler*, 161 Wis. 328, L. R. A. 1916B, 667, 154 N. W. 377.

⁵ *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977; *Coon v. Metzler*, 161 Wis. 328, L. R. A. 1916B, 667, 154 N. W. 377.

¹ See ch. XVIII.

² *Illinois. Schommer v. Farwell*, 56 Ill. 542.

Kentucky. Voiers v. Stout, 67 Ky. (4 Bush.) 572.

New Hampshire. Richardson v. Duncan, 3 N. H. 508.

Ohio. Reinhard v. Columbus, 49 O. S. 257, 31 N. E. 35.

Pennsylvania. Fillman v. Ryon, 168 Pa. St. 484, 32 Atl. 89.

Wisconsin. Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473.

Wyoming. And see *Hontz v. Uinta County*, 11 Wyom. 152, 70 Pac. 840; where the right to recover a fine imposed by a justice who had no final jurisdiction was held to depend on that question whether such payment was made to procure release from imprisonment, it could be recovered; but if merely to avoid inconvenience in the district court to which an appeal had been allowed, it could not.

³ *Baldwin v. Hutchison*, 8 Ind. App. 454, 35 N. E. 711; *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109; *Deshong v. New York*, 176 N. Y. 475, 68 N. E. 680; *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977. (Recovery allowed under statute defining extortion.)

⁴ *Sweet v. Kimball*, 166 Mass. 332, 55 Am. St. Rep. 406, 44 N. E. 243.

⁵ *Reinhard v. Columbus*, 49 O. S. 257, 31 N. E. 35.

⁶ *Pryor v. Morgan*, 170 Pa. St. 568, 33 Atl. 98.

arrest was used as a means of extorting such payment.⁷ If, however, the imprisonment is lawful and is not made the means of extortion, it does not of itself constitute duress, and does not afford a basis for recovery of payments.⁸

In jurisdictions in which it is said that a threat in order to amount to duress must be such as to overcome the will of a man of ordinary firmness, the fact that a warrant has issued is material in determining whether a threat of imprisonment amounts to duress or not.⁹ A threat of imprisonment not immediate is ordinarily not duress,¹⁰ and money paid thereunder can not ordinarily be recovered as paid under duress;¹¹ but under special circumstances, as where the person to whom the threat is made and against whom it is directed is old, weak and infirm, a payment extorted by such threats may be recovered.¹² Since duress may exist where the arrest of a third person in certain relations to the promisor or payor is made or threatened,¹³ such payment may be recovered.¹⁴ Thus money extorted from a wife by a threatened imprisonment of her husband, as under circumstances which would injure his health,¹⁵ may be recovered. Thus where a husband was threatened with lawful arrest when in broken health and about to go to Europe with his wife in the hope of regaining health, and arrest and detention would produce a serious effect upon his physical condition, a payment made by his wife to prevent such arrest is made under duress and may be recovered.¹⁶ The mere fear of future imprisonment without any threat thereof is not such duress as to enable the party who has made the payment to recover it.¹⁷

⁷ Williford v. Eason, 110 Ark. 303, 161 S. W. 498; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Richardson v. Duncan, 3 N. H. 508; Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473.

⁸ Fillman v. Ryan, 168 Pa. St. 484, 32 Atl. 89; Meachem v. Newport, 70 Vt. 67, 39 Atl. 631.

⁹ Campbell v. Chabot, 115 Me. 247, 98 Atl. 746.

¹⁰ See § 488.

¹¹ St. Louis, etc., R. R. v. Thomas, 85 Ill. 464; Hines v. Hamilton Co., 93 Ind. 266; Hilborn v. Bucknam, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; Claffin

v. McDonough, 33 Mo. 412, 84 Am. Dec. 54.

¹² Cribbs v. Sowle, 87 Mich. 340, 24 Am. St. Rep. 166, 49 N. W. 587.

¹³ See § 499.

¹⁴ Gorrings v. Reed, 23 Utah 120, 90 Am. St. Rep. 692, 63 Pac. 902; Schultz v. Culbertson, 49 Wis. 122, 4 N. W. 1070, 46 Wis. 313, 1 N. W. 19.

¹⁵ Adams v. Bank, 116 N. Y. 606, 15 Am. St. Rep. 447, 6 L. R. A. 491, 23 N. E. 7.

¹⁶ Adams v. Bank, 116 N. Y. 606, 15 Am. St. Rep. 447, 6 L. R. A. 491, 23 N. E. 7.

¹⁷ Felton v. Gregory, 130 Mass. 176.

§ 1534. Payment extorted by wrongful detention of goods.

The original common-law rules of duress did not allow a contract to be avoided if the person entering into it was induced to do so by a wrongful detention of goods.¹ It was more just in allowing recovery of payments extorted by such detention. If A's personal property is unlawfully detained by B, a payment made by A to obtain possession of such property is not a voluntary payment and may be recovered.² Thus where goods are illegally seized under apparent authority of a writ of sequestration;³ or a fish-trap is unlawfully seized by a fish warden;⁴ or logs are seized under an illegal claim for toll;⁵ or a ship is detained for an illegal demand for tonnage;⁶ or a cargo is detained for an illegal demand for demurrage;⁷ or payment illegally exacted as tariff is paid to get possession of goods imported into this country,⁸ as where the customs officials threaten to add a penalty if the tariff demanded is not paid;⁹ or goods are seized on an unfounded claim and a lien is asserted thereon,¹⁰ payments made to obtain possession of such

¹ See § 485.

² England. *Atlee v. Backhouse*, 3 M. & W. 633.

United States. *Maxwell v. Griswold*, 51 U. S. (10 How.) 242, 13 L. ed. 405; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013.

Georgia. *Du-Vall v. Norris*, 119 Ga. 947, 47 S. E. 212.

Illinois. *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10.

Indiana. *Lafayette, etc., Ry. v. Pattison*, 41 Ind. 312.

Kentucky. *Hamilton v. Kentucky Title Savings Bank & Trust Co.*, 159 Ky. 680, L. R. A. 1915B, 498, 167 S. W. 898.

Maine. *Chamberlain v. Reed*, 13 Me. 357, 29 Am. Dec. 506.

Minnesota. *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942.

Nebraska. *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35; *Nelson v. Nelson*, 90 Neb. 456, 156 N. W. 1036.

New Mexico. *Cadwell v. Higginbotham*, 20 N. M. 482, 151 Pac. 315.

New York. *Briggs v. Boyd*, 56 N. Y. 289; *Scholey v. Mumford*, 60 N. Y. 498.

Oregon. *Siverson v. Clanton*, 88 Or. 261, 170 Pac. 933, 171 Pac. 1051. (Decided under special statute.)

South Carolina. *Riggs v. Wilson*, 30 S. Car. 172, 8 S. E. 848.

Texas. *Taylor v. Hall*, 71 Tex. 213, 9 S. W. 141.

Utah. *Buford v. Lonergan*, 6 Utah 301, 22 Pac. 164 [affirmed in 148 U. S. 581, 37 L. ed. 569].

³ *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787.

⁴ *Siverson v. Clanton*, 88 Or. 261, 170 Pac. 933, 171 Pac. 1051.

⁵ *Carson, etc., Co. v. Patterson*, 33 Cal. 334; *Chase v. Dwinal*, 7 Greenl. (Me.) 134, 20 Am. Dec. 352.

⁶ *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

⁷ *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942.

⁸ *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. ed. 373; *Erhardt v. Winter*, 92 Fed. 918.

⁹ *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 33 L. ed. 236.

¹⁰ *Chamberlain v. Reed*, 13 Me. 357, 29 Am. Dec. 506.

goods may be recovered. Such a payment is made under "moral compulsion."¹¹ So where A has delivered a printing press to B under a contract of sale by the terms of which it is to remain A's property until B pays the entire purchase price, and B's landlord, X, takes possession thereof, a payment by A to X to get possession of such machine may be recovered.¹²

In some opinions, especial stress is laid on the fact that great hardship or serious inconvenience will result to the person whose property is detained unless he can get possession of it, and his right to recover payments made by him to get possession of such goods.¹³ The fact that the goods which are unlawfully detained are perishable tends to show that such unlawful detention amounts to duress.¹⁴ If B causes an attachment to be levied upon perishable goods which belong to A, and A pays to B the amount for which such attachment has been levied, A may recover the difference between the amount thus paid and the real debt which was owing from him to B.¹⁵ The detention of goods by custom house officials may amount to duress for which payments in excess of the legal duty may be recovered.¹⁶ If property perishable in its nature or liable to deterioration is withheld, payment to obtain possession thereof and to avoid damage has been held to be made under duress, as where cattle are withheld from the owner,¹⁷ or where oysters have been taken on a writ of attachment wrongfully obtained.¹⁸ Where a cargo of grain is withheld on an unjust claim for demurrage, and the consignee will be put to serious inconvenience if the cargo is not delivered, a payment of such demurrage may be recovered.¹⁹ The right to recover money paid to liberate one's tools of trade has been placed on similar grounds.²⁰ Elimination of these cases, however, leaves a respectable number of authorities in support of the proposition that money paid to regain possession of goods which have been unlawfully taken

¹¹ *Chamberlain v. Reed*, 13 Me. 357, 29 Am. Dec. 506.

¹² *Whitlock Machine Co. v. Holway*, 92 Me. 414, 42 Atl. 799.

¹³ *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942.

¹⁴ *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 33 L. ed. 236; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10.

¹⁵ *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10.

¹⁶ *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 33 L. ed. 236.

¹⁷ *Buford v. Lonergan*, 6 Utah 301, 22 Pac. 164 [affirmed in 148 U. S. 581, 37 L. ed. 569].

¹⁸ *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10.

¹⁹ *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942.

²⁰ *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178.

from the owner, without his having opportunity to be heard in court, may be recovered.

In some jurisdictions, the unlawful detention of goods may amount to duress, although such goods are not perishable.²¹ If A detains B's non-perishable goods until B pays an amount which A claims as demurrage, such detention amounts to duress of goods for which B may recover the difference between the amount thus paid and the amount actually due.²² Where A, an officer, had attached B's bank notes and refused to redeliver them unless B allowed him to keep some as an alleged reward, and X, another officer, was about to attach them, and B allows A to keep some of them as he had demanded, B may recover such amount from A as paid under duress.²³ If B detains A's personalty and A being unable to find who has it or where it is, pays money to X to be used in order to secure the release of such goods, A may recover such payment from B after such goods have been returned to A.²⁴

The weight of authority is that payments made to prevent a threatened wrongful seizure of personalty are made under duress and may be recovered.²⁵ Recovery of such payments has been allowed, although such wrongful seizure may not be regarded as technical duress,²⁶ at least if such threatened wrongful seizure will cause hardship to the owner of such goods.²⁷ Thus if a justice renders a void judgment, the case not being within his jurisdiction, and subsequently execution issues and the judgment debtor, being sick and in mental distress on account of the recent death of members of her family, paid such execution to avoid a threatened levy, it was held that she might recover from the judgment creditor who received the money.²⁸ So money paid to avoid a threatened wrongful distraint of personalty may be recovered.²⁹ So where a sheriff

²¹ *Du Vall v. Norris*, 119 Ga. 947, 47 S. E. 212; *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942.

²² *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942.

²³ *Loyejoy v. Lee*, 35 Vt. 430.

²⁴ *Du Vall v. Norris*, 119 Ga. 947, 47 S. E. 212.

²⁵ *England. Hills v. Street*, 5 Bing. 37.

United States. Robertson v. Frank Bros. Co., 132 U. S. 17, 33 L. ed. 236.
Iowa. Chambliss v. Hass, 125 Ia. 484, 68 L. R. A. 126, 3 Am. & Eng. Ann. Cas. 16, 101 N. W. 153.

Michigan. Cox v. Welcher, 68 Mich. 263, 13 Am. St. Rep. 339, 36 N. W. 69.
Texas. Taylor v. Hall, 71 Tex. 213, 9 S. W. 141.

²⁶ *Nelson v. Nelson*, 99 Neb. 456, 156 N. W. 1036.

²⁷ *Nelson v. Nelson*, 99 Neb. 456, 156 N. W. 1036.

²⁸ *Hollingsworth v. Stone*, 90 Ind. 244.

²⁹ *Hills v. Street*, 5 Bing. 37.

Contra, Colwell v. Peden, 3 Watts (Pa.) 327, where a bona fide distress was held not to be duress.

holding an execution threatened to levy unless an excessive amount were paid by the debtor, and the debtor paid the amount demanded, he may recover such excess from the sheriff.³⁰ Duress by threatened seizure of goods has been limited very sharply by some authorities to cases where the danger of seizure was imminent. In case of payments to an officer the test of the right to recover them if not justly due has been held to be whether or not the officer has apparent power to seize or levy on the property which he is threatening to take.³¹ Where this limitation on the doctrine of duress of goods prevails, something more than the possible deprivation of goods in the future is necessary to amount to duress of goods.³² Thus where a chattel mortgage with power of sale had been given to secure payment of the price of corn sold by the mortgagee to the mortgagor, a payment of the full amount of the purchase price, though some of the corn is never delivered, can not be recovered, though made because of a threat of the mortgagee to sell the mortgaged property under the power of sale.³³ A payment of a debt secured by a chattel mortgage can not be recovered although the amount of such debt is not disputed, if the creditor did not threaten to make use of such chattel mortgage to enforce such payment and if the debtor did not claim that he made such payment to release such goods.³⁴

Outside of questions of abuse of legal process in seizing person or property, a lawful act does not amount to duress, although by such act a person is induced to make a payment which he is not willing to make. As a result, the detention of goods must be unlawful in order to amount to compulsion. The party making payment must do everything necessary to entitle him to the property detained if he wishes to recover excess payments. This principle has been carried so far that a payment of excessive freight charges to obtain possession of goods can not be recovered where the consignee did not tender the amount actually due, which amount he knew, and demand the property.³⁵ In this case payment was made to an agent on his statement that the company would refund any excessive charges. Such agent did not, however, have authority to bind his principal by a contract to refund. Where A

³⁰ *Snell v. State*, 43 Ind. 359.

³¹ *Taylor v. Hall*, 71 Tex. 213, 9 S. W. 141.

³² *Lamb v. Rathburn*, 118 Mich. 666, 77 N. W. 268.

³³ *Vick v. Shinn*, 49 Ark. 70, 4 Am. St. Rep. 28, 4 S. W. 60.

³⁴ *Lamb v. Rathburn*, 118 Mich. 666, 77 N. W. 268.

³⁵ *Gulf City Construction Co. v. Ry.*, 121 Ala. 621, 25 So. 579.

moved his office to B's stockyards, as tenant at will, B agreeing to charge no rent, and B then charged rent, which A paid because all the offices at such yards belonged to B, no duress exists.^{3*}

§ 1535. Payment to remove cloud from title to realty. Duress of property need not always involve detention of personalty however. If the unlawful acts of one person cast a cloud on the title of another to realty, a payment made to remove such cloud may be made under duress.¹ Thus a payment made to prevent a threatened sale for taxes which would cast a cloud on the title to realty;² or a payment to clear title to realty from a pretended mechanic's lien, so as to raise a new loan to take up an overdue mortgage and other pressing claims,³ where the party making such payment had no other means of raising money than by mortgaging such realty, or payment extorted by threatening to sell realty under a power of sale contained in a mortgage;⁴ or payment of an amount over and above the true amount of a mortgage debt;⁵ or an unlawful payment of attorney fees exacted as a condition precedent to redemption,⁶ may be recovered. But payment of a judgment while proceedings in error were pending because the judgment was a lien on the realty of the judgment debtor, who was in financial distress and could not raise money except by a loan on such realty and such loan could be obtained only by paying such judgment has been held to be a voluntary payment.⁷ So where A gave B a mortgage in the form of a deed to secure his

^{3*} *Minneapolis, etc., Co. v. Cunningham*, 59 Minn. 325, 61 N. W. 329. (Ending such tenancy at will was "nothing more than defendant would have had a legal right to do.")

¹ *Shane v. St. Paul*, 26 Minn. 543, 6 N. W. 349; *Joannin v. Ogilvie*, 49 Minn. 564, 32 Am. St. Rep. 581, 16 L. R. A. 376, 52 N. W. 217; *American Baptist Missionary Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078; *Bowns v. May*, 120 N. Y. 357, 24 N. E. 947; *Poth v. New York*, 151 N. Y. 16, 45 N. E. 372; *Montgomery v. Cowlitz*, 14 Wash. 230, 44 Pac. 259.

² See § 1545.

³ *Joannin v. Ogilvie*, 49 Minn. 564, 32 Am. St. Rep. 581, 16 L. R. A. 376, 52 N. W. 217.

⁴ *Close v. Phipps*, 7 Man. & G. 586; *McMurtrie v. Keenan*, 109 Mass. 185.

⁵ *Cazenove v. Cutler*, 61 Mass. (4 Met.) 246; *David City First National Bank v. Sargeant*, 65 Neb. 594, 59 L. R. A. 296, 91 N. W. 695; *Union Cent. Life Ins. Co. v. Erwin*, 44 Okla. 768, 145 Pac. 1125.

⁶ *Klein v. Bayer*, 81 Mich. 233, 45 N. W. 991.

Contra, where the mortgage had been discharged by a tender of the full amount of the mortgage debt. *Wessel v. Mortgage Co.*, 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922.

⁷ *Hipp v. Crenshaw*, 64 Ia. 404, 20 N. W. 492. (Hence the proceedings in error were dismissed.)

debt to B, and B then refused to recognize A's rights or consent to A's selling his rights in such realty unless paid a large sum of money over and above A's indebtedness to B, and threatened prolonged litigation if A did not make such payment, and A had no other way of paying his debt except by the sale of such realty, it was held that A paid such additional sum under duress and could recover it.⁸ In all these cases no opportunity for a judicial hearing was given before the title was apparently encumbered or affected.

It has been said that an apparent lien which amounts to a cloud upon the title but which does not involve the immediate possession of the realty, is not duress or compulsion for which a payment may be recovered.⁹ If a judgment has been obtained in a manner not authorized by law but not by fraud, a payment of such judgment which was made to prevent a threatened foreclosure sale of such realty can not be recovered, even if such judgment was an apparent cloud, as long as there was no danger to possession.¹⁰

Wrongful acts which do not cast a cloud on the title to realty do not amount to duress of realty.¹¹ Thus a threatened sale for illegal taxes, where the purchaser has the burden of proving every step necessary to make out a valid sale,¹² or a threatened sale of the land of one person on an execution issued against another,¹³ do not cast a cloud on the title and hence payment by reason thereof is not made under duress.

§ 1536. Civil action as compulsion—Failure to invoke protection of law. The principle that a lawful act does not constitute duress in the absence of special circumstances find illustration in the commencement of a civil action. The mere threat of a civil action is not duress or legal compulsion; and a payment made by reason of such threat can not be recovered.¹ The same principle

⁸ *First National Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595.

⁹ *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482.

¹⁰ *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482 [distinguishing, *Murphy v. Casselman*, 24 N. D. 336, 139 N. W. 802].

¹¹ *Stover v. Bowman*, 45 Ill. 213; *Davies v. Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145.

¹² *Davies v. Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145.

¹³ *Stover v. Mitchell*, 45 Ill. 213.

¹ *California*. *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891; *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733.

Indiana. *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323.

Iowa. *Muscatine v. Packet Co.*, 45 Ia. 185; *Paulson v. Barger*, 132 Ia. 547, 109 N. W. 1081.

applies where a civil action has been instituted;² and, accordingly, payment of money on service of summons is not payment under duress and can not be recovered.³ Indeed, if any defense to such cause of action exists, the threatened action is the very means provided for by law for determining its validity. Thus if an action in replevin,⁴ or attachment;⁵ or a seizure in admiralty for non-payment of an alleged claim for wharfage;⁶ or an action against a corporation for the appointment of a receiver;⁷ or an action by a receiver to enforce a stock liability;⁸ or a foreclosure suit;⁹ or a foreclosure of a statutory lien which the lessor has upon the lessee's property,¹⁰ is either begun or threatened it does not of itself amount to duress. Thus where an overdue note given by A to B bore interest at ten per cent., but B had agreed in writing that it should bear only eight per cent. after maturity, and B subsequently sues in foreclosure and demands ten per cent. interest, A should set up such agreement as a defense. If he pays the full

Kentucky. *Hamilton v. Kentucky Title Sav. Bank & Trust Co.*, 159 Ky. 680, L. R. A. (N.S.) 1915B, 498, 167 S. W. 898.

Louisiana. *New Orleans, etc., R. R. v. Improvement Co.*, 109 La. 13, 94 Am. St. Rep. 395, 33 So. 51.

Maine. *Parker v. Lancaster*, 84 Me. 512, 24 Atl. 952.

Massachusetts. *Preston v. Boston*, 29 Mass. (12 Pick.) 7; *Benson v. Monroe*, 61 Mass. (7 Cush.) 125, 54 Am. Dec. 716; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

Oregon. *Siverson v. Clanton*, 88 Or. 261, 170 Pac. 933, 171 Pac. 1051.

Pennsylvania. *Peebles v. Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714. "To pursue or threaten to pursue the usual legal steps for the collection of a debt in the manner provided by law does not constitute duress of property." *Burke v. Gould*, 105 Cal. 277, 283, 38 Pac. 733. See, however, *Welch v. Beeching*, 193 Mich. 338, 159 N. W. 486.

²*Dawson v. Mann*, 49 Ia. 596; *Benson v. Monroe*, 61 Mass. (7 Cush.) 125, 54 Am. Dec. 716; *Brummitt v. McGuire*,

107 N. Car. 351, 12 S. E. 191; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219.

³*Hamlet v. Richardson*, 9 Bing. 644; *Marriot v. Hampton*, 7 T. R. 269. "Money paid under pressure of legal process can not be recovered." *Moore v. Fulham* [1895], 1 Q. B. 399.

⁴*Brummitt v. McGuire*, 107 N. Car. 351, 12 S. E. 191.

⁵*Benson v. Monroe*, 61 Mass. (7 Cush.) 125, 54 Am. Dec. 716.

⁶*New Orleans, etc., R. R. v. Improvement Co.*, 109 La. 13, 94 Am. St. Rep. 395, 33 So. 51. The wharfage fees were held legal in *New Orleans, etc., R. R. v. Improvement Co.*, 75 Fed. 309, 21 C. C. A. 364.

⁷*Dustin v. Farrelly*, 81 Mo. App. 380.

⁸*Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

⁹*Burke v. Gould*, 105 Cal. 277, 38 Pac. 733; *Savannah Savings Bank v. Logan*, 99 Ga. 291, 25 S. E. 692; *Vereycken v. Vanden-Brooks*, 102 Mich. 119, 60 N. W. 687; *Shuck v. Loan Association*, 63 S. Car. 134, 41 S. E. 28.

¹⁰*Paulson v. Barger*, 132 Ia. 547, 109 N. W. 1081.

amount, including interest at ten per cent., he can not recover the difference.¹¹ The fact that the creditor who demands payment of installments which are in arrears has a right to declare the entire debt due, does not amount to such duress that the debtor can recover a premium which he has paid to the creditor to induce the creditor to accept the payment of the entire debt, including the installments not yet due and to release the security.¹²

If the person who claims to have been compelled to make a payment is in a situation in which he could invoke the protection of the law without subjecting himself to serious inconvenience or injury, and instead of invoking the protection of the law he prefers to make the payment which he now seeks to recover, it is held that such payment is not made under duress and that it can not be recovered.¹³ If the person who makes such payment is in a position to protect his rights by obtaining a restraining order,¹⁴ or by obtaining the vacation of a judgment,¹⁵ or by taking an appeal,¹⁶ or by giving a bond which he is able to give,¹⁷ such payments are not made under duress and can not be recovered. Since the existence of duress in each case is a question of fact, the results of the foregoing cases may be justified on the theory that the undisputed evidence showed that the party who made the payment was not in fact under any compulsion but made such payment voluntarily rather than resort to the proper means of securing legal protection.

§ 1537. Legal process as compulsion. If the property of one is seized on legal process procured by another in good faith and "in pursuit of the ordinary remedy afforded by law,"¹ a payment made to procure the release of such property is not made under duress and can not be recovered if the right of recovery rests on that ground alone.² Thus if A resides in one state and his property

¹¹ *Vereycken v. Vanden-Brooks*, 102 Mich. 119, 60 N. W. 687.

¹² *Hamilton v. Kentucky Title Sav. Bank & Trust Co.*, 159 Ky. 680, L. R. A. 1916B, 498, 167 S. W. 898.

¹³ *Manning v. Poling*, 114 Ia. 20, 83 N. W. 895, 86 N. W. 30; *D'Aloia v. Summit*, 89 N. J. L. 154, 97 Atl. 722; *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482.

¹⁴ *Manning v. Poling*, 114 Ia. 20, 83 N. W. 895, 86 N. W. 30.

¹⁵ *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482.

¹⁶ *D'Aloia v. Summit*, 89 N. J. L. 154, 97 Atl. 722; *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482.

¹⁷ *Turner v. Barber*, 66 N. J. L. 496, 49 Atl. 676.

¹ *Kohler v. Wells*, 26 Cal. 606.

² "It will not do to hold that a payment secured by none but the means provided by the law itself is a com-

is duly attached by B in another on a claim which B in good faith believes to be a just one, a payment by A to B to settle such claim and to procure the release of such attachment can not be recovered.³ So if property is taken in good faith upon an attachment which is not issued simply to hold the property until another attachment can be levied, but is intended as a regular means of securing a just debt, and the first attachment is dismissed because the defendant is misnamed, and a second attachment issues under which the officer continues to hold the attached property, he is not liable in assumpsit because he did not return the attached property to the owner before levying the second attachment.⁴ A fraudulent use of legal process may amount to duress however.⁵ If goods are seized by legal process and a payment is thus extorted such payment is made by compulsion.⁶ If an attachment is levied not in good faith, but on a claim known to be unfounded for the purpose of extorting a payment, such payment if made to procure the release of such goods is "by compulsion,"⁷ and may be recovered, especially if made by one who is unable with reasonable diligence to learn the facts.⁸ A payment made to prevent the levy of an unlawful writ of execution may be recovered though no property has been seized.⁹ If A has given to B A's promissory note without consideration but in the absence of mistake, duress, and the like, A can not recover from B the amount which A has been obliged to pay to X, a bona fide holder, to whom B has transferred such note before maturity;¹⁰ at least if A has not notified B before B had negotiated such note, that A elected to repudiate it.¹¹ If B has executed and delivered a negotiable instrument to A, in whose hands it is unenforceable by reason of lack of full capacity, and A sells such negotiable instrument to X, a bona fide holder, who

pulsory or coerced one, there being no element of fraud or other ingredient of oppression in the case." *Dickerman v. Lord*, 21 Ia. 338, 343, 89 Am. Dec. 579.

³ *Kohler v. Wells*, 26 Cal. 606; *Dickerman v. Lord*, 21 Ia. 338, 89 Am. Dec. 579.

⁴ *Brady v. Royce*, 180 Mass. 553, 62 N. E. 960.

⁵ *Pitt v. Coomes*, 2 Ad. & El. 459; *Cadaval (Duke of) v. Collins*, 4 Ad. & El. 858; *Colwell v. Peden*, 3 Watts (Pa.) 327.

⁶ *Hopkinson v. Sears*, 14 Vt. 494, 39 Am. Dec. 236.

⁷ *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367.

⁸ *Adams v. Reeves*, 68 N. Car. 134, 12 Am. Rep. 627.

⁹ *Kaiser v. Barron*, 153 Cal. 474, 95 Pac. 879.

¹⁰ *Dickinson v. Carroll*, 21 N. D. 271, 37 L. R. A. (N.S.) 286, 130 N. W. 829.

¹¹ *Dickinson v. Carroll*, 21 N. D. 271, 37 L. R. A. (N.S.) 286, 130 N. W. 829.

enforces the instrument against B, B may recover from A. Thus where a city issues bonds to a corporation, in payment of an ultra vires subscription by the city to the capital stock of such corporation, and the corporation delivers the bonds to a bona fide purchaser in whose hands they are enforceable against the city, the city may maintain an action against the corporation for the proceeds of such bonds.¹²

A entered into a contract with B for the sale of real property, by the terms of which contract A reserved as his own a building thereon. Subsequently, at B's request, A made to X a warranty deed for such property with full covenants of warranty, X having purchased B's rights in such contract. X claimed the building by force of the deed, and B was obliged to pay X the value of such improvements for the privilege of removing them. It was held that A could recover from B the amount thus paid, since B got the benefit thereof in the additional price received by him on sale of his interests in such property.¹³

§ 1538. Breach of contract as duress. A payment which is made to induce the adversary party to perform a contract is ordinarily not made under duress, and it can not, therefore, be recovered.¹ Thus excessive payments made to induce an irrigation company to continue to furnish water;² or payments made to induce a vendor to deliver future installments of coal according to his contract, the payments being the contract price for the coal already delivered which was held not to be of the quality required by the contract;³ or payments made to an agent of what he claimed to be the balance due him from his principal to induce him to deliver butter which was not the principal's until it was delivered,⁴ can none of them be recovered. So a contractor can not recover a payment made by him as due on a forfeiture for failure to complete the work in accordance with the terms of the contract on the theory that it was made under duress, although the board of public works, to whom it was made, would not notify the council that the work had been accepted until this payment had been made, and until such notice the council would not appropriate

¹² *Geneseo v. Natural Gas Co.*, 55 Kan. 358, 40 Pac. 655.

¹³ *Edmunds v. Depper*, 97 Ky. 661, 31 S. W. 468.

¹ *Smithwick v. Whitley*, 152 N. Car. 369, 67 S. E. 913.

² *Steck v. Irrigation Co.*, 4 Colo. App. 323, 35 Pac. 919.

³ *Armstrong v. Latimer*, 165 Pa. St. 398, 30 Atl. 990.

⁴ *Hubbard v. Mills*, 46 Vt. 243.

the amount due the contractor.⁵ Under some circumstances, however, a refusal to perform a contract may have so disastrous an effect upon the business of the adversary party that a payment made by him to induce performance of such contract may be held to be made under compulsion. Thus where a theatrical performance had been advertised, and a short time before it was to begin the actor refused to go on unless he was paid the full amount of an item in dispute between himself and the manager, it was held that a payment of such amount by the manager was made under "a species of constraint," and could be recovered.⁶

A strike or a boycott is likely to be accompanied by physical violence; and even if physical violence is absent, a manufacturer or a business man may be prevented from engaging in business more effectively, for practical purposes, by a strike or a boycott than by any available physical violence. Accordingly, money which is paid by a manufacturer or a business man under threat of a strike or boycott which will interfere with his business is paid under compulsion, and if it is not justly due it may be recovered.⁷ A manufacturer who is obliged to pay money to a labor union in order to induce its members not to refuse to handle his product on the ground that he has sold to dealers whom they regard as unfair, may be recovered, since it was paid by compulsion.⁸ B, a building contractor, who was constructing a church in Boston, sent some stone to New York to be cut. For this he was fined five hundred dollars by an association of stonemasons. B refused to make such payment, and the association threatened to cause a strike among B's workmen unless such amount was paid. On B's continued refusal the association caused a strike, which lasted for some time. B was unable to procure laborers competent to complete such job, and he finally paid this amount in order to have the strike declared off. Subsequently he brought suit against the association and those who had handled the check by which such payment was made and received the money therefor. The lower

⁵ *Laidlaw v. Detroit*, 110 Mich. 1, 67 N. W. 967. But similar facts in the formation of a contract have been held to constitute duress. See § 492.

⁶ *Dana v. Kemble*, 34 Mass. (17 Pick.) 545. In this case the judgment in favor of the manager was reversed on the ground of failure of proof, and a new trial ordered.

⁷ *March v. Bricklayers' & Plasterers' Union No. 1*, 79 Conn. 7, 4 L. R. A. (N.S.) 1198, 6 Ann. Cas. 848, 63 Atl. 291.

⁸ *March v. Bricklayers' & Plasterers' Union No. 1*, 79 Conn. 7, 4 L. R. A. (N.S.) 1198, 6 Ann. Cas. 848, 63 Atl. 291.

court held that B had no right of action. For this the supreme court reversed the judgment of the lower court, holding that B had a right of action, although they were undecided whether it was in tort or in assumpsit.⁹

Under modern conditions of life it is ordinarily impossible to use a building which is not supplied with water, gas, electricity, and the like. Payment of illegal charges for water,¹⁰ or gas,¹¹ made under threat of cutting off the supply if such illegal charge is not paid, or payment of an illegal water license charge,¹² or an illegal charge for rent of a gas meter,¹³ made under like circumstances, may be recovered. If the rates which an irrigation company may charge are not fixed by statute, such a company may charge only reasonable rates; and if it demands rates in excess of a reasonable amount and threatens to refuse to furnish water if such amount is not paid, such payment is made by compulsion and the difference between the amount paid and a reasonable rate may be recovered.¹⁴

§ 1539. Other forms of duress. While duress or legal compulsion generally involves person or tangible property, it is not limited thereto. If a public officer unlawfully demands fees for the performance of a public duty, and his failure to perform such public duty will result in great inconvenience and possible loss to the person upon whom such demand is made, payment of such fees is to be regarded as being made under duress.¹ Thus payment made by force of a statute afterward held unconstitutional, requiring a certain payment as a condition precedent to the jurisdiction of the probate court in administering an estate,² such as a

⁹ *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. This case was subsequently settled, and was not tried a second time.

¹⁰ *Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40, 1 L. R. A. (N.S.) 770, 75 N. E. 803; *Panton v. Duluth, etc., Co.*, 50 Minn. 175, 36 Am. St. Rep. 635, 52 N. W. 527; *St. Louis Brewing Association v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

¹¹ *Indiana, etc., Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

¹² *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

¹³ *Capital, etc., Co. v. Gaines (Ky.)*, 49 S. W. 462.

¹⁴ *Salt River Valley Canal Co. v. Nelssen*, 10 Ariz. 9, 12 L. R. A. (N.S.) 711, 16 Am. Cas. 796, 85 Pac. 117.

¹ *Trower v. San Francisco*, 152 Cal. 479, 15 L. R. A. (N.S.) 183, 92 Pac. 1025; *Malin v. LaMoure County*, 27 N. D. 140, 50 L. R. A. (N.S.) 997, Ann. Cas. 1916C, 207, 145 N. W. 582.

² *Trower v. San Francisco*, 152 Cal. 479, 15 L. R. A. (N.S.) 183, 92 Pac. 1025; *Mearkle v. Hennepin Co.*, 44 Minn. 540, 47 N. W. 165; *Malin v. LaMoure*, 27 N. D. 140, 50 L. R. A. (N.S.) 997, 145 N. W. 582.

fee demanded by the clerk for filing inventories and appraisements of the estate of a decedent which by law were to be filed within a specified time and in case of failure to file which inventories and appraisement the administrator was liable to be removed,³ may be recovered. The owner of a vessel who purchases revenue stamps in order to affix them to the manifest and thus to obtain a clearance can not recover such payment from the collector if no protest was made to him when the stamps were purchased and if no protest was made to the collector of the port from whom clearance was had.⁴

If a payment is made when the party who makes it has the alternative between making it and resorting to legal proceedings to protect his rights which would involve an injurious delay, such payment is to be regarded as made under compulsion.⁵

§ 1540. Dilemma not duress. The mere fact that one makes a payment when in doubt as to his legal rights and afraid of imperiling them if he refuses payment does not constitute duress.¹ The fact that the person who makes the payment is uncertain as to his legal rights, and pays for revenue stamps because he fears the consequences of omitting them,² or pays an invalid tax because he does not know whether it is valid or not, and fears that he will lose a discount if such tax is not paid promptly,³ or pays a sum of

³ *Trower v. San Francisco*, 152 Cal. 479, 15 L. R. A. (N.S.) 183, 92 Pac. 1025.

⁴ *United States v. Cuba Mail S. S. Co.*, 200 U. S. 488, 50 L. ed. 569 [following, *Chesebrough v. United States*, 192 U. S. 253, 48 L. ed. 432].

⁵ *Alabama. Mobile & M. R. Co. v. Steiner*, 61 Ala. 559.

California. Trower v. San Francisco, 152 Cal. 479, 15 L. R. A. (N.S.) 183, 92 Pac. 1025.

Illinois. Chicago v. Northwestern Mutual Life Insurance Co., 218 Ill. 40, 1 L. R. A. (N.S.) 770, 75 N. E. 803; *Cook County v. Fairbank*, 222 Ill. 578, 78 N. E. 895.

Minnesota. State, ex rel., v. Nelson, 41 Minn. 25, 4 L. R. A. 300, 42 N. W. 548; *Mearkle v. Hennepin County*, 44 Minn. 546, 47 N. W. 165.

North Dakota. St. Anthony & D. Elevator Co. v. Bottineau County, 9 N. D. 346, 50 L. R. A. 262, 83 N. W. 212; *Malin v. LaMoure County*, 27 N. D. 140, 50 L. R. A. (N.S.) 997, Ann. Cas. 1916C, 207, 145 N. W. 582.

¹ *United States v. New York & Cuba Mail Steamship Co.*, 200 U. S. 488, 50 L. ed. 569; *Pardue v. Absher*, 174 N. Car. 676, 94 S. E. 414; *De La Cuesta v. Ins. Co.*, 136 Pa. St. 62, 658, 9 L. R. A. 631, 20 Atl. 505.

² *United States v. New York & Cuba Mail Steamship Co.*, 200 U. S. 488, 50 L. ed. 569.

³ *Atchison, Topeka & Santa Fe Ry. v. Humboldt*, 87 Kan. 1, 41 L. R. A. (N.S.) 175, 123 Pac. 727; *Louisville v. Becker*, 139 Ky. 17, 28 L. R. A. (N.S.) 1045, 129 S. W. 311.

money as to bonus for the privilege of subscribing for stock, although he has a legal right to such subscription without making such payment, because he fears that if he does not make such payment he will be debarred from making such subscription,⁴ is held not to amount to compulsion in any of these cases.

This is merely an illustration of a mistake of law. The party paying does not know whether he is bound by law to pay or not, and to save his rights he makes payment. In such case, if he was not bound by law to pay, he has paid under a mistake of law, and can not recover. If he was bound by law to pay, he has done only what he should have done and can not recover. The practical working out of these rules show, however, that there is something lacking in the rules themselves or in their underlying principles on the one side, or in their practical application on the other. A greater freedom in recovering payments made under a mistake of law and in securing a judicial declaration of rights in advance is necessary to avoid practical injustice.

§ 1541. Unfair advantage as duress. Payments made by one who is not on terms of practical equality with the person to whom such payments are made are looked upon, not as voluntary payments, but as payments made under compulsion.¹ Where A demands from B payment of tolls which are not legally due, under threat of drawing off water from a dam used by B, a step which would interfere with B's business seriously, and to avoid such action B pays such tolls, he may recover such payment.² A, a section foreman of a railroad, extorted money from B, one of the section hands, by showing B a written order from A's superior, X, directing A to discharge every man who would not pay over ten dollars. In order to keep from being discharged, B paid such amount. It was held that B could recover from A.³ The fact that A had transmitted such money to X, did not relieve him from the liability to account to B therefor. A pension attorney who charges and collects a fee in excess of that fixed by federal statute for obtaining a pension is liable for such excess to the person by whom

⁴ *De La Cuesta v. Ins. Co.*, 136 Pa. St. 62, 9 L. R. A. 631, 20 Atl. 505.

¹ *Bither v. Packard*, 115 Me. 306, 98 Atl. 929; *State, ex rel., v. Chicago & Alton Railroad Co.*, 265 Mo. 646, L. R. A. 1916C, 309, 178 S. W. 129; *Kilpatrick v. Germania Life Insurance*

Co., 183 N. Y. 163, 2 L. R. A. (N.S.) 574, 75 N. E. 1124; *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977.

² *Lehigh, etc., Co. v. Brown*, 100 Pa. St. 338.

³ *Bocchino v. Cook*, 67 N. J. L. 467, 51 Atl. 487.

such payment is made.⁴ Where insurance was effected in the names of lessor and lessee jointly and on loss, proof of loss must be made by both, and the lessor takes advantage of the financial necessities of the lessee to exact a payment out of the lessee's share of the insurance of an amount which is not due to the lessee, such payment may be recovered as made under duress.⁵ A payment which is obtained by taking advantage of extreme financial necessity may be regarded as a payment induced by duress or compulsion; and such payments may be recovered if they were not originally due.⁶ If a mortgage debtor is required to pay a bonus which is not authorized by law in order to secure the discharge of a mortgage upon his payment of the mortgage debt after foreclosure proceedings upon such mortgage have been begun, such payment is made under compulsion and it may be recovered.⁷ A refusal of a vendee to accept a deed unless revenue stamps are affixed thereto is not duress; and the vendor who buys such stamps from the revenue collector without protest and without notifying him of their intended use can not recover from him.⁸ In some jurisdictions it is held that payments of usurious interest are necessarily made under compulsion, and hence may be recovered, even though the contract has been fully performed, and there is no statute specifically providing for recovery.⁹ A common carrier and a shipper do not stand upon terms of equality. The shipper is usually under a practical compulsion to have his property transported at once. He does not know, and he has no means of communicating with the officers of the road whose business it is to fix the charges for transportation. Accordingly, payment by a shipper of an unreasonable charge, or one in excess of the amount fixed by law is not looked upon as one of voluntary payment, and the shipper may recover,¹⁰ even if no protest is made at the time of

⁴ *Hall v. Kimmer*, 61 Mich. 269, 1 Am. St. Rep. 575, 28 N. W. 96.

⁵ *Guetzkow Bros. Co. v. Breese*, 96 Wis. 591, 65 Am. St. Rep. 83, 72 N. W. 45.

⁶ *Bither v. Packard*, 115 Me. 306, 98 Atl. 929; *Kilpatrick v. Germania Life Insurance Co.*, 183 N. Y. 163, 2 L. R. A. (N.S.) 574, 75 N. E. 1124.

⁷ *Kilpatrick v. Germania Life Insurance Co.*, 183 N. Y. 163, 2 L. R. A. (N.S.) 574, 75 N. E. 1124.

⁸ *Chesebrough v. United States*, 192 U. S. 253, 48 L. ed. 432.

⁹ *Bexar, etc., Association v. Robinson*, 78 Tex. 163, 22 Am. St. Rep. 36, 9 L. R. A. 292, 14 S. W. 227. See § 1079.

¹⁰ *Alabama. Mobile, etc., Ry. v. Steiner*, 61 Ala. 559.

Illinois. Chicago, etc., R. R. v. Coal Co., 79 Ill. 121.

Indiana. Lafayette, etc., R. R. v. Pattison, 41 Ind. 312; *Chicago, etc., Ry. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451.

the overpayment.¹¹ If a railway company has obtained an injunction against the enforcement of rates which were fixed by a railway commission, shippers who have been obliged to pay the original rates may recover the difference between such rates and the rates which were fixed by such commission after such injunction is dissolved.¹² Where by law charges must be uniform, a shipper who has been obliged to pay regular rates while other shippers have received rebates, may recover the difference between the rates paid by him and what he would have been obliged to pay had he received the same rebate.¹³ So if the carrier has paid to one shipper a proportion of the freight charges paid by another shipper, a competitor of the former, the latter may recover such amount from the former.¹⁴ But it has been held that under a statute permitting the refunding of excessive charges for freight an action can not be brought to compel such refunding.¹⁵

A private individual and a public officer do not ordinarily stand upon an equal footing.¹⁶ One who has entered into a contract with a telephone company by which he has agreed to pay rates in excess of those fixed by its charter and who makes payments in accordance with such contract, can not recover back the difference between the rates thus paid and the rates as fixed by charter.¹⁷

The fact that a public official can be compelled by a proceeding in mandamus to perform certain public services for which he is attempting to exact an unlawful fee, does not prevent his demand for such fee from amounting to compulsion if the person upon whom such demand is made will be placed in a position in which

North Carolina. *Hilton Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. Car. 171, 6 L. R. A. (N.S.) 225, 53 S. E. 823.

Ohio. *Peters v. R. R.*, 42 O. S. 275, 51 Am. Rep. 814; *Brundred v. Rice*, 49 O. S. 640, 32 N. E. 169.

Vermont. *Beckwith v. Frisbie*, 32 Vt. 559.

West Virginia. *West Virginia, etc., Co. v. Sweetzer*, 25 W. Va. 434.

¹¹ *Louisville, etc., Ry. v. Wilson*, 132 Ind. 517, 18 L. R. A. 105, 32 N. E. 311; *Hilton Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. Car. 171, 6 L. R. A. (N.S.) 225, 53 S. E. 823.

¹² *State, ex rel., v. Chicago & Alton Railroad Co.*, 265 Mo. 646, L. R. A. 1916C, 300, 178 S. W. 129.

¹³ *Cook v. Ry.*, 81 Ia. 551, 25 Am. St. Rep. 512, 9 L. R. A. 764, 46 N. W. 1080.

¹⁴ *Brundred v. Rice*, 49 O. S. 640, 34 Am. St. Rep. 589, 32 N. E. 169.

¹⁵ *Randle v. Abeel*, 88 Fed. 719.

¹⁶ *Marcotte v. Allen*, 91 Me. 74, 40 L. R. A. 185, 39 Atl. 346; *American Steamship Co. v. Young*, 89 Pa. St. 186, 33 Am. Rep. 748.

¹⁷ *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 18 L. R. A. (N.S.) 124, 85 N. E. 200.

he may suffer serious loss if such public service is not performed.¹⁸ Accordingly, a payment demanded and received of a public officer, under color of office, may be recovered by the private person making such payment, even if he makes it under a mistake of law. Thus where A lived in a county attached for certain purposes to another at the time that certain taxes were levied, but subsequently reorganized as a separate county before such taxes were paid, and A pays his taxes to the treasurer of such other county, A may recover such taxes from such county.¹⁹ So a postmaster who exacts an unauthorized fee for delivering letters may be made to refund such payment in an action for money had and received.²⁰ If the public officer receives fees to which he is not entitled, and he knows that the person paying them is ignorant of the law and makes such payments because he thinks he is bound by law to pay them, his act in receiving such payment without informing the other person of his rights is looked upon as a fraud, and the party making such payments may recover them.²¹ Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party and especially if the parties are not on an equal footing, an action to recover it back is maintainable.²² Payment made to a public officer by a private citizen for services which the officer was not required to render as a part of his public duty, can not be recovered. Thus if an auditor makes a special charge for services in preparing a bond which he is not required by his office to do, a payment therefor can not be recovered.²³ The legislature has power to change the common-law rule that money paid under mistake of law can not be recovered, and may give a right of action against a public officer who collects, from a private person, fees to which he is not entitled by law.²⁴ If legal and illegal charges are so blended by the officer making them, that the legal can not be separated from the illegal, he may be liable to pay all fees thus received.²⁵ A borrowed money from a school fund. The county auditor made an illegal demand for a payment as a penalty as delinquent interest. A paid such amount into the county treas-

¹⁸ *Trower v. San Francisco*, 152 Cal. 479, 15 L. R. A. (N.S.) 183, 92 Pac. 1025.

¹⁹ *Fremont, etc., Ry. v. Holt County*, 28 Neb. 742, 45 N. W. 163.

²⁰ *Barnes v. Foley*, 5 Burr. 2711.

²¹ *Marcotte v. Allen*, 91 Me. 74, 40 L. R. A. 185, 39 Atl. 346.

²² *Marcotte v. Allen*, 91 Me. 74, 40 L. R. A. 185, 39 Atl. 346.

²³ *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836.

²⁴ *Benson v. Christian*, 129 Ind. 535, 29 N. E. 26.

²⁵ *Benson v. Christian*, 129 Ind. 535, 29 N. E. 26.

ury. The county attorney was paid for his services in obtaining such payment out of the county revenue funds. It was held that A could not recover from any of these officers; since the auditor, who had demanded the payment, did not receive it, the treasurer who received it did not exact it; and the county attorney was not paid out of such funds.²

§ 1542. Payment of another's debt to protect one's interests.

If A is obliged to pay B's debt in order to protect A's property interests, A's payment is not voluntary and he may recover from B.¹ If the debt which B owes, and upon which B is primarily liable, is a lien upon A's property, and A is obliged to pay such lien to protect his interest in the property, he may recover from B.² If two different tracts of land owned by different owners are encumbered by a blanket mortgage and the owner of one of such tracts is obliged to pay the mortgage to protect his interest, he may have contribution in equity from the owner of the other tract.³ Where property subject to an assessment was conveyed, and the grantor had promised as a part of the consideration to pay the assessments due thereon, and he does not make such payments, and by reason thereof the grantee is obliged to pay such assessments, he may recover from the grantor, on the theory of an implied contract in an action for money paid, and need not sue on the express contract to pay the assessment.⁴ So if a court has by decree found that A is holding stock for B, subject to a lien in favor of A for advances which he has made to B, on account of such stock, A may recover from B for assessments made upon the stock by the corporation and paid by A to the corporation to preserve his interest in it, and his right to recover from B is not defeated by his taking an appeal from such decree.⁵ So if a lessee to protect his interest is obliged to pay taxes on the leased realty he may recover from his lessor.⁶ So if a lessee covenants in the lease to

²⁸ Coleman v. Goben, 16 Ind. App. 346, 45 N. E. 194.

¹ Exall v. Partridge, 8 T. R. 308; Post v. Gilbert, 44 Conn. 9; Gleason v. Dyke, 39 Mass. (22 Pick.) 390; La Paul v. Heywood, 113 Minn. 376, 32 L. R. A. (N.S.) 368, Ann. Cas. 1912A, 274, 129 N. W. 763.

See also, Bovey-Shute Lumber Co. v. Farmers' & Merchants' Bank, — N. D. —, 173 N. W. 455.

² Gleason v. Dyke, 39 Mass. (22 Pick.) 390; Hunt v. Amidon, 4 Hill (N. Y.) 345, 40 Am. Dec. 283.

³ Sawyer v. Lyon, 10 Johns. (N. Y.) 32.

⁴ Post v. Gilbert, 44 Conn. 9.

⁵ Irvine v. Angus, 93 Fed. 629, 35 C. C. A. 501.

⁶ Vermont, etc., Ry. v. Ry., 63 Vt. 1, 10 L. R. A. 562, 21 Atl. 262, 731.

pay taxes on the leased realty, and does not do so, the lessor may pay such taxes and recover from the lessee or his assignee, even after the lessor has conveyed his interest by a deed containing a covenant against encumbrances.⁷ If improvements placed upon realty by a lessee may be removed under the terms of the lease and no provision is made for the payment of taxes thereon, the lessor may recover from the lessee the proportion of the taxes levied upon the improvement after he has been obliged to pay the entire amount of taxes in order to prevent the realty from being sold at a tax sale.⁸ The party paying such liens can not recover unless the payment is necessary to protect his interests. So a mortgagee who pays taxes on the realty mortgaged to enable him to negotiate his mortgage, and who subsequently transfers the mortgage to the mortgagors, releasing the mortgage debt, can not recover from them the amount thus expended as taxes.⁹ The tax thus paid must be on the property in which the person paying it owns an interest or he can not recover. So where a first mortgagee foreclosed and made the assignee of a second mortgagee a party to the suit, but the interest of the second mortgagee had been sold for taxes and had been bought in by the state, the first mortgagee can not after buying in the realty and paying to the state the amount for which such second mortgage had been sold with costs, recover such amount from such assignee.¹⁰ It has been said that one who has purchased realty which was once encumbered by a mortgage can not pay a tax upon such mortgage, although the mortgagee refuses to make such payment and although the mortgage has been paid and the tax is a lien upon the realty.¹¹ In such a case the right to maintain an action for money had and received is denied on the ground that there is no contractual relation between the parties.¹² In order to enable A to recover from B for paying a debt of B's, which was a lien upon A's property, the lien must be a valid debt of B's, and must also be a lien upon A's property. Thus if a grantee takes by a warranty deed, with a covenant against encumbrances, he can not recover from his grantor for

⁷ *Wills v. Summers*, 45 Minn. 90, 47 N. W. 463.

⁸ *La Paul v. Heywood*, 113 Minn. 376, 32 L. R. A. (N.S.) 368, Ann. Cas. 1912A, 274, 129 N. W. 763.

⁹ *Kersenbrock v. Muff*, 29 Neb. 530, 45 N. W. 778.

¹⁰ *Canadian, etc., Co. v. Boas*, 136 Cal. 419, 69 Pac. 18.

¹¹ *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R. A. (N.S.) 562, 96 Pac. 81.

¹² *William Ede Co. v. Heywood*, 153 Cal. 615, 22 L. R. A. (N.S.) 562, 96 Pac. 81.

payment of a void tax assessed against such property.¹³ So A held the legal title to realty, and A, B and C each had a third of the beneficial interest therein. C bought in the property at a tax sale, taking a deed thereto in his wife's name. X, a judgment creditor of A, redeemed the land to protect his interest. X can not recover from B, since one co-owner can not acquire interests as against another at a tax sale, and C's right to recover from B for his share of the taxes thus paid was restricted to the balance, if any, due on the accounts of each as to the property owned in common.¹⁴ If A induces B to enter into a contract for the sale of land by false representations as to the identity of A, B being induced to believe that he is dealing with X, and B avoids such contract, A can not recover the amount which he has paid to redeem such land from a tax sale.¹⁵ A conveyed realty to B, who took possession and paid taxes. Subsequently the conveyance was set aside on the theory that it was intended as a will. It was held that equity and good conscience required payment of such taxes, and that slight circumstances were sufficient from which to infer a promise to pay,¹⁶ implying a promise to pay, recovery could be had.

If one co-tenant has paid more than his share on account of the property which they own in common,¹⁷ such as a payment for repairs,¹⁸ he may recover from the other co-tenants for their proportional share of such payments. In Massachusetts it is held that no action lay at common law, either in England or in Massachusetts, by which one co-tenant could enforce contribution against another for repairs which were made without the assent of the other;¹⁹ although if such repairs were made with the assent of all the tenants in common, one who has paid out more than his share for such repairs may recover in quasi-contract from the

¹³ *Balfour v. Whitman*, 89 Mich. 202, 50 N. W. 744.

¹⁴ *Lindley v. Snell*, 80 Ia. 103, 45 N. W. 726.

¹⁵ *Ellsworth v. Randall*, 78 Ia. 141, 16 Am. St. Rep. 425, 42 N. W. 629.

¹⁶ *Smith v. Roundtree*, 185 Ill. 219, 56 N. E. 1130 [affirming, 85 Ill. App. 161]. (This case, however, falls short of holding that in the absence of some circumstances implying a promise to pay, recovery could be had.)

¹⁷ *Alabama. Strother's Adm'r v. Butler*, 17 Ala. 733.

Connecticut. Fowler v. Fowler, 50 Conn. 256.

Illinois. Haven v. Mehlgarten, 19 Ill. 91.

Massachusetts. Gwineth v. Thompson, 26 Mass. (9 Pick.) 31, 19 Am. Dec. 350.

Vermont. Paine v. Slocum, 56 Vt. 504.

¹⁸ *Haven v. Mehlgarten*, 19 Ill. 91.

¹⁹ *Calvert v. Aldrich*, 99 Mass. 74.

other tenants in common, as long as the title to land is not brought into question.²⁰

One who has an interest in a fund in common with others, and who incurs expenses in recovering or in preserving such fund, may be compensated out of the fund.²¹

§ 1543. Payment by party secondarily liable. If A has, at B's request, incurred a liability by reason of which A is subsequently bound to pay a debt to C upon which B was primarily liable, A may recover from B for such payment, although B did not expressly request A to make such payment. If a party, such as a surety, is liable primarily to the creditor, but as between himself and the principal debtor the debt should have been paid by the principal debtor and such surety is obliged to pay such debt, he may recover the amount thereof from the principal debtor.¹ This right of recovery does not, however, rest on express contract of any sort between the parties. One surety who has paid more than his proportionate share of the debt may recover from his co-sureties.² In order to amount to a payment by compulsion or duress, no further constraint is necessary than the legal obligation which the surety has undertaken by signing in such capacity.³ The surety's right of action accrues when he makes such payment; and the period of limitations begins to run from that time.⁴

If two persons are jointly liable and one of them is obliged to pay the entire amount of such obligation, he may enforce a con-

²⁰ *Gwineth v. Thompson*, 26 Mass. (9 Pick.) 31, 19 Am. Dec. 350.

²¹ *Trustees v. Greenough* 105 U. S. 527, 26 L. ed. 1157.

¹ *United States. Hall v. Smith*, 46 U. S. (5 How.) 96, 12 L. ed. 66.

California. Curtis v. Parks, 55 Cal. 106.

Florida. Chamberlain v. Lesley, 39 Fla. 452, 22 So. 736.

Kentucky. Kennedy v. Gaddie (Ky.), 32 S. W. 408.

Massachusetts. Gibbs v. Bryant, 18 Mass. (1 Pick.) 118.

Montana. Merchants' National Bank v. Opera House Co., 23 Mont. 33, 75 Am. St. Rep. 499, 45 L. R. A. 285, 57 Pac. 445.

New York. Blanchard v. Blanchard, 201 N. Y. 134, 37 L. R. A. (N.S.) 783, 94 N. E. 630.

Wisconsin. Fanning v. Murphy, 126 Wis. 538, 4 L. R. A. (N.S.) 666, 5 Ann. Cas. 435, 105 N. W. 1056.

² *Berlin v. New Britain School Society*, 9 Conn. 175; *Rushworth v. Moore*, 36 N. H. 188; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791.

³ *Fanning v. Murphy*, 126 Wis. 538, 4 L. R. A. (N.S.) 666, 5 Ann. Cas. 435, 105 N. W. 1056.

⁴ *Blanchard v. Blanchard*, 201 N. Y. 134, 37 L. R. A. (N.S.) 783, 94 N. E. 630.

tribution from the other party who is liable upon such obligation if such obligation arises out of contract. This right of contribution may now be enforced at law.⁵

If the obligation arises out of tort one who is not a wilful wrongdoer may have contribution against the other for the amount which he has been obliged to pay in excess of his proportionate share.⁶ A wilful wrongdoer, however, can not have contribution for the amount which he is obliged to pay, since in order to make out a cause of action he is obliged to show as a basis of recovery that he has committed a wrong.⁷ An express contract between two parties by which one agrees to commit a tort and the other agrees to exonerate him from liability or to contribute to such liability, is illegal;⁸ and in the absence of an express contract the law will not create an obligation of this sort.

If A is bound by law to pay a debt for which B is primarily liable, such payment is not voluntary and A can recover from B.⁹ Where certain damages for opening streets must by law be paid out of a county treasury, although the liability therefor is against the city in the first instance, such payments are not voluntary, and the county may recover therefor from the city.¹⁰ So if a county agrees to pay for certain fire plugs which by order of the fiscal court are to be entered on the contract of the waterworks company with the city, and the city is thus obliged to pay for them, it may recover from the county.¹¹ The maker of a note is bound to reimburse an accommodation endorser for the amount which he has been obliged to pay thereon.¹²

If A has given to B a negotiable instrument for value and there is a total failure of consideration, A may recover from B the amount which A is obliged to pay to X, a bona fide holder, to whom B has transferred such instrument.¹³ If A has given a nego-

⁵ *Sanders v. Herndon*, 122 Ky. 760, 121 Am. St. Rep. 493, 5 L. R. A. (N.S.) 1072, 93 S. W. 14; *Gardner v. Conn*, 34 O. S. 187.

⁶ *Acheson v. Miller*, 2 O. S. 203 [overruling, *Acheson v. Miller*, 18 Ohio 1].

⁷ *Talmadge v. Zanesville & Maysville Road Co.*, 11 Ohio 197; *Davis v. Gelhaus*, 44 O. S. 69; *Wilhelm v. Defiance*, 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18.

⁸ See §§ 1127 et seq.

⁹ *Blanchard v. Blanchard*, 201 N. Y. 134, 37 L. R. A. (N.S.) 783, 94 N. E. 630.

¹⁰ *Lancaster County v. Lancaster*, 160 Pa. St. 411, 28 Atl. 854.

¹¹ *Stanford (City of) v. Lincoln County (Ky.)*, 61 S. W. 463.

¹² *Blanchard v. Blanchard*, 201 N. Y. 134, 37 L. R. A. (N.S.) 783, 94 N. E. 630.

¹³ *Evans v. Central Life Ins. Co.*, 87 Kan. 641, 41 L. R. A. (N.S.) 1130, 125 Pac. 86.

tible instrument to an insurance company and the insurance company refuses to issue a policy in accordance with the oral representations of its agent, A may recover from such insurance company the amount which A is obliged to pay upon such note to X, to whom the insurance company has transferred such note.¹⁴

§ 1544. Recovery of payments made on judgments. The question whether payments made on a judgment can be recovered depends in the first instance upon the further question whether such judgment has been reversed, set aside, and the like, or whether it has not. If the judgment is not reversed, set aside, or modified in a proper proceeding for that purpose directly attacking the judgment, it is binding between the parties if rendered by a court having jurisdiction of the parties and the subject-matter. Since matters concluded by such judgment can not be relitigated it follows that money paid by reason of such judgment can not be recovered, even if the judgment is erroneous, or should have been rendered for the defeated party on the real merits of the case. The enforcement of such judgment is clearly a resort to the means provided by law for enforcing liabilities, and such payments can not be said to be made under duress.¹ Thus if money forfeited as bail has been decreed by order of court to the county in which the cause of action was brought, instead of to the county to which the trial was transferred, the latter county, the party who has been prejudiced by such order should appeal from the order; and can not sue the former county for the money thus paid in, while the order stands unmodified.² Thus in a condemnation suit, A, the owner of an undivided interest in realty was awarded a certain sum of money as damages for his interest in the realty appropriated. A partition suit was then pending between A and the other co-owners. Subsequently the tract out of which the land

¹⁴ *Evans v. Central Life Ins. Co.*, 87 Kan. 641, 41 L. R. A. (N.S.) 1130, 125 Pac. 86.

¹ *Connecticut. Carter v. Society*, 3 Conn. 455.

Iowa. Warren County v. Polk County, 89 Ia. 44, 56 N. W. 281.

Kentucky. Williams v. Shelbourne, 102 Ky. 579, 44 S. W. 110.

Maine. Footman v. Stetson, 32 Me. 17, 52 Am. Dec. 634.

Missouri. New Madrid County v. Phillips, 125 Mo. 61, 28 S. W. 321.

Nebraska. Gerecke v. Campbell, 24 Neb. 306, 38 N. W. 847.

Tennessee. Kirkland v. Brown, 23 Tenn. (4 Humph.) 174, 40 Am. Dec. 635.

² *Warren County v. Polk County*, 69 Ia. 44, 56 N. W. 281.

had been appropriated was awarded to another co-owner, B. It was held that the county which had made the payment in the condemnation proceedings could not recover from A.³ Thus where A, who had at one time been a commissioner of insolvents, assumed to act as such, and required B to give bond with sureties, which B did, and after the bond was forfeited A sued B and such surety, and obtained a judgment which was paid by one of the sureties, such surety can not recover from A.⁴ So after a judgment which includes usurious interest, recovery of such usury can not be had while the judgment is unreversed.⁵ So where A was sued as surety on a bail bond, and judgment rendered, and after such judgment he filed a remission of the penalty executed by the governor of the state, but such judgment was not set aside or modified, it was held that A could not recover the amount paid in by him on such judgment.⁶ Equity has allowed recovery of money paid upon a common-law judgment which was obtained by fraud, though such judgment is not reversed, set aside or modified.⁷ Thus A held a note signed by the firm B and C, per C. A represented to B that the money for which this note was given was loaned to the firm, and B allowed A to take a judgment on such note. Subsequently B enjoined the collection of such judgment on the ground that it was not a firm debt; but on A's answer that it was a firm debt, and that the judgment was not obtained by fraud, the injunction was dissolved. B paid such judgment. After payment B found evidence that the money was loaned to C, and used by him to discharge an individual debt. It was held that on these facts B could recover from A in equity.⁸ Equity has refused to give relief in the absence of fraud, although the judgment was rendered against one against whom it should not have been rendered in view of all the facts, and although the time for a new trial has elapsed.⁹ If A obtained a judgment against his cashier, B, for a shortage, and B contended that such money was taken away by unknown persons, a judgment rendered in favor of A against B, which has been affirmed by the

³ *New Madrid County v. Phillips*, 125 Mo. 61, 28 S. W. 321. In this case A was B's guardian. No fraud, however, was found to exist.

⁴ *Job v. Collier*, 11 Ohio 422.

⁵ *Footman v. Stetson*, 32 Me. 17, 52 Am. Dec. 634; *Thatcher v. Gammon*, 12 Mass. 268.

⁶ *Williams v. Shelbourne*, 102 Ky. 579, 44 S. W. 110.

⁷ *West v. Kerby*, 27 Ky. (4 J. J. Mar.) 55.

⁸ *Ellis v. Kelly*, 71 Ky. (8 Bush.) 621.

⁹ *Michael v. American National Bank*, 84 O. S. 370, 38 L. R. A. (N.S.) 220, 95 N. E. 905.

court of last resort, is final as between the parties; and B can not resort to equity to have such judgment set aside and to compel A to repay to him the amount of such judgment which B has paid to A, although B has subsequently discovered the person by whom such money was taken.¹⁰

At law payments on a judgment obtained by fraud can not be recovered until such judgment is reversed or set aside.¹¹ A judgment is not conclusive as to matters arising after its rendition. Thus if A is compelled by judicial proceedings to pay assessments for a street improvement and such improvement is thereafter abandoned, A can recover the money thus paid in.¹²

A different question arises where the judgment has been reversed, set aside, modified, and the like. In such cases a payment made upon such judgment can be recovered: (1) if made under duress and not voluntarily, and if the judgment is reversed upon the merits, or (2) if the judgment of reversal contains an order of restitution.¹³ If the property of the judgment debtor is seized and sold on execution and the proceeds paid over to the judgment creditor, the judgment debtor may recover such amount from the judgment creditor.¹⁴ The same principle applies where money in the hands of an officer of the court is distributed by such officer under an erroneous order or decree. Upon reversal, the party who was entitled to such fund may recover from the person to whom

¹⁰ *Michael v. American National Bank*, 84 O. S. 370, 38 L. R. A. (N.S.) 220, 95 N. E. 905.

¹¹ *Ogle v. Baker*, 137 Pa. St. 378, 21 Am. St. Rep. 886, 20 Atl. 998. (Where the judgment was entered on a warrant of attorney contained in a forged note.)

¹² *McConville v. St. Paul*, 75 Minn. 383, 74 Am. St. Rep. 508, 43 L. R. A. 584, 77 N. W. 993.

¹³ *England*. Anonymous, 2 Salk. 588. *United States*. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 151.

Alabama. *Carroll v. Draughon*, 173 Ala. 338, 56 So. 209.

Illinois. *Ure v. Ure*, 223 Ill. 454, 114 Am. St. Rep. 336, 79 N. E. 153.

Maryland. *Green v. Stone*, 1 Har. & J. (Md.) 405.

Missouri. *Chicago Herald Co. v. Bryan*, 195 Mo. 590, 6 Am. & Eng. Ann. Cas. 751, 92 S. W. 906; *Arkansas Valley Trust Co. v. Corbin* (Mo.), 179 S. W. 484.

Oklahoma. *State National Bank v. Ladd* (Okla.), L. R. A. 1917C, 1176, 162 Pac. 684.

Wisconsin. *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. 683.

¹⁴ *United States*. *Crane v. Runey*, 26 Fed. 15.

Illinois. *Field v. Anderson*, 103 Ill. 403.

Indiana. *Smith v. Zent*, 83 Ind. 86, 43 Am. Rep. 61.

Ohio. *Bickett v. Garner*, 31 O. S. 28. *Virginia*. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263.

it is paid.¹⁶ If the law permits execution to issue on a judgment while appeal or proceedings in error are pending, money paid by reason of such execution may be recovered if the judgment is reversed thereafter.¹⁶ Thus if the execution is levied, and payment is made to stop the sale,¹⁷ or if an execution has issued but has not been levied and payment is made to prevent a levy,¹⁸ such payment is under compulsion and may be recovered. So recovery has been allowed where the execution was forwarded by mail to the debtor, and the amount for which it issued was paid in by him.¹⁹ On the same principle a payment made after a creditor's bill has been filed in equity to enforce the lien of the judgment on certain realty may be recovered after reversal, the court finding as a fact that such payment was compelled by the action, and was not made voluntarily in settlement of the claim.²⁰ The same relief has been given, though in another form, where payments have been made upon a decree in equity, which fixes the amount of the debt and orders a sale of the realty. Where such decree has been reversed because the amount of the debt was ascertained erroneously by the trial court, payments on the original decree should be credited upon the subsequent decree.²¹ In some cases the court does not think it necessary to indicate more than that money was paid on a writ of execution without indicating whether a levy was made or not, on the ground that in either case payment was made by duress.²² If execution has not issued, but may issue at the option of the judgment creditor, there is some conflict of authority on the question whether payment of the judgment is voluntary. In some jurisdictions it is held that if the judgment debtor pays such judgment

¹⁶ Metzner v. Bauer, 98 Ind. 425; In re Home Provident, etc., Association, 129 N. Y. 288, 29 N. E. 323.

¹⁷ United States Bank v. Bank, 31 U. S. (6 Pet.) 8, 8 L. ed. 299; Wright v. Nostrand, 100 N. Y. 616, 3 N. E. 78; Bickett v. Garner, 31 O. S. 28; Travelers' Ins. Co. v. Heath, 95 Pa. St. 333.

¹⁷ Stevens v. Fitch, 52 Mass. (11 Met.) 248.

Contra, Gould v. McFall, 118 Pa. St. 455, 4 Am. St. Rep. 606, 12 Atl. 336. (In this case the judgment was reversed for technical reasons.)

¹⁸ Lewis v. Hull, 39 Conn. 116; Travelers' Ins. Co. v. Heath, 95 Pa. St. 333.

¹⁹ United States Bank v. Bank, 31 U. S. (6 Pet.) 8, 8 L. ed. 299.

²⁰ Chapman v. Sutton, 68 Wis. 657, 32 N. W. 683.

²¹ Effinger v. Kenney, 92 Va. 245, 23 S. E. 742.

²² As where the return "money made: paid by John Heath," left it in doubt whether a levy had been made or not. Travelers' Ins. Co. v. Heath, 95 Pa. St. 333.

before execution issues he does not do so voluntarily.²³ Where this view obtains, such payments may be recovered,²⁴ even if the surety who pays the judgment against himself and his principal takes a formal assignment of the judgment to keep it alive against the principal.²⁵ Relief is also given in such cases on a rule by the court to which such cause is sent on reversal to show cause why restitution should not be made.²⁶ In other jurisdictions payment of a judgment on which execution has not issued is not under duress,²⁷ even if execution is threatened,²⁸ and such payment, therefore, can not be recovered. Hence, a payment of a judgment in which excessive attorney's fees have been awarded, made in order to clear the title to realty so that a new loan could be effected, can not be recovered.²⁹ So if a judgment is paid voluntarily while appeal or error proceedings are pending, such payment can not be recovered, even though the decree appealed from is modified or reversed.³⁰ When *Kalmbach v. Foote* first came before the supreme court,³¹ it was held that a payment under a threatened levy made to the attorney of the plaintiff and retained by him for his own use could be recovered from him. The judgment below was reversed and the cause remanded. When it came before the supreme court a second time the evidence showed that no threat of levy was made, that the party making the payment, a surety of the principal debtor made the payment voluntarily and took an assignment of the judgment against his principal, which was afterwards reversed, and that the attorney who collected the money paid it

²³ "He may as well pay the amount at one time as at another and save the expense of delay." *Peyser v. Mayor*, 70 N. Y. 497, 501, 26 Am. Rep. 624 [quoted in *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. 683].

²⁴ *Buford v. Briggs*, 96 Ark. 150, 131 S. W. 351; *Gregory v. Litsey*, 48 Ky. (9 B. Mon.) 43; *Scholey v. Halsey*, 72 N. Y. 578. "It is not necessary in order to maintain the action that the payment should have been coerced by execution." *Scholey v. Halsey*, 72 N. Y. 578.

²⁵ *Gates v. Brinkley*, 72 Tenn. (4 Lea) 710.

²⁶ *Gregory v. Litsey*, 48 Ky. (9 B. Mon.) 43, 48 Am. Dec. 415.

²⁷ *Groves v. Sentell*, 66 Fed. 179, 13 C. C. A. 386; *Estes v. Thompson*, 90 Ga. 698, 17 S. E. 98; *Cohen v. Laundry Co.*, 99 Ga. 289, 25 S. E. 689; *Lewis v. Brewing Co.*, 63 Ill. App. 345; *Gould v. McFall*, 118 Pa. St. 455, 4 Am. St. Rep. 606, 12 Atl. 336.

²⁸ *Perryman v. Pope*, 94 Ga. 672, 21 S. E. 715.

²⁹ *Estes v. Thompson*, 90 Ga. 698, 17 S. E. 98.

³⁰ *Weaver v. Stacy*, 93 Ia. 683, 62 N. W. 22; *Kalmbach v. Foote*, 86 Mich. 240, 49 N. W. 132; *Ditman v. Raule*, 134 Pa. St. 480, 19 Atl. 676.

³¹ *Kalmbach v. Foote*, 79 Mich. 236, 44 N. W. 603.

over to his client, not even retaining his fees. It was then held that such payment could not be recovered.³² Thus where A's land is sold as the property of B, and while an appeal is pending A voluntarily pays the amount necessary to redeem such realty, A can not recover such payment when the decree under which the realty was sold is reversed.³³ But where no opportunity to make a defense is given to the judgment debtor, as where a cognovit judgment is taken, payment or giving a new security may be considered as made under duress.³⁴ Where the officer who is about to serve the execution has an agreement with the judgment creditor to receive half the proceeds collected, and such agreements are illegal, it has been held that because of such interest a payment or security given to avoid such unlawful levy is given under duress.³⁵ Whether the judgment debtor's right of action for involuntary payments always accrues on reversal is a question on which there is a divergence of authority. In some cases the right of the debtor to recover is denied if the money belongs in good conscience to the creditor.³⁶ Money which is paid in satisfaction of a judgment can not be recovered where the judgment is reversed, not upon the merits, but upon mere technicalities, as where the judgment was reversed because the judgment creditor who took a default judgment had omitted to make proof in proper form,³⁷ or because it was held that the judgment creditor had technically waived his right to recover.³⁸ On reversal of a judgment in foreclosure, as being excessive in amount,³⁹ the trial court attempted to evade the reversal by the supreme court, by reducing and modifying its original judgment *nunc pro tunc*; while this innovation in procedure was held erroneous,⁴⁰ it was held that the defendant could not recover from the plaintiff for the rents during the time that plaintiff was in posses-

³² *Kalmbach v. Foote*, 86 Mich. 240, 49 N. W. 132.

³³ *Weaver v. Stacy*, 93 Ia. 683, 62 N. W. 22.

³⁴ *Knox County Bank v. Doty*, 9 O. S. 506, 75 Am. Dec. 479.

³⁵ *Van Dusen v. King*, 106 Mich. 133, 64 N. W. 9. This is "fraud and coercion." It is "not so much a question of individual right as of public policy."

³⁶ *Cowdery v. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Teas-*

dale v. Stoller, 133 Mo. 645, 54 Am. St. Rep. 703, 34 S. W. 873.

³⁷ *Gould v. McFall*, 118 Pa. St. 455, 4 Am. St. Rep. 606, 12 Atl. 336.

³⁸ *Teasdale v. Stoller*, 133 Mo. 645, 54 Am. St. Rep. 703, 34 S. W. 873.

In these cases, however, the payment is looked upon as, to some extent, a voluntary payment.

³⁹ For judgment of reversal see *London, etc., Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583.

⁴⁰ *Cowdery v. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

sion as purchaser under the erroneous order of sale, since "his only remedy is to have them applied on the mortgage debt."⁴¹ In other cases the court has ordered restitution as a matter of course, and has declined to prejudge the result of a new trial following reversal in a proceeding to recover.⁴² A suit in assumpsit has been held to lie where an action by an insurance company against its agent for premiums collected by him had resulted in judgment which he had been compelled to pay; and this judgment had subsequently been reversed, not because the premiums did not belong to the company, but because the company, not having complied with the statute authorizing it to do business in that state, was not allowed to enforce rights growing out of such business.⁴³ Under the former practice recovery of what a judgment debtor had lost by reason of the judgment was effected by a writ of restitution, if the record disclosed what he had lost or by an action in scire facias if it did not.⁴⁴ Under modern practice the reversing court may order restitution,⁴⁵ even if the judgment is reversed because the trial court lacked jurisdiction.⁴⁶ Even where a judgment has been reversed on the ground that the trial court had no jurisdiction,⁴⁷ the trial court may retain the case for the purpose of enforcing restitution.⁴⁸ If the judgment of reversal contains an order of restitution the judgment debtor may recover independent of any question, whether payment by him was voluntary or involuntary.⁴⁹ Such question of voluntary payment should be raised as a ground for refusing to reverse. The judgment of reversal and restitution

⁴¹ *Cowdery v. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196 (quotation: 139 Cal. 309, 96 Am. St. Rep. 124, 73 Pac. 196).

⁴² *Ex parte Walter*, 89 Ala. 237, 18 Am. St. Rep. 103, 7 So. 400. (In this case the trial court was compelled by mandamus to order restitution after reversal without reference to the probable result of a new trial.) *Murray v. Berdell*, 98 N. Y. 480.

⁴³ *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

⁴⁴ *Anonymous*, 2 Salk. 588; *United States Bank v. Bank*, 31 U. S. (6 Pet.) 8; 8 L. ed. 209.

⁴⁵ *Morris's Cotton*, 75 U. S. (8 Wall.) 507, 19 L. ed. 481; *Ex parte Morris*, 76 U. S. (9 Wall.) 605, 19 L. ed. 799;

Market National Bank v. Bank, 102 N. Y. 464, 7 N. E. 302.

⁴⁶ *O'Reilly v. Henson*, 97 Mo. App. 491, 71 S. W. 109.

⁴⁷ *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 151. (Since, except in case of negotiable instruments and the like, an assignee could not bring an action in the United States courts on the ground of being a citizen of another state from that in which the defendant was domiciled unless his assignor could have so brought an action.)

⁴⁸ *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 151.

⁴⁹ *Hiler v. Hiler*, 35 O. S. 645; *Breading v. Blocher*, 29 Pa. St. 347.

"establishes beyond further question the right of plaintiff in error to be restored to all things which he has lost by reason of the erroneous judgment. Its justice can not be rejudged in any collateral proceeding."⁵⁰ An action in scire facias or a writ of restitution are neither indispensable at modern practice. A direct action for money had and received may be maintained.⁵¹ This right, however, has been limited in some states to cases where no order of restitution was made on reversal.⁵² The fact that restitution is asked and refused in the proceedings which result in reversal does not prevent a separate action in assumpsit.⁵³ The statutory method of restitution is not exclusive and does not prevent an action in assumpsit.⁵⁴ Trespass, however, will not lie if the judgment upon which the execution issued under which the judgment debtor's property was taken and sold was merely erroneous and not void. The debtor's remedy is in assumpsit.⁵⁵ The right of action for money paid exists in favor of the real party in interest whose money has been paid to the judgment creditor, even if he is not a party of record.⁵⁶ It lies against the judgment creditor to whom or on whose behalf money has been paid. Thus if money of a judgment debtor is applied to paying witness fees which should have been paid by the judgment creditor, the debtor's action on reversal is against the sheriff and he can not recover from the witness.⁵⁷ In an action for money had the debtor may recover the amount of the proceeds of his property, if it has been sold on execution, paid over to or on behalf of the judgment creditor.⁵⁸ If the property sells for less than its value, or its seizure has caused other damage to the judgment debtor, it is

⁵⁰ *Breeding v. Blocher*, 29 Pa. St. 347, 349 [quoted in *Hiler v. Hiler*, 35 O. S. 645].

⁵¹ *Raun v. Reynolds*, 18 Cal. 275; *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 15 L. R. A. 588, 30 N. E. 963; *Clark v. Pinney*, 6 Cow. (N. Y.) 298.

⁵² *Duncan v. Kirkpatrick*, 13 S. & R. (Pa.) 292.

⁵³ *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

⁵⁴ *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 15 L. R. A. 588, 30 N. E. 963.

⁵⁵ *Field v. Anderson*, 103 Ill. 403.

⁵⁶ *Stevens v. Fitch*, 52 Mass. (11 Met.) 248.

⁵⁷ *Gray v. Alexander*, 26 Tenn. (7 Humph.) 16.

⁵⁸ *England*. *Goodyer v. Junce*, *Yelv.* 179 [sub nomine *Goodyere v. Ince*, *Cro. Jac.* 246].

Indiana. *Martin v. Woodruff*, 2 Ind. 237; *Thompson v. Reasoner*, 122 Ind. 454, 7 L. R. A. 495, 24 N. E. 223.

Kentucky. *Hess v. Deppen*, 125 Ky. 424, 15 Am. & Eng. Ann. Cas. 670, 101 S. W. 362.

Minnesota. *Peck v. McLean*, 36 Minn. 228, 1 Am. St. Rep. 665, 30 N. W. 759.

evident that this right of recovery is inadequate. Accordingly, in some jurisdictions the judgment debtor is not limited to this measure of damages, but may recover the value of his property so seized on execution.⁵⁰

If a restitution bond has been given and a judgment has been collected while proceedings in error were pending, the judgment debtor may maintain an action upon such restitution bond after such reversal;⁵⁰ and the judgment creditor can not dismiss his original cause of action and interpose it as a set-off as an action on the restitution bond.⁶¹

§ 1545. Application of foregoing principles to taxes, assessments for local improvements and license fees. Payments unlawfully coerced as taxes may be recovered.¹ On the other hand, if a tax is paid voluntarily its illegality is no ground for an action to recover it.² An agreement between a taxpayer and a public corporation to the effect that such tax is to be repaid if it is not a

Oklahoma. *State National Bank v. Ladd* (Okla.), L. R. A. 1917C, 1176, 162 Pac. 684.

Wisconsin. *Lewis v. Ry.*, 97 Wis. 368, 72 N. W. 976.

⁵⁰ *Reynolds v. Hosmer*, 45 Cal. 616; *McJilton v. Love*, 13 Ill. 486; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628; *Smith v. Zent*, 83 Ind. 86, 43 Am. Rep. 61.

⁶⁰ *Bickett v. Garner*, 31 O. S. 28.

⁶¹ *Bickett v. Garner*, 31 O. S. 28.

See also, *Hier v. Anheuser-Busch Brewing Association*, 60 Neb. 320, 83 N. W. 77.

¹ *Iowa.* *Eyerly v. Jasper County*, 72 Ia. 149, 33 N. W. 609.

Kansas. *Connelly v. Board*, 64 Kan. 168, 67 Pac. 453; *Atchison, Topeka & Santa Fe Ry. Co. v. Humboldt*, 87 Kan. 1, 41 L. R. A. (N.S.) 175, 123 Pac. 727.

Kentucky. *Newport v. Ringo*, 87 Ky. 635, 10 S. W. 2.

Massachusetts. *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532.

Minnesota. *Wheeler v. Board, etc.*, 87 Minn. 243, 91 N. W. 890.

Missouri. *Simmons Hardware Co. v. St. Louis* (Mo.), 192 S. W. 394.

New Hampshire. *Benton v. Goodale*, 66 N. H. 424, 30 Atl. 1121.

North Dakota. *Malin v. Lamoure County*, 27 N. D. 140, 50 L. R. A. (N.S.) 997, Ann. Cas. 1916C, 207, 145 N. W. 582.

Rhode Island. *Horgan v. Taylor*, 36 R. I. 232, 89 Atl. 1058.

Utah. *Raleigh v. Salt Lake City*, 17 Utah 130, 53 Pac. 974.

Washington. *Wyckoff v. King County*, 18 Wash. 256, 51 Pac. 379.

² **California.** *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76.

Colorado. *Board, etc., v. Springs Co.*, 15 Colo. App. 274, 62 Pac. 336.

Florida. *Johnson v. Atkins*, 44 Fla. 185, 32 So. 879.

Georgia. *Jeem v. Ellijay*, 89 Ga. 154, 15 S. E. 33.

Iowa. *Odendahl v. Rich*, 112 Ia. 182, 83 N. W. 886.

Kansas. *Atchison, Topeka & Santa Fe Ry. Co. v. Humboldt*, 87 Kan. 1, 41 L. R. A. (N.S.) 175, 123 Pac. 727.

Kentucky. *Louisville v. Becker*, 139 Ky. 17, 28 L. R. A. (N.S.) 1045, 129 S. W. 311.

legal tax, is a valid agreement; and it may be enforced in an action by the taxpayer to recover such tax if it is in fact illegal.³ In the absence of specific statutory provision prescribing the form and contents of a protest, it is not necessary that the protest should specify the ground upon which the party who pays such tax contends that it is illegal,⁴ especially if such grounds are known to the taxing officials.⁵

While there is practical unanimity of opinion upon these general propositions, there is a decided lack of harmony in the adjudications upon the question of what degree of compulsion amounts to a coercion so that the tax may be recovered if it proves to be illegal. This lack of harmony is in part due to a difference in the powers granted by the various states to their taxing officers in making summary collection of taxes. After eliminating these reasons for divergence, however, there remains a clear conflict of authority as to what amounts to coercion of payment of taxes. Payment of taxes has been held to be made under duress where arrest was threatened;⁶ or criminal proceedings;⁷ or where the omission to pay an excise tax was made a crime;⁸ or where property is withheld,⁹ or seizure,¹⁰ or sale thereof is threatened,¹¹ such

Maryland. Monticello, etc., Co. v. Baltimore, 90 Md. 416, 45 Atl. 210.

Massachusetts. Foley v. Haverhill, 144 Mass. 352, 11 N. E. 554.

Minnesota. Falvey v. Board, etc., 76 Minn. 257, 79 N. W. 302.

Missouri. State v. R. R., 165 Mo. 597, 65 S. W. 989.

Montana. Hopkins v. Butte, 16 Mont. 103, 40 Pac. 171.

Nebraska. Foster v. Pierce County, 15 Neb. 48, 17 N. W. 261; Bates v. York County, 15 Neb. 284, 18 N. W. 81; Baker v. Fairbury, 33 Neb. 674, 50 N. W. 950.

Ohio. State v. Commissioners, 56 O. S. 718 [sub nomine, State v. Bader, 47 N. E. 564].

Vermont. Sowles v. Soule, 59 Vt. 131, 7 Atl. 715.

Wisconsin. Babcock v. Fond du Lac, 58 Wis. 230, 16 N. W. 625.

³State National Bank v. Memphis, 116 Tenn. 441, 7 L. R. A. (N.S.) 663, 8 Ann. Cas. 22, 94 S. W. 606.

⁴Whitford v. Clarke, 33 R. I. 331, 36

L. R. A. (N.S.) 476, Ann. Cas. 1913D, 564, 80 Atl. 257.

⁵Whitford v. Clarke, 33 R. I. 331, 36 L. R. A. (N.S.) 476, Ann. Cas. 1913D, 564, 80 Atl. 257.

⁶Swift Co. v. United States, 111 U. S. 22, 28 L. ed. 341; Douglas v. Kansas City, 147 Mo. 428, 48 S. W. 851.

⁷Hoeftling v. San Antonio, 85 Tex. 228, 16 L. R. A. 603, 20 S. W. 85.

⁸Ratterman v. Express Co., 49 O. S. 608, 32 N. E. 754. So an internal revenue tax paid under protest may be recovered. Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 48 L. ed. 496.

⁹Erhardt v. Winter, 92 Fed. 918, 35 C. C. A. 84.

¹⁰Hennel v. Board, etc., 132 Ind. 32, 31 N. E. 462; Minor Lumber Co. v. Alpena, 97 Mich. 409, 56 N. W. 926; St. Anthony, etc., Co. v. Bottineau, 9 N. D. 346, 50 L. R. A. 262, 83 N. W. 212.

¹¹Sale of realty. Whitney v. Port Huron, 88 Mich. 268. 26 Am. St. Rep.

as will cast a cloud upon the owner's title,¹² or terminate the owner's rights;¹³ as where the collector threatens to sell lands on a tax warrant, or the holder of a tax title threatens to claim a tax deed unless the land is redeemed.¹⁴ If a tax sale casts a cloud on the title, money paid to redeem property from such sale is not paid voluntarily and may be recovered.¹⁵ Thus, while as a general rule, a mortgagor or one claiming under him who buys at a tax sale, can not assert any claim by reason thereof as against a mortgagee, yet if the purchaser at a tax sale is the equitable owner holding under an assignee of a second mortgagee and his interest does not appear of record, money paid to redeem from such sale may be recovered.¹⁶ So if a levy on property,¹⁷ or seizure of property is threatened,¹⁸ or by statute the tax is made a lien upon specific personalty, such as bank stock,¹⁹ payment is held to be made under compulsion. So where land can not be conveyed until the tax is paid,²⁰ or redemption from a tax sale is necessary,²¹ recovery has been allowed. Where the tax collecting officers have power to

291, 50 N. W. 316; *Thompson v. Detroit*, 114 Mich. 502, 72 N. W. 320; *Bowns v. May*, 120 N. Y. 357, 24 N. E. 947; *Stephan v. Daniels*, 27 O. S. 527; *Whittaker v. Deadwood*, 12 S. D. 608, 82 N. W. 202. Personalty. *Hennel v. Board*, 132 Ind. 32, 31 N. E. 462; *Lyon v. Receiver, etc.*, 52 Mich. 271, 17 N. W. 839; *Kelley v. Rhoads*, 7 Wyom. 237, 75 Am. St. Rep. 904, 39 L. R. A. 594, 51 Pac. 593.

¹² *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259.

¹³ *Gill v. Oakland*, 124 Cal. 335, 67 Pac. 150.

¹⁴ *Bowns v. May*, 120 N. Y. 357, 24 N. E. 947.

¹⁵ *American, etc., Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078.

¹⁶ *American, etc., Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078.

¹⁷ *Cox v. Welcher*, 68 Mich. 263, 13 Am. St. Rep. 339, 36 N. W. 69; *Lindsay v. Allen*, 19 R. I. 721, 36 Atl. 840.

¹⁸ *Powder River Cattle Co. v. Custer County*, 45 Fed. 323; *Hennel v. Vanderburgh Co.*, 132 Ind. 32, 31 N. E. 462; *Atchison, etc., Ry. Co. v. Atchison*

County, 47 Kan. 722, 28 Pac. 999; *Kelley v. Rhoads*, 7 Wyom. 237, 75 Am. St. Rep. 904, 39 L. R. A. 594, 51 Pac. 593.

¹⁹ *Aetna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593.

²⁰ *State v. Nelson*, 41 Minn. 25, 4 L. R. A. 300, 42 N. W. 548. A contrary view is taken in *Weston v. Luce County*, 102 Mich. 528, 81 N. W. 15, but subsequently in view of the Michigan statute allowing recovery of taxes illegally exacted if paid under protest, recovery of such a payment was allowed in *Gage v. Saginaw*, 128 Mich. 682, 87 N. W. 1027. Hence the treasurer can not be compelled by mandamus to issue a receipt, illegal taxes being unpaid, as the owner may pay them under protest to get his deed and recover them. *State v. Nelson*, 41 Minn. 25, 4 L. R. A. 300, 42 N. W. 548.

²¹ *Keehn v. McGillicuddy*, 19 Ind. App. 427, 40 N. E. 609; *American Baptist Missionary Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078.

collect a tax by summary process without giving to the alleged delinquent a right to be heard in court upon the question of the illegality of the tax, he should not be obliged in order to protect his rights to wait until his property has been actually seized before making payment. When the circumstances are such that unless he pays, his property is liable to summary process in the ordinary routine of collection there is, in justice, no reason for further delay to protect his rights. Accordingly, it has been held that under such circumstances payment is under compulsion,²² even if a considerable time must elapse before the collectors are bound to collect summarily,²³ and even if the warrant has not yet issued.²⁴ In some jurisdictions the courts are far less liberal in allowing recovery of payment of taxes. Payment of customs without objection or protest is held to be voluntary.²⁵ Payment of illegal taxes under protest, before the collector has made any demand therefor,²⁶ or before any process has issued for its collection,²⁷ or before any legal steps have been taken to compel payment,²⁸ or before the collector has any power to collect taxes by legal proceedings or summary process,²⁹ is voluntary. Publication of a delinquent tax-list, under the method of collecting taxes in force in some states does not constitute compulsion.³⁰ Where such publication is one

²² Connecticut. *Jackson v. Union*, 82 Conn. 266, 73 Atl. 773.

²³ Maine. *Howard v. Augusta*, 74 Me. 79.

²⁴ Massachusetts. *McGee v. Salem*, 149 Mass. 238, 21 N. E. 386.

²⁵ Michigan. *Thompson v. Detroit*, 114 Mich. 502, 72 N. W. 320.

²⁶ New York. *Vaughn v. Port Chester*, 135 N. Y. 460, 32 N. E. 137.

²⁷ Pennsylvania. *Grim v. School District*, 57 Pa. St. 433, 98 Am. Dec. 237.

²⁸ Tennessee. *State National Bank v. Memphis*, 116 Tenn. 641, 7 L. R. A. (N.S.) 663, 8 Ann. Cas. 22, 94 S. W. 606.

²⁹ Rhode Island. *Albro v. Kettelle*, — R. I. —, 107 Atl. 108.

³⁰ Vermont. *Allen v. Burlington*, 45 Vt. 202.

³¹ Wisconsin. *A. H. Stange Co. v. Merrill*, 134 Wis. 514, 115 N. W. 115.

³² *Rumford Chemical Works v. Ray*, 19 R. I. 456, 34 Atl. 814.

³³ *Board, etc., v. R. R.*, 4 Kan. App. 772, 46 Pac. 1013.

³⁴ *Flint, etc., Co. v. Bidwell*, 123 Fed. 200.

³⁵ *Conkling v. Springfield*, 132 Ill. 420, 24 N. E. 67.

³⁶ *Decker v. Perry* (Cal.), 35 Pac. 1017; *Wilson v. Pelton*, 40 O. S. 306; *Houston v. Feesser*, 76 Tex. 365, 13 S. W. 266.

³⁷ *Conkling v. Springfield*, 132 Ill. 420, 24 N. E. 67; *Gould v. Board, etc.*, 76 Minn. 279, 79 N. W. 303, 530; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233, 2 Atl. 766.

³⁸ *Peninsular Iron Co. v. Crystal Falls*, 60 Mich. 79, 26 N. W. 840.

³⁹ *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76.

of the steps leading up to a sale, this rule could not apply except where the sale itself would be held not to amount to compulsion.

A taxpayer who pays a tax before it is due in order to secure a rebate which is offered in case of payment before maturity, makes such payment voluntarily and can not recover it.³¹ Payment to avoid a money penalty for non-payment is held to be voluntary,³² though in some jurisdictions such payment is held to be under compulsion.³³ The *reductio ad absurdum* of the former view is found in those decisions which hold that payment made to prevent the sale of realty for a void tax is voluntary and can not be recovered.³⁴ This holding is based on the theory that the owner's method of testing the validity of the tax is to allow the sale to proceed and then to attack it whenever the attempt is made to deprive him of his realty under it. A jurisprudence which can devise no fairer means of attacking the validity of a tax than this means which has grown up in a country where not all taxes are valid by divine right, is indeed inadequate.

One who pays for revenue stamps without notifying the collector of their intended use and without making protest can not recover such payment.³⁵ It is always possible for the government to do justice and to order voluntarily the payment of taxes illegally exacted.³⁶ Statutes authorizing repayment of illegal taxes are for the benefit of the parties making such payments, and hence even if permissive in their terms are construed as mandatory.³⁷ Moved by the injustice of the rules in force in many jurisdictions, some legislatures have

³¹ *Atchison, Topeka & Santa Fe Ry. Co. v. Atchison*, 47 Kan. 712, 28 Pac. 1000; *Atchison, Topeka & Santa Fe Ry. Co. v. Atchison County*, 47 Kan. 722, 28 Pac. 999; *Atchison, Topeka & Santa Fe Ry. Co. v. Humboldt*, 87 Kan. 1, 41 L. R. A. (N.S.) 175, 123 Pac. 727; *Louisville v. Becker*, 139 Ky. 17, 28 L. R. A. (N.S.) 1045, 129 S. W. 311.

Contra, *Stowe v. Stowe*, 70 Vt. 609, 41 Atl. 1024.

³² *Arkansas. Brunson v. Board of Directors*, 107 Ark. 24, 44 L. R. A. (N.S.) 293, Ann. Cas. 1915A, 493, 153 S. W. 828.

California. Decker v. Perry (Cal.), 35 Pac. 1017.

Michigan. Peninsular Iron Co. v. Crystal Falls, 60 Mich. 79, 26 N. W. 840.

Nevada. Bowman v. Boyd, 21 Nev. 281, 30 Pac. 823.

³³ *State v. Franklin Bank*, 10 Ohio 91 (obiter, as tax which was exacted was held to be legal). *Allen v. Burlington*, 45 Vt. 202.

³⁴ *Phelan v. San Francisco*, 120 Cal. 1, 52 Pac. 38; *Otis v. People*, 196 Ill. 542, 63 N. E. 1053.

³⁵ *Chesebrough v. United States*, 192 U. S. 253, 48 L. ed. 432.

³⁶ *Lange v. Soffell*, 33 Ill. App. 624; *Farmers', etc., Bank v. Vandalia*, 57 Ill. App. 681.

³⁷ *De Pauw Plate-Glass Co. v. Alexandria*, 152 Ind. 443, 52 N. E. 606.

made more or less liberal provision for the recovery of payments of illegal taxes.³⁹ The effect of such statutes often is to eliminate the question of duress entirely, and to allow recovery of payments of illegal taxes even if made voluntarily.⁴⁰ Thus a statute may provide for recovery of illegal taxes paid voluntarily, if a proper ground of objection to such tax is contained in the protest made at the time of such payment.⁴¹ The provisions of such statute must be complied with to enable recovery thereunder. If the statute requires a specific protest, voluntary payment under a general protest can not be recovered.⁴² Under such a statute an indorsement "paid under protest" on the tax roll and the tax receipt is insufficient.⁴³ A protest which alleges wilful over-valuation, favoritism, and the omission of property from the roll by the supervisor, charges fraud with sufficient certainty.⁴⁴ A protest against the entire tax on bonds on the ground that they are bonds of foreign corporations, that they are in another state, and that they are held by a non-resident trustee, is sufficient as to the interest of such trustee, on the theory that "the greater includes the less," although he owns but an undivided half interest in such bonds.⁴⁵

Even in the absence of a statutory provision, the grounds of protest must be stated.⁴⁶ If a written protest is required by statute an oral protest is insufficient.⁴⁷ A payment extorted by compulsion may, however, be recovered without complying with these statutes.⁴⁸

³⁹ *White v. Smith*, 117 Ala. 232, 23 So. 525; *Topeka, etc., Co. v. Board, etc.*, 63 Kan. 351, 65 Pac. 660; *Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659; *Day v. Pelican*, 94 Wis. 503, 69 N. W. 368.

⁴⁰ *Pacific Coast Co. v. Wells*, 134 Cal. 471, 66 Pac. 657; *Matter of Adams v. Board, etc.*, 154 N. Y. 619, 49 N. E. 144; *Centennial, etc., Co. v. Juab County*, 22 Utah 395, 62 Pac. 1024.

⁴¹ *Connelly v. San Francisco*, 164 Cal. 101, 127 Pac. 834; *Idaho Irrigation Co. v. Lincoln County*, 28 Ida. 98, 152 Pac. 1058; *Williams v. Acton*, 219 Mass. 520, 107 N. E. 362; *White v. Millbrook Township*, 60 Mich. 532, 27 N. W. 674.

⁴² *Peninsular Iron Co. v. Crystal Falls*, 60 Mich. 79, 26 N. W. 840; *Traverse Beach Association v. Elmwood Township*, 142 Mich. 78, 105 N. W. 30;

Davis v. Otoe County, 55 Neb. 677, 76 N. W. 465; *Bankers' Life Association v. Douglas County*, 61 Neb. 202, 85 N. W. 54.

⁴³ *Traverse Beach Association v. Elmwood Township*, 142 Mich. 78, 105 N. W. 30.

⁴⁴ *Lingle v. Elmwood Township*, 142 Mich. 194, 105 N. W. 604.

⁴⁵ *Mackay v. San Francisco*, 128 Cal. 678, 61 Pac. 382.

⁴⁶ *Albro v. Kettelle*, — R. I. —, 107 Atl. 198 [overruling on this point, *Rumford Chemical Works v. Ray*, 19 R. I. 456, 34 Atl. 814, and *Whitford v. Clarke*, 33 R. I. 339, 36 L. R. A. (N.S.) 476, Ann. Cas. 1913D, 564, 80 Atl. 257].

⁴⁷ *Kehe v. Blackhawk County*, 125 Ia. 549, 101 N. W. 281.

⁴⁸ *Pere Marquette R. R. v. Ludington*, 133 Mich. 397, 95 N. W. 417.

The general rules as to recovering taxes paid under duress are always subject to this qualification. If the legislature has provided means for testing the legality of a tax, without risking loss of property, imprisonment, and the like, such method must be resorted to. Payment made without seeking such remedy will be deemed voluntary.⁴⁸ Thus where an application for abatement may be made, payment under protest without making such application can not be recovered.⁴⁹ If an injunction to restrain the collection of an illegal tax is granted, and subsequently the treasurer threatens a sale of property for such tax, the remedy of the property owners is by proceedings in contempt of court. Subsequent payment of such tax under such threat is voluntary and can not be recovered.⁵⁰ However, recovery has been allowed where in addition the treasurer makes the false statement that such tax has been held by the supreme court to be lawful.⁵¹

Payment of invalid local assessments, made under duress, may be recovered.⁵² If such payment is made voluntarily it can not be recovered.⁵³ As in the case of taxes, the conflict of authority appears when we attempt to pass from such general statements to a discussion of what constitutes payment under duress. The difference between payment of assessments and payment of taxes is that while the tax is usually a personal debt enforceable out of property

⁴⁸ *De Graff v. Ramsey County*, 46 Minn. 319, 48 N. W. 1135; *Bradley v. Laconia*, 66 N. H. 269, 20 Atl. 331; *Pooley v. Buffalo*, 122 N. Y. 592, 26 N. E. 16, 624; *Jamaica, etc., Road Co. v. Brooklyn*, 123 N. Y. 375, 25 N. E. 476.

⁴⁹ *All Saints Parish v. Brookline*, 178 Mass. 404, 52 L. R. A. 778, 59 N. E. 1003.

⁵⁰ *Trustees v. Thoman*, 51 O. S. 285, 37 N. E. 523.

⁵¹ *Greenbaum v. King*, 4 Kan. 332, 96 Am. Dec. 172.

⁵² *Arkansas. Magnolia v. Sharman*, 46 Ark. 358.

California. Gill v. Oakland, 124 Cal. 335, 57 Pac. 150.

Michigan. Newberry v. Detroit, 184 Mich. 188, 150 N. W. 838.

Minnesota. McConville v. St. Paul, 75 Minn. 383, 74 Am. St. Rep. 508, 43 L. R. A. 584, 77 N. W. 993.

New York. Poth v. New York, 151 N. Y. 16, 45 N. E. 372.

⁵³ *Colorado. Richardson v. Denver*, 17 Colo. 398, 30 Pac. 333.

Georgia. Hoke v. Atlanta, 107 Ga. 416, 33 S. E. 412.

Iowa. Newcomb v. Davenport, 86 Ia. 291, 53 N. W. 232.

Kentucky. Louisville v. Anderson, 79 Ky. 334, 42 Am. Rep. 220.

Montana. Hopkins v. Butte, 16 Mont. 103, 40 Pac. 171.

New Jersey. Fuller v. Elizabeth, 42 N. J. L. 427.

New York. Redmond v. New York, 125 N. Y. 632, 26 N. E. 727; *United States Trust Co. v. New York*, 144 N. Y. 488, 39 N. E. 383.

Ohio. Whitbeck v. Minch, 48 O. S. 210, 31 N. E. 743.

Tennessee. Bank v. Memphis, 107 Tenn. 66, 64 S. W. 13.

generally and sometimes against the person, an assessment rarely is a personal debt. Payment of assessments has been held to be under duress where realty subject to the lien thereof has been⁵⁴ or is about to be sold⁵⁵ in proceedings to enforce the lien of such assessments. Thus where proper authorities have begun active proceedings to collect such assessments,⁵⁶ or have ordered that such proceedings be begun,⁵⁷ payment thereof is not voluntary. On the other hand, payment to avoid the addition of interest,⁵⁸ or of a penalty in money,⁵⁹ is not made under duress. Even the sale for a void assessment, if it is void and casts no cloud on the title,⁶⁰ as where the purchaser at the sale has the burden of proving the validity of the sale,⁶¹ has been held not to be compulsion; and a payment compelled by threat of such a sale is in the law a voluntary payment. As in the case of taxes it must be observed that a method of testing the validity of a tax which requires a sale of property thereunder is most unfair and inadequate. Payment under protest is not necessarily under duress.⁶²

If a means is given by law for testing the validity of the assessment without awaiting the seizure and sale of one's property,⁶³ as by an injunction suit,⁶⁴ or if the levy may be resisted as illegal,⁶⁵ such means must be resorted to; and a failure so to do shows that in law the payment is voluntary. It has been held that money paid on an assessment, illegal but not void on its face, can not be recovered until the assessment has been set aside in a proceeding brought for that purpose.⁶⁶

⁵⁴ *Keehn v. McGillicuddy*, 19 Ind. App. 427; 49 N. E. 609.

⁵⁵ *Vaughan v. Port Chester*, 135 N. Y. 460, 32 N. E. 137; *Poth v. New York*, 151 N. Y. 16, 45 N. E. 372.

⁵⁶ *Poth v. New York*, 151 N. Y. 16, 45 N. E. 372.

⁵⁷ *Vaughn v. Port Chester*, 135 N. Y. 460, 32 N. E. 137.

⁵⁸ *Vanderbeck v. Rochester*, 122 N. Y. 285, 25 N. E. 408.

⁵⁹ *Decker v. Perry* (Cal.), 35 Pac. 1017.

⁶⁰ *Phelan v. San Francisco*, 120 Cal. 1, 52 Pac. 38.

⁶¹ *Davies v. Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145.

⁶² *First National Bank v. Americus*,

68 Ga. 110, 45 Am. Rep. 476; *Hawkeye, etc., Co. v. Marion*, 110 Ia. 468, 81 N. W. 718; *Whitbeck v. Minch*, 48 O. S. 210, 31 N. E. 743; *Peebles v. Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714.

⁶³ *Hoke v. Atlanta*, 107 Ga. 416, 33 S. E. 412.

⁶⁴ *Whitbeck v. Minch*, 48 O. S. 210, 31 N. E. 743.

⁶⁵ *Union Pacific Ry. v. (Commissioners of) Dodge County*, 98 U. S. 541, 25 L. ed. 196; *Hoke v. Atlanta*, 107 Ga. 416, 33 S. E. 412.

⁶⁶ *Elizabeth v. Hill*, 30 N. J. L. 555; *Fuller v. Elizabeth*, 42 N. J. L. 427; *State v. Elizabeth*, 51 N. J. L. 485, 18 Atl. 302; *Trimmer v. Rochester*, 130 N. Y. 401, 29 N. E. 746.

Payment of an unauthorized license fee made under duress may be recovered.⁶⁷ A voluntary payment of an illegal license fee can not be recovered.⁶⁸ Here again under harmony in general propositions we find marked divergence of authority in applying these general propositions to specific cases. Where arrest is threatened for conducting a business and the like without paying such license fee,⁶⁹ or according to some authorities, where the statute or ordinance imposing such license makes non-payment a crime, though no immediate arrest is threatened,⁷⁰ or where non-payment will result in exclusion from the right to do business in the state and no mode of redress or opportunity for a hearing is given,⁷¹ such payment is

Contra, that it is not necessary that such assessment be first set aside if valid on its face, but levied by assessors who had no jurisdiction to make such levy. *Bruecher v. Port Chester*, 101 N. Y. 240, 4 N. E. 272.

⁶⁷ *Colorado*. *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458.

Kentucky. *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062; *Harrodsburg v. Renfro* (Ky.), 51 L. R. A. 897, 58 S. W. 795.

Missouri. *Simmons Hardware Co. v. St. Louis* (Mo.), 192 S. W. 394; *American Manufacturing Co. v. St. Louis*, 270 Mo. 40, 192 S. W. 402.

Ohio. *Catoir v. Watterson*, 38 O. S. 319.

South Carolina. *Wood-Mendenhall Co. v. Greer*, 88 S. Car. 249, 70 S. E. 724.

Texas. *Marshall v. Snediker*, 25 Tex. 460, 78 Am. Dec. 534.

Wisconsin. *Newmann v. La Crosse*, 94 Wis. 103, 68 N. W. 654.

⁶⁸ *Alabama*. *Singer Sewing Machine Co. v. Teasley* (Ala.), 73 So. 969.

Arkansas. *Helena v. Dwyer*, 65 Ark. 155, 45 S. W. 349.

California. *Maxwell v. San Luis Obispo*, 71 Cal. 466, 12 Pac. 484.

Delaware. *Wilmington v. Wicks*, 2 Marv. (Del.) 297, 43 Atl. 173.

Georgia. *Tatum v. Trenton*, 85 Ga. 468, 11 S. E. 705.

Indiana. (Town of) *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323.

Kentucky. *Maysville v. Melton*, 102 Ky. 72, 42 S. W. 754; *Providence v. Shackelford*, 106 Ky. 378, 50 S. W. 542.

Louisiana. *Fuselier v. St. Landry Parish*, 107 La. 221, 31 So. 678; *Sims v. Mer Rouge*, 141 La. 91, 74 So. 706.

Michigan. *Eslow v. Albion*, 153 Mich. 720, 22 L. R. A. (N.S.) 872, 117 N. W. 328.

Nebraska. *Baker v. Fairbury*, 33 Neb. 674, 50 N. W. 950.

New Jersey. *Shoemaker v. Board of Health*, 83 N. J. L. 425, 85 Atl. 312.

New York. *People v. Wilmerding*, 136 N. Y. 363, 32 N. E. 1099.

Tennessee. *Shelton v. Silverfield*, 104 Tenn. 67, 56 S. W. 1023.

Wisconsin. *Van Buren v. Downing*, 41 Wis. 122; *Noyes v. State*, 46 Wis. 250, 32 Am. Rep. 710, 1 N. W. 1.

⁶⁹ *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851; *American Manufacturing Co. v. St. Louis*, 270 Mo. 40, 192 S. W. 402; *Toledo v. Buechle*, 21 Ohio C. C. 429; *Newmann v. La Crosse*, 94 Wis. 103, 68 N. W. 654.

⁷⁰ *Chicago v. Sperbeck*, 69 Ill. App. 562.

Contra, *Helena v. Dwyer*, 65 Ark. 155, 45 S. W. 349; *Betts v. Reading*, 93 Mich. 77, 52 N. W. 940.

⁷¹ *Scottish, etc., Ins. Co. v. Herriott*, 109 Ia. 606, 77 Am. St. Rep. 548, 80 N. W. 665.

held to be made under duress. So the expense of abating a nuisance on demand of health authorities may be recovered by a property owner where the duty of abating such nuisance really rests on the sanitary authorities and a refusal to comply with the demand would render the property owner prima facie liable to a penalty.⁷² In some of the cases denying the right to recover, the voluntary character of the payment is quite clear. Thus payment of a license voluntarily made to a board which has no legal authority to issue such licenses can not be recovered.⁷³ So a voluntary payment of a license fee by one who subsequently abandons the business because he is unable or unwilling to file a bond as required by law, can not be recovered.⁷⁴ In other cases a right to recover is denied under circumstances which seem to show what to the ordinary mind looks very like compulsion. Thus payment made on receipt of a circular threatening to enforce the law,⁷⁵ or under threat of criminal prosecution,⁷⁶ or under threat of arrest on the following day if such payment was not made,⁷⁷ has been held not to be made under duress.

§ 1546. Protest. The question of the necessity of a protest when a payment is made by compulsion and the effect of a protest are occasionally presented for adjudication. In spite of obiter which tend to emphasize the necessity and effect of protest unduly, the presence or absence of protest has of itself but little effect. If a payment is made without compulsion, the fact that it is made under protest does not justify the recovery thereof.¹ On the other hand, if a payment is made under compulsion the general rule is that protest is not necessary and that failure to make protest does

Contra, *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367; *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851; *Western Union Telegraph Co. v. Mayer*, 28 O. S. 521; *Austin v. Viroqua*, 67 Wis. 314, 30 N. W. 515.

⁷² *Andrew v. St. Olave's, etc.* [1898], 1 Q. B. 775.

⁷³ *Tatum v. Trenton*, 85 Ga. 468, 11 S. E. 705.

⁷⁴ *Curry v. Tawas Township*, 81 Mich. 355, 45 N. W. 831.

⁷⁵ *Yates v. Ins. Co.*, 200 Ill. 202, 65 N. E. 726.

⁷⁶ *Betts v. Reading*, 93 Mich. 77, 52 N. W. 940.

⁷⁷ *Eslow v. Albion*, 153 Mich. 720, 22 L. R. A. (N.S.) 872, 117 N. W. 328.

¹ *United States v. Union Pacific Ry. v. Dodge County Commissioners*, 98 U. S. 541, 25 L. ed. 196.

Massachusetts. Rosenfeld v. Boston Mutual Life Ins. Co., 222 Mass. 284, 110 N. E. 304.

Michigan. Warren v. Federal Life Insurance Co., 198 Mich. 342, 164 N. W. 449.

New Jersey. Koewing v. West Orange, 89 N. J. L. 539, 99 Atl. 203.

not prevent the recovery of such payment.² In some jurisdictions protest is made necessary by specific statutory provisions, as in the case of payment of taxes.³ If payment is made to one who does not take in his own right and who does not know of the facts which amount to compulsion or which prevent the money paid from being justly due from the person by whom it is paid, protest may be necessary to justify recovery against such person if he has altered his position and can not be placed in statu quo.⁴ An illustration is found in payments made to public officers, such as taxing officers, against whom an action can not be brought unless protest is made or unless it is shown that they know that by means of compulsion payment of a claim which is not justly due has been extorted.⁵

§ 1547. Necessity of demand. If B receives money rightfully from A under a contract by which B agrees to repay such money to A on demand, it is generally said that A can not maintain an action against B unless he has made such demand,¹ or unless B has in effect denied his obligation to repay such fund to A as by fraudulent representation as to the amount of the balance due from him to A.² In other cases it is said to be the general rule that wherever money is due, an action will lie without previous demand.³ This should be the rule in all cases in which the defendant has money or property in his possession which the plaintiff has a right to recover. The bringing of an action is in itself a notice that the plaintiff expects the defendant to pay money or to deliver property; and if the court dismisses such action because no demand was made before the action was brought, the plaintiff can then bring another action immediately, treating the first action as a demand and he can thus recover upon the same evidence as to the

North Dakota. *Diocese of Fargo v. Cass County*, 28 N. D. 209, 148 N. W. 541.

Ohio. *Marietta v. Slocomb*, 6 O. S. 471.

Vermont. *Meacham v. Newport*, 70 Vt. 67, 39 Atl. 631.

² *Southern Pacific Co. v. California Adjustment Co.*, 237 Fed. 954, 150 C. C. A. 604; *McKee v. Campbell*, 27 Mich. 497; *De Graff v. Ramsey County*, 46 Minn. 319, 48 N. W. 1135.

³ See § 1545.

⁴ See § 1484.

⁵ See § 1545.

¹ *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Abbott v. Draper*, 4 Denio. (N. Y.) 51.

² *Clark v. Moody*, 17 Mass. 145.

³ *White v. Franklin Bank*, 39 Mass. (22 Pick.) 181.

See also, *Bither v. Packard*, 115 Me. 306, 98 Atl. 929.

merits of the case as that in which the original action was dismissed. This is a slow and cumbersome way of administering justice. If the defendant has not had a fair opportunity to know that the money or property in his possession belongs to the plaintiff and to pay it over to him the facts should be determined whether the plaintiff should pay the costs of the action or whether, if he brings the action without due demand, he should be obliged to pay all costs in case the defendant does not contest the action upon the merits; while if the defendant does contest the action upon the merits, a demand would apparently have been ineffective. Instead, however, of treating circumstances of this sort as affecting liability for costs, many of the courts have treated the absence of demand in some cases as a ground for dismissing the action. For this reason it is necessary to consider the classes of cases in greater detail.

If a payment is induced by the wrongful act of the party to whom the money is paid, a demand is not necessary.⁴ If payment is induced by duress or compulsion,⁵ or by the fraud of the person to whom such payment is made,⁶ or by the innocent misrepresentation of the party to whom such payment is made,⁷ demand is not necessary. If one who has been injured by the tort of another elects to waive his right of action in tort, and to sue on the theory of constructive contract, demand should not be necessary, since the defendant is a wrongdoer.⁸ It is said, however, that if the owner

⁴ *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717.

⁵ *Bither v. Packard*, 115 Me. 306, 98 Atl. 929; *Hinsdill v. White*, 34 Vt. 558; *Babcock v. Granville*, 44 Vt. 325.

⁶ *White v. Franklin Bank*, 39 Mass. (22 Pick.) 181; *Malone v. Harris*, 6 Mo. 451.

"The doctrine is clearly recognized that where the receiver is guilty of fraud or other wrong in taking the money, he is not entitled to notice. The necessity of a demand does not, therefore, exist in a case where the party receiving the money, instead of acting innocently and under an honest mistake, knows the whole truth, and consciously receives what does not belong to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus

obtained as his own. In such case he can not assume the attitude of bailee or trustee, for he holds the money as his own, and his duty to return it arises at the instant of the wrongful receipt of the overpayment. He is already in the wrong, and it needs no request to put him in that position. *The Utica Bank v. Var Gieson*, 18 Johns. 485; *Andrews v. Artisans' Bank*, 26 N. Y. 299; *Dill v. Wareham*, 7 Met. 447; *Southwick v. First National Bank*, 84 N. Y. 430." *Sharkey v. Mansfield*, 20 N. Y. 227, 43 Am. Rep. 181.

⁷ *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 32 L. ed. 342.

⁸ *Spencer v. Morgan*, 5 Ind. 146; *Ferguson v. Dunn*, 28 Ind. 58; *Fuller v. Tuska*, 13 N. Y. Supp. 580.

of property which has been converted wrongfully and sold, elects to sue for money had and received, demand is necessary.⁹ If money is paid by a mistake and both parties are acting in good faith, it is said in a number of cases that demand is necessary.¹⁰ In some of the jurisdictions in which this view has been expressed in broad terms, it has been qualified very materially. If the person to whom the payment was made accepted it in good faith but discovered the mistake before the action was brought, it is said that it is his duty to repay such money at once, and that accordingly demand is not necessary.¹¹ In some of these jurisdictions the question of the necessity of demand seems now to depend upon the relative fault in inducing such mistake as between the party who made the payment and the party who received the payment when such payment was made. If the mistake is induced primarily by the fault of the person to whom the payment is made, it is said that demand is not necessary.¹² If payment is made by mistake of the party who makes it, and the adversary party has full knowledge of the facts, demand is not necessary.¹³ If A purchases from B land which A already owns, a demand is not necessary as a condition precedent to A's action to recover from B the money paid for such land.¹⁴ In some jurisdictions it seems to be held that demand is not necessary as a condition precedent to an action to

⁹ *Babb v. Babb*, 89 Ind. 281.

¹⁰ *Freeman v. Jeffries*, L. R. 4 Exch. 189; *Southwick v. First National Bank*, 84 N. Y. 420; *Gillett v. Brewster*, 62 Vt. 312, 20 Atl. 105; *Lawton v. Howe*, 14 Wis. 241.

"If the mistake was induced by the fraud of the party receiving the same, and he had knowledge of the overpayment at the time, or if he had subsequently discovered the mistake, the duty was then cast upon him to rectify the mistake and repay the money. Thereafter he knowingly has the money of the other party to the transaction in his hands, which he holds against equity and good conscience, and there is no apparent reason for any demand for the repayment of the money before suit. But where the overpayment arises from the mistake or negligence of the party making it, and without

the fault or knowledge of the party receiving it, it is reasonable that the party so receiving the overpayment should not be subject to a suit until he has been notified of the overpayment and called upon, and had a reasonable opportunity to rectify the mistake." *Bishop v. Brown*, 51 Vt. 330 [quoted in *Gillett v. Brewster*, 62 Vt. 312, 20 Atl. 105].

¹¹ *Bishop v. Brown*, 51 Vt. 330.

¹² *Varnum v. Highgate*, 65 Vt. 416, 26 Atl. 628; *Holt v. Ruleau* (Vt.), 102 Atl. 934.

"When the payor is not in fault and the payee receives the money in his own wrong, no demand is necessary." *Varnum v. Highgate*, 65 Vt. 416, 26 Atl. 628.

¹³ *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161.

¹⁴ *Holt v. Ruleau* (Vt.), 102 Atl. 934.

recover payment made by mistake without regard to the relative fault of the party who made the payment and the party who received it.¹⁵ If the party who made such payment by mistake has received something under such transaction which is or may be of value to the adversary party, he should tender what he has received under such transaction before bringing action to recover the payment thus made.¹⁶

E. PAYMENT OBTAINED BY FRAUD

§ 1548. Payment obtained by fraud—General principles. As has already been stated,¹ one who has been induced to enter into a contract by the fraud of the adversary party has an election of remedies, one of which is to avoid the contract and recover what he has parted with or a reasonable compensation therefor. Where fraud exists, we have few of the complications that limit recovery of payments made by mistake. The chief question that makes this branch of the subject difficult is the extent of the right to waive tort and sue in contract. If money has been paid under such contract, the right of the party defrauded to waive the tort and recover such payment on the theory of an implied contract, in general assumpsit, is very generally recognized.² It is not necessary that the fraud should be the sole cause of the payment.³ It is sufficient if the payment would not have been made if it were not

¹⁵ *Rutherford v. McIvor*, 21 Ala. 750; *Sturgis v. Preston*, 134 Mass. 372.

¹⁶ *Northampton National Bank v. Smith*, 169 Mass. 281, 47 N. E. 1009.

¹ See § 339.

² *England*. *Johnson v. Rex* [1904], A. C. 817; *Kettlewell v. Refuge Assurance Co.* [1908], 1 K. B. 545, 3 B. R. C. 844, 77 L. J. K. B. N. S. 421, 97 L. T. N. S. 896, 24 Times L. R. 217, 52 Sol. Jo. 158.

Alabama. *Tuscaloosa County v. Foster*, 132 Ala. 392, 31 So. 587.

Iowa. *McCord v. Mitchell* (Ia.), 165 N. W. 453.

Maine. *Bither v. Packard*, 115 Me. 306, 98 Atl. 929.

Missouri. *Needles v. Burk*. 81 Mo. 569, 51 Am. Rep. 251.

Nebraska. *Martin v. Hutton*, 90 Neb.

34, 36 L. R. A. (N.S.) 602, 132 N. W. 727.

New Jersey. *Hanrahan v. Provident Association*, 67 N. J. L. 526, 61 Atl. 480 [affirming, 66 N. J. L. 80, 48 Atl. 517].

New York. *Supervisors of New York v. Tweed*, 13 Abb. Pr. (N.S.) 152.

Texas. *Weis v. Ahrenbeck*, 5 Tex. Civ. App. 542, 24 S. W. 356.

Vermont. *Johnson v. Gate*, 77 Vt. 218, 59 Atl. 830.

Washington. *Scandinavian American Bank v. Puget Sound Machinery Depot*, 79 Wash. 599, 140 Pac. 901.

West Virginia. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

Wisconsin. *Burke v. Ry.*, 83 Wis. 410, 53 N. W. 692.

³ *McCord v. Mitchell* (Ia.), 165 N. W. 453.

for such fraud.⁴ If payment is obtained by fraudulent representation of fact as to the existence of liability, such payment may be recovered, even though no contract existed between the parties.⁵ If A represents to B that entry has been made upon a certain tract of land but that A could obtain a relinquishment of such filing for a certain sum of money and B pays such amount to A for such purpose, B may recover such payment,⁶ even if an inspection of the government records would have disclosed the falsity of such statement.

Recovery has been permitted where a payment was induced by fraudulent representation as to a fact which if true would have caused such payment to be made, although it would not have imposed any legal liability upon the party who made such payment.⁷ A father who has been induced to pay for a loss by fraudulent representation that his child destroyed certain property, may recover such payment, although he would not have been liable legally for such loss if such statement had been true.⁸ Recovery may be had where payments are induced by constructive fraud.⁹ Thus where bonds of a corporation are in effect, though under a disguise in outward form, sold to its directors at a discount, the amount of such discount may be recovered from such purchasers.¹⁰

If goods are sold under a contract induced by fraud, we have, by reason of the divergent theories concerning the right to waive tort and sue in assumpsit,¹¹ two views: (1) that the vendor may waive the tort and sue in assumpsit,¹² and (2) that he can not sue in assumpsit, but must sue either in replevin or trover.¹³ A constructed for B an apparatus for making gas. Soon afterwards it was destroyed by fire. On B's fraudulent statement that this was the fault of the gas apparatus, A agreed to do certain repairing

⁴ *McCord v. Mitchell* (Ia.), 165 N. W. 453.

⁵ *Illinois. People v. Foster*, 133 Ill. 496, 23 N. E. 615.

Indiana. Ingalls v. Miller, 121 Ind. 188, 22 N. E. 995.

Kansas. Frick v. Larned, 50 Kan. 776, 32 Pac. 383.

Minnesota. Holland v. Bishop, 60 Minn. 23, 61 N. W. 681.

South Dakota. Gillespie v. Evans, 10 S. D. 234, 72 N. W. 576.

⁶ *Martin v. Hutton*, 90 Neb. 34, 36 L. R. A. (N.S.) 602, 132 N. W. 727.

⁷ *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251.

⁸ *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251.

⁹ See ch. XVI.

¹⁰ *Fitzgerald v. Construction Co.*, 41 Neb. 374, 59 N. W. 838.

¹¹ See §§ 1507 et seq.

¹² Where credit is obtained by fraud the vendor may sue in assumpsit at once. *Crown Cycle Co. v. Brown*, 39 Or. 285, 64 Pac. 451.

¹³ *Jones v. Brown*, 167 Pa. St. 395, 31 Atl. 647.

without charge. After making such repairs, A learned of B's fraud and brought suit in assumpsit for a reasonable compensation. It was held that he could recover.¹⁴

One who has obtained an insurance policy by fraudulent representations can not recover premiums or assessments paid by him when the insurance company elects to avoid such policy for such fraud,¹⁵ since the parties can not be placed in statu quo.¹⁶

The right to recover in assumpsit assumes that on discovering the fraud the party defrauded elects to disaffirm the express contract. If he elects to affirm, he can not sue in general assumpsit. Thus a defrauded vendor who affirms the contract, can not thereafter sue the vendee for the amount realized by him on a resale.¹⁷

The fact that a contract is ingenious and speculative in character and that one party assumes a risk of never receiving compensation; does not amount to fraud and does not entitle the party to avoid such transaction and to recover what he has paid.¹⁸

§ 1549. Payment obtained by fraud—Specific illustrations. One who pays money, deceived by fraudulent representations of the adversary party with reference to the mortgage which the latter is selling to the former, may recover such payment in assumpsit.¹ So if a vendor is induced by fraudulent representations to accept securities in payment for his goods, he may credit the value of such securities on the purchase price of such goods and sue in assumpsit to recover the difference.² So money paid by drawee on a draft accepted "against indorsed bills of lading" attached to the draft, may be recovered when these bills of lading were in fact fictitious.³ Money paid by shippers to a carrier of goods in excess of charges made to other shippers of similar goods by such carrier, induced by the statement of such carrier that it

¹⁴ *Citizens', etc., Co. v. Granger*, 118 Ill. 266, 8 N. E. 770.

¹⁵ *Elliott v. Knights of Modern Maccabees*, 46 Wash. 320, 13 L. R. A. (N.S.) 856, 89 Pac. 929.

¹⁶ *Elliott v. Knights of Modern Maccabees*, 46 Wash. 320, 13 L. R. A. (N.S.) 856, 89 Pac. 929.

¹⁷ *Bedier v. Fuller*, 116 Mich. 126, 74 N. W. 506.

¹⁸ *Jacobs v. Wisconsin National Life Insurance Co.*, 162 Wis. 318, 156 N. W. 159.

¹ *Cornell v. Crane*, 113 Mich. 460, 71 N. W. 878; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73. So of a purchase of a bond. *Ripley v. Chase*, 78 Mich. 126, 18 Am. St. Rep. 428, 43 N. W. 1097.

² *Blalock v. Phillips*, 38 Ga. 216; *Hidey v. Swan*, 111 Mich. 161, 69 N. W. 225; *Wilson v. Foree*, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195.

³ *Guaranty Trust Co. v. Grottrian*, 114 Fed. 433, 57 L. R. A. 689, 52 C. C. A. 235.

gave no lower rates, may be recovered.⁴ If the president of a public board allows fictitious claims, and shares in the proceeds thereof, an action for money had and received will lie against him.⁵ Recovery exists in cases of fraud though the party guilty of fraud is thus securing from the party who seeks recovery the payment of a debt due from a third party. Thus A had embezzled money from a railway company, B. B's agent represented to X that payment of a certain sum would make good such shortage and enable A to retain his position. In fact the shortage was much greater, and A was discharged. It was held that X could recover such payment from B.⁶ If A, who has sold goods to B through B's agent, X, and who has been paid therefor by B, represents to X that he has not been paid for such goods and thus induces X to pay for them again, such payment may be recovered in assumpsit upon the common counts.⁷ Money paid for realty, under a contract voidable for fraud may be recovered if a reconveyance is tendered.⁸

If an agent obtains money as commissions from his principal by fraudulently representing that certain parties to whom he had sold on credit were solvent, such payment may be recovered.⁹ So if A obtains money from B under a contract to use it in making a joint purchase, which contract A has no intention of performing;¹⁰ or if A obtains money from B by falsely claiming to be the holder of B's note, which he has in fact transferred, and on which he then declines to pay such money,¹¹ such payments may be recovered.

§ 1550. Who may recover, and from whom. A volunteer can not recover on the theory that payment has been made through fraud however. The right of recovery is limited to the party making the payment or his legal representatives. A obtained a loan of money from B through B's agent, X, by fraud. B was thereafter dissatisfied, and X, being under no legal liability, repaid

⁴ *Cook v. Ry.*, 81 Ia. 531, 25 Am. St. Rep. 512, 9 L. R. A. 764, 46 N. W. 1080.

⁵ *Supervisors of New York v. Tweed*, 13 Abb. Pr. (N.S.) 152.

⁶ *Burke v. Ry.*, 83 Wis. 410, 53 N. W. 692.

⁷ *Johnson v. Cate*, 77 Vt. 218, 59 Atl. 830.

⁸ *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178, 6 L. R. A. 121, 43 N. W. 800.

⁹ *Frick v. Larned*, 50 Kan. 776, 32 Pac. 383.

¹⁰ *Holland v. Bishop*, 60 Minn. 23, 61 N. W. 681.

¹¹ *Gillespie v. Evans*, 10 S. D. 234, 72 N. W. 576.

him the amount advanced and took A's security. It was held that X could not recover from A in quasi-contract.¹

A payment can not be recovered from one who is not a party to the fraud and to whom a part of the proceeds of such fraud have been paid upon a valuable consideration.² An attorney who has received part of the proceeds of the life insurance policy as a contingent fee upon recovering such proceeds for his client, can not be compelled to reimburse such life insurance company if it is found that the insured was not dead and that the transaction was a fraud between the insured and the beneficiary to which such attorney was not a party.³

This right of recovery can not be made a means of collecting damages in tort. Only the person who receives the payment is liable. Thus A, agent of X, by fraudulent representations induced B to enter into a contract with X and to pay money thereunder to X. B can not recover from A for money had and received.⁴ By statute in some states assumpsit may be brought against the person guilty of deceit, even if no money was paid to him or for his benefit under such transaction.⁵

F. PAYMENT BY MISREPRESENTATION

§ 1551. Payment by misrepresentation. Payment made under misrepresentation presents fewer difficulties than payment by mistake. In cases of mistake both parties are innocent, though one may be negligent. In payment by misrepresentation, the party receiving the payment has by his false statement caused such payment to be made. Though he is innocent of intentional wrongdoing, and is not guilty of a tort, such payment may be recovered.¹ Thus where A induced B to pay money a second time, by stating that B had not delivered it the first time;² or if a creditor induces an illiterate debtor to make an overpayment by stating that an

¹Steiner v. Clisby, 103 Ala. 181, 15 So. 612.

²Fidelity Mutual Life Ins. Co. v. Clark, 203 U. S. 64, 51 L. ed. 91.

³Fidelity Mutual Life Ins. Co. v. Clark, 203 U. S. 64, 51 L. ed. 91.

⁴Minor v. Baldrige, 123 Cal. 187, 55 Pac. 783.

⁵Hallett v. Gordon, 122 Mich. 573, 82 N. W. 827 [modifying on rehearing, 122 Mich. 567, 81 N. W. 556].

¹Putnam v. Dungan, 89 Cal. 231, 26 Pac. 904; Blue v. Smith, 46 Ill. App. 166; Fisher v. During, 53 Mo. App. 548; Montgomery County v. Fry, 127 N. Car. 258, 37 S. E. 259.

Contra, Harse v. Pearl Life Assur. Co. [1904], 1 K. B. 558.

²Houser v. McGinnas, 108 N. Car. 631, 13 S. E. 139. B was acting as express messenger and had charge of a package of five hundred dollars for A, which A claimed not to have received.

amount was due on a debt on which part payments had been made larger than was in fact due;³ or if A induces B to pay him a thousand dollars by claiming an interest in B's land, when in fact A had none;⁴ or if A obtains money from B for certain realty by an innocent misrepresentation as to the identity of such realty;⁵ or if an administrator obtains payment of excessive fees by misrepresenting the amount thereof,⁶ such payments may be recovered even though no fraud is found to exist. On the other hand, it has been held that if an agent of an insurance company represents in good faith that an insurance upon the life of a third person could be effected, one who relies upon such representations and pays premiums upon such policies can not recover such premiums, although the contract is invalid for want of an insurable interest.⁷

If fraud exists, the right to recover in some form of action is still clearer. As fraud is a tort, however, the question sometimes becomes one of the right to waive a tort and sue in quasi-contract.⁸

G. PAYMENT UNDER MISTAKE OF FACT

§ 1552. Payment under mistake of fact. A person who, under a mistake of material fact, makes a payment which he is not under legal liability to make, can recover the money thus paid, if the other elements necessary in an action to recover payments are present.¹ In other words, such payments are not looked on as

³ *Steer v. Oakley*, 186 Pa. St. 582, 40 Atl. 815.

⁴ *Putnam v. Dungan*, 89 Cal. 231, 28 Pac. 904.

⁵ *Buckley v. Patterson*, 39 Minn. 250, 39 N. W. 490; *Thwing v. Lumber Co.*, 40 Minn. 184, 41 N. W. 815; *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178, 6 L. R. A. 121, 43 N. W. 800.

⁶ *Blue v. Smith*, 46 Ill. App. 166.

⁷ *Harse v. Pearl Life Assur. Co.* [1904], 1 K. B. 558.

⁸ See §§ 1504 et seq.

¹ *England. Kelly v. Solari*, 9 M. & W. 54.

United States. *Espy v. Bank*, 85 U. S. (18 Wall.) 604, 21 L. ed. 947; *United States v. Barlow*, 132 U. S. 271, 33 L. ed. 346; *Adams v. Henderson*, 168 U. S. 573, 42 L. ed. 584.

Alabama. *Hardigree v. Mitchum*, 51 Ala. 151.

California. *Corson v. Berson*, 86 Cal. 433, 25 Pac. 7; *Putnam v. Dungan*, 89 Cal. 231, 28 Pac. 904; *Lutz v. Rothchild* (Cal.), 38 Pac. 360.

Connecticut. *Mansfield v. Lynch*, 59 Conn. 320, 12 L. R. A. 285, 22 Atl. 313; *Hogben v. Ins. Co.*, 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214.

Illinois. *People v. Foster*, 133 Ill. 496, 23 N. E. 615; *Tuller v. Fox*, 46 Ill. App. 97; *Blue v. Smith*, 46 Ill. App. 166.

Indiana. *Cross v. Herr*, 96 Ind. 96; *Stokes v. Goodykoontz*, 126 Ind. 535, 26 N. E. 391; *Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313, 810; *Tarplee v. Capp*, 25 Ind. App. 56, 56 N. E. 270.

Iowa. *Cook v. Ry.*, 81 Ia. 551, 25 Am. St. Rep. 512, 9 L. R. A. 764, 46 N. W. 1080; *Chickasaw, etc., Ins. Co. v. Weller*, 98 Ia. 731, 68 N. W. 443; *Fidelity Savings Bank v. Reeder*, 142

voluntary payments.² The action of assumpsit lies to recover such payments.³

Ia. 373, 120 N. W. 1029; Gossweiler v. Jansen, 179 Ia. 808, 162 N. W. 45.

Kansas. Noble v. Doughten, 72 Kan. 336, 3 L. R. A. (N.S.) 1167, 83 Pac. 1048; Lowe v. Wells, 78 Kan. 105, 96 Pac. 74; Kansas City v. The R. J. & W. M. Boyd Construction Co., 86 Kan. 213, 120 Pac. 347.

Kentucky. Lyon v. Mason, etc., Co., 102 Ky. 594, 44 S. W. 135; Rhodes v. Lambert (Ky.), 58 S. W. 608; Tucker v. Denton (Ky.), 15 L. R. A. (N.S.) 289, 106 S. W. 280, 32 Ky. L. Rep. 521; Supreme Council Catholic Knights of America v. Fenwick, 169 Ky. 269, 183 S. W. 906.

Massachusetts. Garland v. Bank, 9 Mass. 408, 6 Am. Dec. 86; Gould v. Emerson, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065.

Minnesota. Grand Lodge Ancient Order of United Workmen v. Towne, 136 Minn. 72, L. R. A. 1917E, 344, 161 N. W. 403.

Missouri. Jordan v. Harrison, 46 Mo. App. 172; Connell v. Hudson, 53 Mo. App. 418.

New Jersey. Wood v. Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523.

New Mexico. Elgin v. Gross, 20 N. M. 450, L. R. A. 1916A, 711, 150 Pac. 922.

New York. Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161; Martin v. Bank, 160 N. Y. 190, 54 N. E. 717.

North Dakota. James River National Bank v. Weber, 19 N. D. 702, 124 N. W. 952.

Ohio. Ward v. Ward, 12 Ohio C. D. 59.

Oregon. Scott v. Ford, 45 Or. 531, 68 L. R. A. 469, 78 Pac. 742, 80 Pac. 899.

Pennsylvania. Boaz v. Updegrove, 5 Pa. St. 516, 47 Am. Dec. 425; McKibben v. Doyle, 173 Pa. St. 579, 51 Am. St. Rep. 785, 34 Atl. 455; Donner v. Sackett, 251 Pa. St. 524, 97 Atl. 89.

Rhode Island. Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211.

South Carolina. Glenn v. Shannon, 12 S. Car. 570.

South Dakota. Caldwell v. Maxfield, 7 S. D. 361, 64 N. W. 166.

Tennessee. Dickens v. Jones, 12 Tenn. (6 Verg.) 483, 27 Am. Dec. 488; Guild v. Baldrige, 32 Tenn. (2 Swan) 295; Neal v. Read, 66 Tenn. (7 Baxt.) 333.

Texas. Alston v. Richardson, 51 Tex. 1; Cleveland School Furniture Co. v. Hotchkiss, 89 Tex. 117, 33 S. W. 855.

Vermont. Holt v. Ruleau (Vt.), 102 Atl. 934.

West Virginia. Shinn v. Shinn, 78 W. Va. 44, 88 S. E. 610.

Wisconsin. Buffalo v. O'Malley, 61 Wis. 255, 50 Am. Rep. 137, 20 N. W. 913; Peterson v. Bank, 78 Wis. 113, 47 N. W. 368; White v. Brotherhood Locomotive Firemen and Enginemen, 167 Wis. 323, L. R. A. 1918D, 1185, 167 N. W. 457.

"Where money is paid upon the supposition that a specific fact, which it is supposed would entitle the other to maintain an action, is true, which fact is not true, an action will lie to recover the money back, 'upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid had no right either to receive or retain, and which, had the true state of facts been present in his mind, at the time, he would not have paid.'" Ingalls v. Miller, 121 Ind. 188, 190, 22 N. E. 905 [quoted in Stotsenburg v. Fordice, 142 Ind. 490, 494, 41 N. E. 313, 810].

² Noble v. Doughten, 72 Kan. 336, 3 L. R. A. (N.S.) 1167, 83 Pac. 1048; Supreme Council Catholic Knights of America v. Fenwick, 169 Ky. 269, 183 S. W. 906. See § 1528.

³ Shinn v. Shinn, 77 W. Va. 44, 88 S. E. 610.

The right of recovering payments made under a mistake of fact is especially clear where government funds have thus been expended,⁴ though the right to recover such funds does not rest solely on the ground of mistake.⁵ If a payment has been made under a mistake of fact, the right to recover such payment does not depend upon the promise of the person to whom such payment was made to repay such amount.⁶

One who has made a payment by mistake may by subsequent agreement as to the application of such payment preclude himself from recovering it.⁷ This has been explained as a ratification of such payment.⁸ On the other hand, it has been said that payment made after the mistake is discovered does not preclude the party who made it from recovering the overpayment.⁹

§ 1553. Elements of mistake of fact—Unconscious ignorance or forgetfulness. The elements of mistake of fact for which a payment may be recovered are substantially the same as the elements of mistake for which an executory promise may be avoided.¹ A mistake which authorizes the recovery of a payment can not exist unless there has been an unconscious ignorance or forgetfulness of an essential fact.² A party who makes a payment knowing that he has no knowledge upon specific essential features of the transaction, can not recover such payment if he discovers subsequently the existence of facts the knowledge of which would have induced him not to make such payment.³ If an insurance company knows that the insured has been absent more than seven years and does not know whether he is alive or dead and pays the face of such policy rather than defend an action thereon, such payment can not be recovered when the insurance company finds that the insured is alive.⁴ It has been held, however, that if the insured disappears

⁴ *United States v. Barlow*, 132 U. S. 271, 33 L. ed. 346; *Kansas City v. Boyd Construction Co.*, 86 Kan. 213, 120 Pac. 347.

⁵ See § 1520.

⁶ *Fidelity Savings Bank v. Reeder*, 142 Ia. 373, 120 N. W. 1029.

⁷ *Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266.

⁸ *Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266.

⁹ *Ficks v. Purcell*, 164 Wis. 596, 160 N. W. 1058.

¹ See §§ 219, 251 et seq., 384 and 400.

² *New York Life Ins. Co. v. Chittenden*, 134 Ia. 613, 120 Am. St. Rep. 444, 11 L. R. A. (N.S.) 233, 13 Ann. Cas. 408, 112 N. W. 96.

³ *New York Life Ins. Co. v. Chittenden*, 134 Ia. 613, 120 Am. St. Rep. 444, 11 L. R. A. (N.S.) 233, 13 Ann. Cas. 408, 112 N. W. 96.

⁴ *New York Life Ins. Co. v. Chittenden*, 134 Ia. 613, 120 Am. St. Rep. 444,

and neither the insurance company nor the beneficiaries know whether he is alive or dead, and the beneficiaries pay assessments upon the certificate to prevent it from lapsing, they may recover the assessments which ultimately prove to have been made after the death of the insured.⁵

§ 1554. Mistake as to essential element. In order to authorize the recovery of a payment it must be shown that the mistake under which it was made was one which went to the essential nature of the transaction.¹ The mistake of fact must not be as to some collateral matter, but must affect the very existence of the liability which the payment was intended to discharge.² If a liability of any sort exists, payment thereof can not be recovered on account of some mistake in the inducement.³ The party who made such payment must have been mistaken as to the facts which affected

11 L. R. A. (N.S.) 233, 13 Ann. Cas. 408, 112 N. W. 96.

⁵ *White v. Brotherhood of Locomotive Firemen and Enginemen*, 165 Wis. 418, 162 N. W. 441; *White v. Brotherhood Locomotive Firemen and Enginemen*, 167 Wis. 323, L. R. A. 1918D, 1185, 167 N. W. 457.

¹ *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251.

² *England. Aiken v. Short*, 1 Hurl. & N. 210.

United States. Otis v. Cullum, 92 U. S. 447, 23 L. ed. 496.

Alabama. Garretson v. Joseph, 100 Ala. 279, 13 So. 948.

Iowa. Kellenberger v. Oskaloosa National Building, Loan and Investment Association, 129 Ia. 582, 105 N. W. 836.

Maryland. National Exchange Bank v. Ginn, 114 Md. 181, 33 L. R. A. (N.S.) 963, Ann. Cas. 1914C, 508, 78 Atl. 1026.

Minnesota. Langevin v. St. Paul, 49 Minn. 189, 15 L. R. A. 766, 51 N. W. 817.

New York. Southwick v. Bank, 84 N. Y. 420.

Pennsylvania. Pepperday v. Bank,

183 Pa. St. 519, 63 Am. St. Rep. 769, 39 L. R. A. 529, 38 Atl. 1030.

Wisconsin. Buffalo v. O'Malley, 61 Wis. 255, 50 Am. Rep. 137, 20 N. W. 913.

"A mistake where that is the foundation of the action must relate to a fact which is material, essential to the transaction between the parties. A payment made under the influence of a mistake concerning a fact which, even if it were as it is supposed to be, would create no legal obligation, but merely operate as an inducement upon the mind of the party paying the money, the other party being without fault, would not justify a recovery as for money had and received." *Langevin v. St. Paul*, 49 Minn. 189, 15 L. R. A. 766, 51 N. W. 817.

³ *Pensacola, etc., R. R. v. Braxton*, 34 Fla. 471, 16 So. 317; *Kellenberger v. Oskaloosa National Building, Loan and Investment Association*, 129 Ia. 582, 105 N. W. 836; *Buffalo v. O'Malley*, 61 Wis. 255, 20 N. W. 913.

"The mistake must be to such an extent as will amount to destruction of the consideration." *Ashley v. Jennings*, 48 Mo. App. 142, 147.

his liability. A payment can not be recovered for a mistake which does not go to the essential character of the transaction, although it concerns a fact which is material to the willingness of the party to make such payment and without which he would not have made such payment.⁴ A payment can not be recovered for a mistake which is not essential and which is not material in inducing the party to make such payment. If A collects a debt for B from C,⁵ or A owes B, and C takes A's check, thinking it good, and pays B personally, C can not recover such payment from B if A's check proves worthless.⁶ So where A is indebted to B, and by mistake as to some other liability pays B on a different non-existent claim, A can not recover such payment from B until A's indebtedness to B is satisfied.⁷ Thus where A had a claim against a railroad for killing cattle, and after he had presented his claim received a voucher, which the railroad paid, he is not obliged to repay such sum until his claim is settled, even though such order was intended for another man of the same name and was paid under mistake as to the identity of the person asking payment.⁸ So if A owns two lots and B a third adjoining A's, and the city brings suit to enforce an assessment on such lots and takes a decree for the assessment against the three lots jointly, A can not redeem his lots alone, but must redeem B's as well. Hence, if A redeems all three, thinking that B's lot belongs to A, this is a mere matter of inducement and A can not recover from the city the amount due on B's lot alone. This is true especially after the city has paid over the money received at the tax sale, from which sale A was redeeming his land to the contractors.⁹ A endorsed several instruments for B, thinking them in effect promissory notes. As they fell due, and were not paid by B, A paid those first maturing to C, the holder thereof, under the belief that A was liable as endorser. A resisted payment of the last instruments of the series and established his non-liability.¹⁰ A then sued C to recover the payment made by him to

⁴ Parodi v. State Savings Bank, 113 Miss. 364, L. R. A. 1918E, 325, 74 So. 280.

⁵ Parodi v. State Savings Bank, 113 Miss. 364, L. R. A. 1918E, 325, 74 So. 280. (A was negligent in taking a defective check from C.)

⁶ Garretson v. Joseph, 100 Ala. 279, 13 So. 948; Pepperday v. Bank, 183 Pa. St. 519, 63 Am. St. Rep. 769, 39 L. R. A. 529, 38 Atl. 1030.

⁷ Pensacola, etc., R. R. v. Braxton, 34 Fla. 471, 16 So. 317; Ashley v. Jennings, 48 Mo. App. 142.

⁸ Pensacola, etc., R. R. v. Braxton, 34 Fla. 471, 16 So. 317.

⁹ Langevin v. St. Paul, 49 Minn. 189, 15 L. R. A. 766, 51 N. W. 817.

¹⁰ First National Bank v. Alton, 60 Conn. 402, 22 Atl. 1010.

C on the first instrument of the series. It was held that he could not recover, even though he had been mistaken in his belief that upon paying such instruments he would be subrogated to the security held therefor.¹¹ A bank which pays a check out of funds which it has on hand in the mistaken belief that the maker of such check is solvent and will pay to the bank that which he owes upon another transaction, can not recover such payment after the maker of such check is known to be insolvent in order to apply such payment as a set-off to such debt.¹² If a building and loan association intending to pay interest to a withdrawing stockholder, pays such interest under an existing agreement at a specified rate, it can not subsequently recover, on the theory of mistake, the difference between the amount to which the stockholder would have been entitled if such building and loan association had paid dividends upon such stock.¹³ A shipper who has paid a carrier at the rate agreed upon, can not recover for the difference between the quantity as determined by the method of measurement agreed upon between the shipper and the carrier and the method of measurement by which a shipper is obliged to measure the article when it is sold at the point of delivery, although by such difference in measurement the carrier suffers a loss.¹⁴ It has been held that one who buys the municipal bonds which he intends to buy, and who pays therefor, can not recover such payment,¹⁵ although it is subsequently decided that such bonds are of no legal validity.¹⁶ Payment of a judgment not a lien on the homestead, made because the judgment debtor, by reason of a mistake in his abstract of title thinks it is a lien thereon and that he can not borrow money on his homestead unless such debt is paid, is not under mistake.¹⁷

¹¹ *Alton v. Bank*, 157 Mass. 341, 34 Am. St. Rep. 285, 18 L. R. A. 144, 32 N. E. 228. The court said that the right of subrogation was "A collateral matter and no part of his principal contract by which he makes himself surety. The existence of that right is not the implied foundation of the principal contract."

¹² *National Exch. Bank v. Ginn*, 114 Md. 181, 33 L. R. A. (N.S.) 963, Ann. Cas. 1914C, 508, 78 Atl. 1026.

¹³ *Kellenberger v. Oskaloosa National Building, Loan and Investment Association*, 129 Ia. 582, 105 N. W. 836.

¹⁴ *Buffalo v. O'Malley*, 61 Wis. 235, 50 Am. Rep. 137, 20 N. W. 913.

¹⁵ *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496.

¹⁶ *Citizens' Savings & Loan Association v. Topeka*, 87 U. S. (20 Wall.) 653, 22 L. ed. 455.

¹⁷ *Lathrope v. McBride*, 31 Neb. 289, 47 N. W. 922. Nor is such payment under duress.

§ 1555. Mistake as to evidence. The mistake of fact which authorizes the recovery of a payment made by mistake of fact is a mistake as to the fact which creates the liability and not a mistake as to the evidence by which the fact of such liability is to be proved.¹ Thus where A paid a debt and subsequently lost the receipt, and on demand of his creditor paid the debt again, it was held that A could not recover such payment after he had found his receipt, and was thus able to prove that he had paid it before.² A maker of a note who pays it to the executor, knowing that the testator had agreed to bequeath such note to the maker, but not knowing that he could prove such oral agreement, can not recover such payment as made under a mistake of fact.³

§ 1556. Illustrations of mistake of fact. The term "mistake of fact" has been held in cases involving the right to recover payments to include mistakes as to the title to realty,¹ the existence of a lien thereon,² the solvency of an estate³—as where such insolvency is produced by the subsequent presentation and allowance of claims whose existence was not known to the executor when he overpaid the legatee from whom he is now seeking to recover the excess,⁴ the amount of the assets of a firm,⁵ the release of an indorser by omission of the holder of a check to present it for payment,⁶ and the validity of sales of furniture on which commissions were paid under the belief that such sales were valid.⁷ If A, a lessor, gives an order upon B as lessee in favor of Y, and

¹ Ball v. James, 176 Ia. 647, 158 N. W. 684; Marriott v. Hampton, 7 T. R. 269.

² Marriott v. Hampton, 7 T. R. 269.

³ Ball v. James, 176 Ia. 647, 158 N. W. 684.

⁴ Adams v. Henderson, 168 U. S. 573, 42 L. ed. 584; Shaw v. Mussey, 48 Me. 247; Holt v. Ruleau (Vt.), 102 Atl. 934. (Where A, by mistake, buys his own realty from B.)

⁵ Hardigree v. Mitchum, 51 Ala. 151; Rhodes v. Lambert (Ky.), 68 S. W. 608.

⁶ Connecticut. Mansfield v. Lynch, 59 Conn. 320, 12 L. R. A. 285, 22 Atl. 343.

Illinois. Wolf v. Beaird, 123 Ill. 585, 5 Am. St. Rep. 565, 15 N. E. 161; Blue v. Smith, 46 Ill. App. 166.

Indiana. Tarplee v. Capp, 25 Ind. App. 56, 56 N. E. 270.

Massachusetts. Bliss v. Lee, 34 Mass. (17 Pick.) 83.

Ohio. Rogers v. Weaver, 5 Ohio 536. But such payment can not be recovered until after a judicial determination that the estate is insolvent.

Wisconsin. Union, etc., Bank v. Jefferson, 101 Wis. 452, 77 N. W. 889.

⁴ Wolf v. Beaird, 123 Ill. 585, 5 Am. St. Rep. 565, 15 N. E. 161.

⁵ Stokes v. Goodykoontz, 126 Ind. 535, 26 N. E. 391.

⁶ Martin v. Bank, 160 N. Y. 190, 54 N. E. 717.

⁷ Cleveland, etc., Co. v. Hotchkiss, 89 Tex. 117, 33 S. W. 855.

also assigns his lease to Y, from whom A had originally leased such property and to whom A was indebted and B pays such order without knowledge of the assignment, B may recover such payment from A on being obliged to pay such rent again to the assignee of the lease.⁸ In the absence of fraud one who has paid premiums upon an insurance policy under which no risk attached may recover the amount of such premiums.⁹ Payment of illegal street assessments made in ignorance of the facts making them illegal may be recovered.¹⁰ If A pays money to B, in performance of a contract between them, under the mistaken belief on A's part that B has performed such contract fully A may recover such payment.¹¹ Thus where B had agreed to plaster a house for A, and A paid him, believing that such work had been done, he may recover the money thus paid, where the material is of such inferior quality as to be valueless.¹² A agreed to sell fish for B, at ten per cent. commission, and to guarantee the purchase price on sales made by him. Before making such contract with A, B had sold some of the fish to X. Memoranda of the amounts delivered to the different vendees were turned in to A, and A paid to B the amount due thereon, less his ten per cent. commission. In this way A paid B for the fish which B had sold to X. On X's refusal to pay A, A sued B for such amount. It was held that A could recover.¹³ If A pays money to B in order to secure the discharge of A's parents in the mistaken belief that the contract between B and A's parents was a valid obligation, A may recover such payment.¹⁴ Under such circumstances A can not be regarded as a volunteer.¹⁵ If A, a broker, has paid B, the owner of stock, the amount for which A is informed that such stock has been sold, A may return the stock and recover the amount of such payment on learning that

⁸ *Egan v. Abbett*, 74 N. J. L. 49 [sub nomine, *Egan v. Abbett*, 64 Atl. 991].

⁹ *Parsons v. Lane*, 97 Minn. 98, 4 L. R. A. (N.S.) 231 [sub nomine, *In re Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485].

¹⁰ *Tripler v. New York*, 139 N. Y. 1, 34 N. E. 729; *Mutual Life Ins. Co. v. New York*, 144 N. Y. 494, 39 N. E. 386; same case, 125 N. Y. 617, 26 N. E. 721; *Redmond v. New York*, 125 N. Y. 632, 26 N. E. 727.

¹¹ *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. 686.

¹² *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. 686.

¹³ *Blanchard v. Low*, 164 Mass. 118, 41 N. E. 118.

¹⁴ *Tucker v. Denton (Ky.)*, 15 L. R. A. (N.S.) 289, 106 S. W. 280, 32 Ky. L. Rep. 521.

¹⁵ *Tucker v. Denton (Ky.)*, 15 L. R. A. (N.S.) 289, 106 S. W. 280, 32 Ky. L. Rep. 521.

such sale had not been effected.¹⁶ X's will provided that A should have control of X's estate until B reached the age of eighteen, when A was to pay B a certain part of the estate; and if B died before reaching such age, the entire estate was to fall to A. A voluntarily paid B B's share before B reached the age of eighteen. Subsequently B died before reaching such age of eighteen. A was allowed to recover on the ground that the payment was made under a mistake of fact, in that B did not know that A would die before the age of eighteen.¹⁷ If A, an executor, has paid a legacy to B, who was the child of a legatee in the belief that the legatee had not died until after the testator had died, when in fact the legatee died before testator died, and accordingly such legacy lapsed, A may recover the amount of such payment from B.¹⁸ Where a city engineer by mistake estimated the area paved at about three thousand square yards more than it really was, and in reliance upon such estimate the city paid the contractor for the entire amount of the engineer's estimate, at the rate of one dollar a square yard, it was held that the city could recover from the contractor on learning of the mistake.¹⁹ So if A pays a note to B under the mistaken belief that A has executed such note, A may recover.²⁰

If A has paid money to B for a license to make use of a patent which A believes that B possesses, and it turns out that B's patent was invalid, A's right to recover such payment presents a question upon which there is a conflict of authority. In some jurisdictions it is held that A has made such payment under a mistake as to an essential element of the transaction and that he has not received anything in return for such payment; and, accordingly, A has been allowed to recover a payment thus made.²¹ Under this principle A may recover royalties which he has paid for the use of a patent right after its expiration.²² In other jurisdictions it is said that such a payment is voluntary, and that since A has used the invention which was patented he has received what he bargained for; and, accordingly, he has been denied the right to

¹⁶ *Donner v. Sackett*, 251 Pa. St. 524, 97 Atl. 89.

¹⁷ *Semmig v. Merrihew*, 67 Vt. 38, 30 Atl. 691.

¹⁸ *Scott v. Ford*, 45 Or. 531, 68 L. R. A. 469, 78 Pac. 742, 80 Pac. 899.

¹⁹ *Duluth v. McDonnell*, 61 Minn. 288, 63 N. W. 727.

²⁰ *Lewellen v. Garrett*, 58 Ind. 442, 26 Am. Rep. 74.

²¹ *Stanley Rule & Level Co. v. Bailey*, 45 Conn. 464.

²² *Stanley Rule & Level Co. v. Bailey*, 45 Conn. 464.

recover such payment.²⁵ Under this principle A has been denied a right to recover where the patent was void for technical reasons,²⁶ and where the invention was not novel.²⁷ Since A is making such payment in order to enjoy a legalized monopoly and since he would have been entitled to make use of such invention without the payment of such license fee, it is difficult to see that he has received anything of value in return for such payment; and no good reason for denying his right of recovery appears.

One who has deposited money in a bank to the credit of a county in reliance upon forged obligations of the county, may recover such payment if the county's right of action against the official who was guilty of such forgery and who has appropriated money belonging to the county is not impaired thereby.²⁸ If A believed that his son, X, who was an express messenger, had lost a package of money when in fact it had been stolen from him by Y, another express messenger, and in reliance on such belief A paid the express company, B, the amount of such supposed loss, A may recover such amount from B on learning the facts.²⁹ If B has lent money to X upon a forged note and mortgage and A is subsequently induced to make a loan upon another forged note and mortgage a part of which loan is to be paid to B to discharge his note and mortgage, A may recover the amount of such payment from B upon discovering the forgery if B has not altered his position.³⁰ If A has given a check to B, the collection of which has been delayed until the drawee bank has become insolvent and A in ignorance of such delay gives to B a second check for such debt which is collected, A, on learning of B's negligence in presenting the first check, may recover such amount.³¹

§ 1557. Mistakes in computation. A mistake as to the amount due on a debt,¹ even where the facts as to the amount of principal

²⁵ *Schwarzenbach v. Odorless Excavating Apparatus Co.*, 65 Md. 34, 57 Am. Rep. 301, 3 Atl. 676; *Hiatt v. Twomey*, 21 N. Car. 315.

²⁶ *Schwarzenbach v. Odorless Excavating Apparatus Co.*, 65 Md. 34, 57 Am. Rep. 301, 3 Atl. 676.

²⁷ *Hiatt v. Twomey*, 21 N. Car. 315.

²⁸ *Hathaway v. Delaware County*, 185 N. Y. 368, 13 L. R. A. (N.S.) 273, 78 N. E. 153.

²⁹ *Lowe v. Wells Fargo Express*, 78 Kan. 105, 96 Pac. 74.

³⁰ *Grand Lodge, Ancient Order of United Workmen v. Towne*, 136 Minn. 72, L. R. A. 1917E, 344, 161 N. W. 403.

³¹ *Noble v. Doughten*, 72 Kan. 336, 3 L. R. A. (N.S.) 1167, 83 Pac. 1048.

¹ *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065; *Peterson v. Bank*, 78 Wis. 113, 47 N. W. 368.

and payments are known, but the amount due can be ascertained only by a long arithmetical calculation,² is a mistake of fact, and a payment made by reason thereof may be recovered. Thus where the parties make a mistake in computing the price to be paid for property, in accordance with a contract of sale;³ or make a mistake in computing the amount due on a mortgage;⁴ or by mistake compute at eight per cent. interest on a note which by its terms bears interest at six per cent.,⁵ or otherwise erroneously compute the interest due;⁶ or where a principal and agent make a mistake in computing their mutual accounts;⁷ or where by mistake the same item is paid twice;⁸ or where a payment is made under mistake in computing the weight of the articles sold, on which weight the payment is based,⁹ money paid under such mistakes may be recovered. A and B, tenants in common in land, were arranging a voluntary partition, and A was to take that half of the land upon which improvements were erected, and pay to B the amount necessary to equalize his share. By a mistake in the computation A paid to B the entire value of the buildings upon this tract, instead of one-half their value. It was held that A could recover the amount thus paid in by him in excess of the amount necessary to equalize his share with B's.¹⁰

§ 1558. Recovery of payment on forged instrument. Whether recovery of payment on a forged instrument can be had from one who has taken such instrument for value and in good faith is a question which arises not infrequently, and on which there is an unfortunate conflict of authority. Under one theory a bank is bound to know the signatures of its depositors; and if it pays a forged check, signed by the name of a depositor, it can not recover the money thus paid, if the payee has acted with reasonable prudence and in good faith.¹ A bank, A, purchased from X a

² *Worley v. Moore*, 97 Ind. 15; *Montgomery County v. Fry*, 127 N. Car. 258, 37 S. E. 259; *Steere v. Oakley*, 186 Pa. St. 582, 40 Atl. 815.

³ *Norton v. Bohart*, 105 Mo. 615, 16 S. W. 598.

⁴ *Klein v. Bayer*, 81 Mich. 233, 45 N. W. 991.

⁵ *Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313, 810.

⁶ *Montgomery County v. Fry*, 127 N. Car. 258, 37 S. E. 259.

⁷ *Spencer v. Goddard*, 62 N. H. 702.

⁸ *Johnson v. Saum*, 123 Ia. 145, 98 N. W. 599.

⁹ *McRae, etc., Co. v. Stone*, 119 Ga. 516, 46 S. E. 668.

¹⁰ *Reed v. Horn*, 143 Pa. St. 323, 22 Atl. 877.

¹ *England. Price v. Neale*, 3 Burr. 1354, 1 W. Bl. 390.

United States. United States Bank v. Bank, 23 U. S. (10 Wheat.) 333, 6 L. ed. 334.

check upon bank B, paying value therefor and acting in good faith. A then sent such check for collection and it was paid by B. Subsequently B learned that such check was a forgery and attempted to recover the amount thereof from A. Under such circumstances B can not recover if A was not guilty of negligence.² Where A indorsed a forged check of which he was the innocent holder, to B, and B presented it at the bank and received payment, and the bank on discovering the fact of the forgery demanded repayment of B, and B complied with the demand, it was held that B had made such payment voluntarily and that he could not recover from A.³ If A sold a traveler's check to B and has agreed to pay such check when countersigned by B's signature, which is placed upon the face thereof, A is liable to B for the amount of all such checks which A pays in reliance upon B's forged signature.⁴

The rule that the drawee is bound to know the signature of the drawer has been applied to drafts drawn by public officials upon a public fund.⁵ If the United States Treasury pays a bona fide

Illinois. *Chicago First National Bank v. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247, 26 L. R. A. 289, 38 N. E. 739.

Iowa. *First National Bank v. Bank*, 107 Ia. 327, 44 L. R. A. 131, 77 N. W. 1045.

Kentucky. *Deposit Bank v. Bank*, 90 Ky. 10, 7 L. R. A. 849, 13 S. W. 339; *Farmers' National Bank v. Farmers' & Traders' Bank*, 159 Ky. 141, L. R. A. 1915A, 77, 166 S. W. 986.

Maine. *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348.

Maryland. *Commercial, etc., Bank v. Bank*, 30 Md. 11, 96 Am. Dec. 534.

Massachusetts. *First National Bank v. Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44.

Minnesota. *Germania Bank v. Bouttell*, 60 Minn. 189, 51 Am. St. Rep. 519, 27 L. R. A. 635, 62 N. W. 327; *Pennington County Bank v. First State Bank*, 110 Minn. 263, 136 Am. St. Rep. 496, 26 L. R. A. (N.S.) 849, 125 N. W. 119.

Missouri. *Northwestern National Bank v. Bank of Commerce*, 107 Mo. 402, 15 L. R. A. 102, 17 S. W. 982.

Nebraska. *State Bank v. First Na-*

tional Bank, 87 Neb. 351, 29 L. R. A. (N.S.) 100, 127 N. W. 244.

New Mexico. *State National Bank v. Bank of Magdalena*, 21 N. M. 653, L. R. A. 1916E, 1296, 157 Pac. 498.

Ohio. *Bank v. Bank*, 58 O. S. 207, 65 Am. St. Rep. 748, 41 L. R. A. 584, 50 N. E. 723 [distinguishing, *Ellis v. Trust Co.*, 4 O. S. 628, 64 Am. Dec. 610, as decided under a local custom].

Pennsylvania. *Levy v. Bank*, 4 Dall. (Pa.) 234; s. c., 1 Binn. (Pa.) 27.

Texas. *Moody v. Bank*, 19 Tex. Civ. App. 278, 46 S. W. 660.

Vermont. *Bank v. Bank*, 10 Vt. 141, 33 Am. Dec. 188.

West Virginia. *Williamson Bank v. McDowell County Bank*, 66 W. Va. 545, 36 L. R. A. (N.S.) 605, 66 S. E. 761.

² *State National Bank v. Bank of Magdalena*, 21 N. M. 653, L. R. A. 1916E, 1296, 157 Pac. 498.

³ *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348.

⁴ *Sullivan v. Knauth*, 220 N. Y. 216, L. R. A. 1917F, 534, 115 N. E. 460.

⁵ *United States v. Bank of New York, National Banking Association*, 219 Fed.

holder of a draft to which the name of an officer of the United States has been forged, the United States can not recover such payment from such holder.⁶ It has been said, however, that the United States is not bound to know the genuineness of its treasury notes; and that a payment to the United States in forged treasury notes is not a payment in legal effect.⁷ This rule is not always placed on the ground that the bank was negligent. Sometimes the reason assigned is that between two equally innocent parties the loss must lie where it falls.

Another line of cases holds that if the drawee bank is free from all negligence except that of paying the check in reliance on the indorsement of the holder, it may recover such payment.⁸ The rule that the drawee is to be regarded as knowing the signature of the drawer is said to apply only where the person to whom the money has been paid has not contributed to the mistake of the drawee.⁹ It is said that an indorsement by the payee without restriction is equivalent to a representation that the check is genuine.¹⁰ In such jurisdictions it is not necessary that the payee should have been negligent or should have contributed to the mistake of the drawee.¹¹ It is sufficient if the payee has not so altered his position in reliance upon the payment as to be prejudiced in case he is obliged to repay such amount.

In some jurisdictions it is said that the drawee bank can not recover a payment upon a forged check unless the payee was not negligent in taking the check, the drawee was negligent in paying

648, 134 C. C. A. 579, L. R. A. 1915D, 797.

⁶ *United States v. Bank of New York National Banking Association*, 219 Fed. 648, 134 C. C. A. 579, L. R. A. 1915D, 797.

⁷ *Cooke v. United States*, 91 U. S. 389, 23 L. ed. 237.

⁸ *Indiana*. *First National Bank v. Bank*, 4 Ind. App. 355, 51 Am. St. Rep. 221, 30 N. E. 808.

New York. *Corn Exchange Bank v. Bank*, 91 N. Y. 73, 43 Am. Rep. 635.

North Dakota. *First National Bank v. Bank of Wyndmere*, 15 N. D. 299, 125 Am. St. Rep. 588, 10 L. R. A. (N.S.) 49, 108 N. W. 546.

Oklahoma. *American Express Co. v.*

State National Bank, 27 Okla. 824, 33 L. R. A. (N.S.) 188, 113 Pac. 711.

South Carolina. *Ford v. People's Bank*, 74 S. Car. 180, 114 Am. St. Rep. 986, 10 L. R. A. (N.S.) 63, 7 Ann. Cas. 744, 54 S. E. 204.

Tennessee. *People's Bank v. Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 6 L. R. A. 724, 12 S. W. 716.

⁹ *Ford v. People's Bank*, 74 S. Car. 180, 114 Am. St. Rep. 986, 10 L. R. A. (N.S.) 63, 54 S. E. 204.

¹⁰ *Ford v. People's Bank*, 74 S. Car. 180, 114 Am. St. Rep. 986, 10 L. R. A. 63, 54 S. E. 204.

¹¹ *First National Bank v. Bank of Wyndmere*, 15 N. D. 299, 125 Am. St. Rep. 588, 10 L. R. A. (N.S.) 49, 108 N. W. 546.

the check, and the payee has altered his position as a result of the payment.¹²

The right to recover is very materially affected by the negligence of either party. If the bank which forwards the forged check was negligent and could by the use of due diligence have discovered the forgery, the bank which pays such forged check may recover from the bank which forwards it.¹³ If, on the other hand, the drawee bank omits to give reasonably prompt notice of the fact of the forgery, it can not recover the payment, even if such recovery would have been permitted otherwise.¹⁴ In jurisdictions in which the payee bank is ordinarily allowed to recover, only reasonably prompt notice is necessary.¹⁵

The right of recovery has been recognized under special circumstances. A sent a check to B on a bank, X. C, a person of almost the same name as B, obtained the check, endorsed it with his own name and deposited it with the bank, Y, which forwarded it to X, but did not show that it was collecting it as agent merely. X paid Y and Y paid C. A then sued the bank, X, in Minnesota, to recover the amount of his deposit without deducting this check. X gave notice to Y, which was located in Massachusetts, of the pendency of this action. Y did not defend and judgment was rendered against X. X then sued Y and recovered the payment. The ground of recovery was based on the theory that the judgment was conclusive against Y.¹⁶ If the drawer of a check has negligently misdirected it so that it is delivered to a man of a name similar to that of the payee by whom it is cashed, the drawer must credit the bank with the amount of such check.¹⁷

If the drawer of a check is induced by fraud to deliver a check payable to a fictitious person to one whom he believes to be such person and it is endorsed by such person and presented for payment, there is a conflict of authority as to the right of the bank to

¹² *American Express Co. v. State National Bank*, 27 Okla. 824, 33 L. R. A. (N.S.) 188, 113 Pac. 711.

¹³ *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 6 L. R. A. 724, 12 S. W. 716; *Canadian Bank v. Bingham*, 30 Wash. 484, 60 L. R. A. 955, 71 Pac. 43.

¹⁴ *United States v. Bank*, 6 Fed. 134; *First National Bank v. First National Bank*, 58 O. S. 207, 65 Am. St. Rep. 748, 41 L. R. A. 584, 50 N. E. 723.

¹⁵ *Schroeder v. Harvey*, 75 Ill. 638.

¹⁶ *First National Bank v. Bank*, 182 Mass. 130, 94 Am. St. Rep. 637, 65 N. E. 24 [citing on the proposition that the judgment was binding on the other bank, *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123; and *Konitsky v. Meyer*, 49 N. Y. 571].

¹⁷ *Weisberger Co. v. Barberton Savings Bank Co.*, 84 O. S. 21, 34 L. R. A. (N.S.) 1100, 95 N. E. 379.

charge such check against the drawer's account. In some jurisdictions it is held that it is the duty of the bank to ascertain the existence and identity of the payee before paying the check; and that if it pays such a check upon such endorsement it can not claim credit for such payment as against the maker.¹⁸ In other jurisdictions it has been said that since the maker of the check intended it to be paid to the person to whom it is actually paid, the bank is entitled to such payment as a credit.¹⁹ This result has been reached where it was not shown what the real name of the impostor was; and the court has said that possibly the name which he used might have been his own, although he induced the drawer to believe that he was dealing with a different person.²⁰

If both the holder of the check and the drawee are negligent it has been said that the drawee can not recover from the holder to whom payment was made.²¹ If the holder was negligent in taking a check from an unidentified stranger and in omitting to notify the drawee of such act and if the drawee was negligent in not having any genuine signature of the drawer by which to verify the check, the drawee can not recover the payment which it made to the holder of such check.²²

As the bank, even if bound to know the signature of the depositor, is not charged with knowledge of the contents of all instruments executed by him, money paid out on an altered check may be recovered.²³

Since a drawee bank is not bound to know the signature of the payee, payment of a genuine check upon a forged endorsement may be recovered unless by reason of its negligence or otherwise the drawee bank is precluded from setting up the fact of such forgery.²⁴ If the drawee has been notified by the drawer not to

¹⁸ *Shipman v. Bank of State of N. Y.*, 126 N. Y. 318, 22 Am. St. Rep. 821, 12 L. R. A. 791, 27 N. E. 371; *Armstrong v. Pomeroy National Bank*, 46 O. S. 512, 15 Am. St. Rep. 655, 6 L. R. A. 625, 22 N. E. 866; *Guaranty State Bank & Trust Co. v. Lively*, 108 Tex. 393, L. R. A. 1917E, 673, 194 S. W. 937.

¹⁹ *McHenry v. Old Citizens' National Bank*, 85 O. S. 203, 38 L. R. A. (N.S.) 1111, 97 N. E. 395.

²⁰ *McHenry v. Old Citizens' National Bank*, 85 O. S. 203, 38 L. R. A. (N.S.) 1111, 97 N. E. 395.

²¹ *Williamson Bank v. McDowell County Bank*, 66 W. Va. 545, 36 L. R. A. (N.S.) 605, 66 S. E. 761.

²² *Williamson Bank v. McDowell County Bank*, 66 W. Va. 545, 36 L. R. A. (N.S.) 605, 66 S. E. 761.

²³ *Espy v. Bank*, 85 U. S. (18 Wall.) 614, 21 L. ed. 949; *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102; *National Bank v. Bank*, 122 N. Y. 367, 25 N. E. 355.

²⁴ *United States. United States v. National Exchange Bank*, 214 U. S. 302, 53 L. ed. 1006.

pay the check and it nevertheless pays such check upon a forged endorsement to a bona fide holder thereof, the drawee can not recover such payment. By reason of its negligence, however, the drawee may be precluded from setting up the fact of forgery in order to recover a payment made to an innocent holder of the forged instrument.²⁵ The United States may recover a payment made to an innocent holder of a check issued by the United States upon which the signature of the payee has been forged.²⁶ If a bank, in reliance upon the representations of a person as to his identity, delivers a check to him which he indorses with the name of the person whom he represents himself to be, and delivers to A, to whom the bank pays it, the bank making the payment can not recover from A if the representations as to the identity of the indorser are false and the indorsement is forged.²⁷ A altered a check on the drawee bank, X, raising the amount and deposited it with a bank, Y, which sent it to X through the clearing house. X paid Y and Y paid A. On learning of the alteration, X sued Y. It was held that no recovery could be had.²⁸

Under any theory, no recovery can be had unless the bank making the payment can show that it has suffered a loss. If it has the means of charging such checks against the account of its depositor, it can not maintain an action to recover such payment.²⁹ If A

Illinois. *First National Bank v. Bank*, 162 Ill. 296, 43 Am. St. Rep. 247, 26 L. R. A. 289, 38 N. E. 739 [affirming, 40 Ill. App. 640].

Indiana. *First National Bank v. Bank*, 4 Ind. App. 355, 51 Am. St. Rep. 221, 30 N. E. 808.

Massachusetts. *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Carpenter v. Bank*, 123 Mass. 66; *First National Bank v. Bank*, 182 Mass. 130, 94 Am. St. Rep. 637, 65 N. E. 24.

Minnesota. *Hensel v. Ry.*, 37 Minn. 87, 33 N. W. 329.

Nebraska. *First National Bank v. Bank*, 56 Neb. 149, 76 N. W. 430; *First National Bank v. Omaha National Bank*, 59 Neb. 192, 80 N. W. 810.

New York. *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655.

Ohio. *Shaffer v. McKee*, 19 O. S. 526.

Oklahoma. *National Bank of Commerce v. First National Bank*, 51 Okla. 787, L. R. A. 1916E, 537, 152 Pac. 596.

Pennsylvania. *Second National Bank v. Guarantee Trust & Safe Deposit Co.*, 206 Pa. St. 616, 56 Atl. 72.

Texas. *Rouvant v. Bank*, 63 Tex. 610.

²⁵ *National Bank of Commerce v. First National Bank*, 51 Okla. 787, L. R. A. 1916E, 537, 152 Pac. 596.

²⁶ *United States v. National Exchange Bank*, 214 U. S. 302, 53 L. ed. 1006.

²⁷ *Land Title and Trust Co. v. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717, 50 L. R. A. 75, 46 Atl. 420.

²⁸ *Crocker-Woolworth National Bank v. Bank*, 139 Cal. 564, 96 Am. St. Rep. 169, 63 L. R. A. 245, 73 Pac. 456.

²⁹ *Land, etc., Co. v. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717, 50 L. R. A. 75, 46 Atl. 420.

makes a loan on a note and mortgage to which X's name is forged and such loan is made in part for the purpose of taking up a prior loan which B has made in reliance upon a similar forged note and mortgage, A may recover from B the amount which A has paid to B in reliance upon such forged note and mortgage if B has not altered his position in reliance upon such payment.³

§ 1559. Recovery of payment causing overdraft. If a bank pays a check which overdraws a depositor's account, some authorities hold that the bank can not recover from payee if he does not know that such check will make an overdraft.¹ The reasons given for such holding are different in different jurisdictions. In some recovery is denied because the bank is chargeable with knowledge of the amount of depositors' funds in its hands.² "The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point there should be none hereafter."³ In others, because the mistake is as to a collateral matter.⁴ Under this rule, where A gave B a check on a bank which B deposited in the same bank, receiving credit therefor in his pass-book, the bank can not on the same day return the check and cancel the credit to B because A's account was overdrawn.⁵ Whether a credit upon the books of the bank is equivalent to a payment of a check or whether the bank is free to cancel such credit if the check is not paid by the maker, is a ques-

³Grand Lodge Ancient Order of United Workmen v. Towne, 136 Minn. 72, L. R. A. 1917E, 344, 161 N. W. 403.

¹Colorado. First National Bank v. Devenish, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177.

Kentucky. First National Bank v. Sidebottom, 147 Ky. 690, 145 S. W. 404.

New York. Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160.

Maryland. Manufacturers' National Bank v. Swift, 70 Md. 515, 24 Am. St. Rep. 381, 17 Atl. 336.

Washington. Spokane & Eastern Trust Co. v. Huff, 63 Wash. 225, 33 L. R. A. (N.S.) 1023, Ann. Cas. 1912D, 491, 115 Pac. 80.

²Manufacturers' National Bank v. Swift, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336; Oddie v. Bank, 45 N. Y. 735, 6 Am. Rep. 160.

³Oddie v. Bank, 45 N. Y. 735, 742; 6 Am. Rep. 160. In Merchants' National Bank v. Swift, *supra*, the depositor's account proved insufficient because a deposit made by him and put to his credit was of trust funds which he could not retain, and the facts of such deposit were all known to the bank.

⁴Chambers v. Miller, 13 C. B. N. S. 125.

⁵Oddie v. Bank, 45 N. Y. 735, 6 Am. Rep. 160.

tion upon which there has been a conflict of authority—some courts regarding such a credit as equivalent to a payment,⁶ while other courts say that such a credit is not of itself a payment and that the bank may cancel such credit if the check is not paid by the maker.⁷ In Massachusetts a payment of a check without the bank's examining the drawer's account, which had not been reduced during the preceding month, was held to be made with such negligence as to preclude recovery.⁸ The fact that the check was paid after business hours to accommodate the payee and that such payment was made in the belief that the drawer had sufficient funds in the bank, does not entitle the bank to recover such payment.⁹

Under different circumstances a recovery has been allowed. B, an agent of a bank, Y, sold goods which had been pledged to Y, and put the proceeds in the bank, Y, in his own name. B then drew a check payable to A upon the bank, Y. A deposited this in the bank, X, and X paid it to Y. Under the rules of the clearing house, checks which were not good could be returned if not retained after one p. m. Before the bank, X, had paid B, but after it had given B credit for the amount of this check upon his book, Y demanded repayment of this amount from X. On X's refusal Y sued. It was held that Y could recover the amount of such check less the amount of B's deposit in the bank actually belonging to B.¹⁰ If the payee knows that the check makes an overdraft and the bank pays in ignorance of such fact, the bank has been allowed to recover from the payee.¹¹ If the drawer of the check has funds on hand sufficient to pay such check, the bank can not recover the amount thereof from the person to whom it has been paid, although the maker becomes insolvent and if the bank had not made such payment it could have treated such deposit as a set-off.¹²

§ 1560. Negligence of party making payment—Held not to bar recovery. Where payment is made by one who is under no legal

⁶ *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160.

⁷ *National, etc., Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697.

⁸ *Boylston National Bank v. Richardson*, 101 Mass. 287.

⁹ *Spokane & Eastern Trust Co. v. Huff*, 63 Wash. 225, 33 L. R. A. (N.S.) 1023, Ann. Cas. 1912D, 491, 115 Pac. 80.

¹⁰ *Merchants' National Bank v. Bank*, 139 Mass. 513, 2 N. E. 89.

¹¹ *Martin v. Morgan*, 3 Moore (C. P. & Ex.) 635; *Peterson v. Bank*, 52 Pa. St. 206, 91 Am. Dec. 146.

¹² *National Exch. Bank v. Ginn*, 114 Md. 181, 33 L. R. A. (N.S.) 963, Ann. Cas. 1914C, 508, 78 Atl. 1026.

liability, under mistake of fact as to the existence of such liability, the weight of authority is that such payment may be recovered, even if the party making it could have discovered his mistake if he had used proper diligence.¹ The mere fact that the party making the payment had the means of knowing the facts does not prevent him from recovering.² It is not the means of knowledge possessed by the party making the payment, but his actual knowledge or ignorance of material facts that determines his right to recover.³ If a bank understands that its depositor who has made two duplicate checks says that he has destroyed the first check and under such mistake the bank pays the second check which makes an overdraft, such payment may be recovered, even though the bank was negligent.⁴ A payment which a trustee has made through his mistake in reading the wrong clause of the will, may

¹ England. *Kelly v. Solari*, 9 Mees. & W. 54.

United States. *Brown v. Tillinghast*, 84 Fed. 71; *Union National Bank v. McKey*, 102 Fed. 662, 42 C. C. A. 583.

Alabama. *Rutherford v. McIvor*, 21 Ala. 750; *Merrill v. Brantley*, 133 Ala. 537, 31 So. 847.

Indiana. *Indianapolis v. McAvoy*, 86 Ind. 587; *Metropolitan Life Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86.

Nebraska. *Douglas County v. Keller*, 43 Neb. 635, 62 N. W. 60.

New York. *Mayer v. New York*, 63 N. Y. 455.

North Carolina. *Houser v. McGinnas*, 108 N. Car. 631, 13 S. E. 139; *Simms v. Vick*, 151 N. Car. 78, 24 L. R. A. (N.S.) 517, 18 Ann. Cas. 669, 65 S. E. 621.

North Dakota. *James River National Bank v. Weber*, 19 N. D. 702, 124 N. W. 952.

Pennsylvania. *McKibben v. Doyle*, 173 Pa. St. 579, 51 Am. St. Rep. 785; 34 Atl. 435; *Union Trust Co. v. Gilpin*, 235 Pa. St. 524, 84 Atl. 448.

Texas. *Hummel v. Flores* (Tex. Civ. App.), 39 S. W. 309.

Virginia. *City National Bank v. Peed* (Va.), 32 S. E. 34.

Whether the carelessness of a maker of a promissory note in paying it after alteration without examining it to detect such alteration, prevents him from recovering such payment, was discussed but not decided in *Davis v. Bauer*, 41 O. S. 257.

² *Indianapolis v. McAvoy*, 86 Ind. 587; *James River National Bank v. Weber*, 19 N. D. 702, 124 N. W. 952; *McKibben v. Doyle*, 173 Pa. St. 579, 51 Am. St. Rep. 785, 34 Atl. 435; *Union Trust Co. v. Gilpin*, 235 Pa. St. 524, 84 Atl. 448.

³ *Union Trust Co. v. Gilpin*, 235 Pa. St. 524, 84 Atl. 448.

"The possession of the means of knowledge by the party who paid the money can be regarded as affording a strong observation to the jury to induce them to believe that he had an actual knowledge of the circumstances; but * * * there is no conclusive rule of law that because a party has the means of knowledge he has the knowledge itself." 2 Chitty Cont. (11 Am. Ed.) 930 [quoted in *Brown v. College Corner, etc., Co.*, 56 Ind. 110; which in turn is quoted in *Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313, 810].

⁴ *James River National Bank v. Weber*, 19 N. D. 702, 124 N. W. 952.

be recovered.⁵ Where A paid money for a party-wall, relying on B's claim of ownership, A may recover, though A had the means of learning of B's want of title.⁶ So A, a mortgagee of a cotton crop, whose mortgage secures a debt greater than the value of the crop, who knows that B holds a second mortgage on the same crop, and who buys from B such crop and pays for it, may recover from B the money thus paid where he did not know that it was the same crop, even if he could have learned such fact by due diligence.⁷ Thus where a sheriff made a levy upon property which had been taken on a prior attachment, and hearing nothing from such prior attaching officer or creditor, sold such property and paid the proceeds over to the party whose execution the sheriff was serving, and the latter was afterwards obliged to pay over the amount for which the prior attachment was issued, it was held that he might recover the amount of such payment from the execution creditor to whom he had paid the entire amount.⁸

One who has known a fact but has forgotten it, and under such forgetfulness makes a payment, may recover such payment.⁹ Where A, acting as clerk for B, an express messenger, delivered a package of money to C and forgot to make a note or take a receipt of it, and C, after A had forgotten the facts, claimed that he had not received the money, and thereupon A and B contributed to make up the amount and paid the express company, which paid C, A was allowed on learning of his mistake to recover the amount from C.¹⁰ If a debtor has made partial payments upon his debts, and in making the final payment he forgets one of such partial payments and overpays by the amount of such forgotten payment, he may recover such amount.¹¹

§ 1561. Negligence held to bar recovery. There is, however, some authority for the proposition that one paying under mistake of fact, which he could have discovered by due diligence, can not

⁵ Union Trust Co. v. Gilpin, 235 Pa. St. 524, 84 Atl. 448.

⁶ McKibben v. Doyle, 173 Pa. St. 579, 51 Am. St. Rep. 785, 34 Atl. 455.

⁷ Merrill v. Brantley, 133 Ala. 537, 31 So. 847.

⁸ Glenn v. Shannon, 12 S. Car. 570.

⁹ Kelly v. Solari, 9 M. & W. 54; Goswiller v. Jansen, 179 Ia. 806, 162 N. W. 45; Houser v. McGinnas, 108 N.

Car. 631, 13 S. E. 139; Simms v. Vick, 151 N. Car. 78, 24 L. R. A. (N.S.) 517, 18 Ann. Cas. 669, 65 S. E. 621; Guild v. Baldridge, 32 Tenn. (2 Swan.) 295.

¹⁰ Houser v. McGinnas, 108 N. Car. 631, 13 S. E. 139.

¹¹ Simms v. Vick, 151 N. Car. 78, 24 L. R. A. (N.S.) 517, 18 Ann. Cas. 669, 65 S. E. 621.

recover such payment.¹ So a debtor who makes a payment under a mistake of a fact which he would have known had he used ordinary diligence in examining his receipts, can not recover.² So it has been held that as an executor has the means of knowing the solvency of the estate, he can not recover a payment made under a mistake of fact as to such solvency.³ So an administrator who believing that the estate of his principal is solvent pays a note of such principal, can not recover a payment in excess of the dividend which such estate pays from a surety on such note, although the surety would have been obliged to pay the note had the administrator not done so, and though the loss will fall on the administrator personally.⁴ No relief can be had for mistake of a fact with knowledge of which the party making the mistake was specially charged.⁵ Thus where A and B, who were to furnish timber to X, agree that it should all be furnished in A's name, and he should draw the money and pay B, and A drew some of the money, giving credit for the rest, and paid B a greater proportion of the cash paid in than corresponded to the share of timber furnished by B, though less than was due B for the timber, it was held that A was bound to know how much timber B had furnished as compared with A, and hence that A could not recover an excess of payment, even assuming that B was entitled only to his proportionate share of the cash paid in.⁶ Where it was the sheriff's duty to look up municipal liens and assessments upon property which he has sold before distributing the funds, a sheriff who overlooks a lien, and pays money to the mortgagee, can not recover from such mortgagee the amount which the sheriff is afterwards compelled to pay to the city.⁷ A payment by a mistake of fact, of which fact the party making the payment has constructive notice, can not be recovered. Thus where a city selected to take part of the land

¹ Alton v. Bank, 157 Mass. 341, 34 (Pa.) 118, 19 Am. Dec. 627; Shriver v. Am. St. Rep. 285, 18 L. R. A. 144, 32 N. E. 228; Rosenfeld v. Boston Mutual Life Insurance Co., 222 Mass. 284, 110 N. E. 304; Brammiff v. McGuire, 107 N. Car. 351, 12 S. E. 491; Stevens v. Head, 9 Va. 174, 31 Am. Dec. 617; Proudfoot v. Clevenger, 33 W. Va. 267, 10 S. E. 394.
² Proudfoot v. Clevenger, 33 W. Va. 267, 10 S. E. 394.
³ Simmons v. Looney, 41 W. Va. 738, 24 S. E. 677.
⁴ Simmons v. Looney, 41 W. Va. 738, 24 S. E. 677.
⁵ Krumbhaar v. Yewdall, 153 Pa. St. 476, 26 Atl. 219. In this case the mortgagee had subsequently altered his position on the assumption that there were no assessment liens upon such

under lease for public use, and by the statute such election conveyed the legal title in such part to the city, a lessee, who after such election has paid the entire rent to his lessor, can not recover from him an amount proportioned to the value of the property thus taken by the city; since, even if he has no actual notice of such election, he is, as a party to the proceeding, bound to take notice.⁸

§ 1562. Innocent payee must be placed in statu quo. If the person to whom the money is paid by mistake receives it in good faith and without knowledge of the mistake under which it is paid, and if the mistake is not due to his own fault, either exclusively or primarily, he can not be compelled to repay it unless he can be placed in statu quo.¹ If he has paid the money over to those who, as far as he is concerned, are entitled to it,² he can not be compelled to refund. If he has otherwise altered his position in reliance on such payment he is not liable therefor.³ If an attorney presents to a bank a check given by one who has no funds therein, and the bank pays such check, it can not recover from the attorney after he has remitted such funds to his client.⁴ Where A, a mortgagor, believes that certain realty which A, and B, the mortgagee,

property, and he could not be placed in statu quo. The court, however, rest their opinion on the ground that the mortgagee took the payment in good faith, and had done nothing to mislead the sheriff.

⁸ *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184.

¹ *Arizona*. *Copper Belle Mining Co. v. Gleeson*, 14 Ariz. 548, 48 L. R. A. (N.S.) 481, 134 Pac. 285.

Massachusetts. *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Moors v. Bird*, 190 Mass. 400, 77 N. E. 643.

Michigan. *Walker v. Conant*, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292.

Minnesota. *Langevin v. St. Paul*, 49 Minn. 189, 15 L. R. A. 766, 51 N. W. 817; *Grand Lodge Ancient Order of United Workmen v. Towne*, 136 Minn. 72, L. R. A. 1917E, 344, 101 N. W. 403 (obiter).

New Jersey. *Behring v. Somerville*, 63 N. J. L. 568, 49 L. R. A. 578, 44 Atl. 641.

Oregon. *Security Savings & Trust Co. v. King*, 69 Or. 228, 138 Pac. 465.

Pennsylvania. *Krumbhaar v. Yewdall*, 153 Pa. St. 476, 26 Atl. 219.

South Carolina. *Atlantic Coast Line Ry. Co. v. Schirmer*, 87 S. Car. 309, 69 S. E. 439.

Utah. *Richley v. Clark*, 11 Utah 467, 40 Pac. 717.

² *Manufacturers' National Bank v. Swift*, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336; *Langevin v. St. Paul*, 49 Minn. 189, 15 L. R. A. 766, 51 N. W. 817.

³ *Krumbhaar v. Yewdall*, 153 Pa. St. 476, 26 Atl. 219. (In this case defendant was held not liable, though his immunity was placed on other grounds.)

⁴ *Manufacturers' National Bank v. Swift*, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336.

intended to include under the mortgage, is covered thereby, and in that belief A pays money to B to secure a release of such realty from such mortgage, and subsequently in a foreclosure suit such payment is credited on the debt and B's rights are fixed by decree, A can not thereafter recover from B.⁵ The opinion of the majority was based on the theory that in such cases the more negligent of the two should suffer. One judge dissented for the reason that B knew of such mistake before the decree was rendered, but still allowed such payment to be credited on his debt.

A, the owner of a note and mortgage assigned it to B by assignment of record, but kept the mortgage. Subsequently A assigned it again to C, who had no actual notice of the assignment to B. X, the mortgagor, paid C's interest in the mortgage to C. Subsequently X was obliged to pay the entire debt to B. X then sued C to recover the amount paid to C, but it was held that X could not recover.⁶

The rule that a party who is guilty of negligence in not ascertaining facts and so makes a payment under a mistake of fact can not recover,⁷ applies with the greatest force where he has by his negligence misled the adversary party, who has altered his position and can not be placed in statu quo.⁸ Thus A was the agent of B, the railroad company. X was A's cashier, and had worked in that capacity for A's predecessor. The rules of the railroad required prompt settlement each month of all money received for freight. X was an embezzler when A entered on his employment; but A allowed X to neglect the rule requiring prompt payment and to transmit money, really received as cash on recent freight accounts, as payments on older accounts. X's defalcation was thus concealed for a time. When it was discovered, the railroad company claimed that the shortage had arisen since A's employment began; and A, believing such claim, paid X's shortage. The delay in discovering the shortage caused the release of a surety on X's bond, by lapse of time. It was held that A, on learning that X's shortage was created before A's employment began, could not recover the payment from the railroad.⁹

⁵ Richley v. Clark, 11 Utah 467, 40 Pac. 717.

⁶ Behring v. Somerville, 63 N. J. L. 568, 49 L. R. A. 578, 44 Atl. 641. (C in reliance on X's payment had released the note and mortgage which he was holding as collateral.)

⁷ See § 1561.

⁸ Fegan v. Ry., 9 N. D. 30, 81 N. W. 39.

⁹ Fegan v. Ry., 9 N. D. 30, 81 N. W. 39.

Conversely, a payment which is made by mistake of fact may be recovered if the party to whom such payment has been made has not altered his position to his damage in reliance upon such payment.¹⁰

Whether the fact that the person to whom a payment has been made has spent such money, is such an alteration of position that he can not be required to repay such amount, is a question upon which there has been some difference of authority. It has been suggested that if the person who receives such payment alters his method of living in reliance upon such payment and thus spends such money, it is such an alteration of position as to prevent the party who made such payment from recovering it.¹¹ There is no necessary connection, however, between such payment and such increased expenditures; and it is generally held that the fact that the money has been spent by the person to whom it was paid does not prevent recovery by the party who made such payment.¹²

§ 1563. Mistake need not be mutual. While the mistake under which payments whose recovery are allowed are made may be mutual,¹ it is not necessary to recovery that it should be mutual.² The doctrine of mutuality of mistake applies primarily to mistakes in expression,³ and has no application to payment by mistake. The cases occasionally cited to show its necessity in the law of payments are cases in which a bona fide payee has so altered his position that he can not be placed in statu quo.

H. PAYMENT BY MISTAKE OF LAW

§ 1564. Payment by mistake of law. As has been indicated already,¹ the Roman law recognized the formal and the real contracts first, then the informal contracts depending upon agreement, and, last of all, the various forms of quasi-contractual obligation. The *condictio indebiti* could be brought to recover payments made

¹⁰ *Grand Lodge Ancient Order of United Workmen v. Towne*, 136 Minn. 72, L. R. A. 1917E, 344, 161 N. W. 403.

¹¹ *Brisbane v. Dacres*, 5 Taunt 143. "For see how it is! If the sum be large it probably alters the habits of his life, he increases his expenses, he has spent it over and over again; perhaps he can not repay it all or not without great distress: is he then five years and

eleven months after to be called on to repay it?" *Brisbane v. Dacres*, 5 Taunt 143.

¹² *Union Trust Co. v. Gilpin*, 235 Pa. St. 524, 84 Atl. 448.

¹ *Worley v. Moore*, 97 Ind. 15.

² *Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313, 810.

³ See § 256.

¹ See § 4.

by mistake. Whether this mistake was of fact only or of fact and law alike, is not at all clear. The mistake for which the *condictio indebiti* may be brought is described by many of the writers in terms so broad as to include mistake of law as well as of fact; while some of the later authorities after the classic period seem inclined to limit the right to recover a payment made under mistake of law.

The English law seems to have started with the theory that money paid under a mistake of law which was justly due might be recovered if it was against good conscience for the person to whom such payment had been made to retain it.² In some cases this proposition is clearly laid down in obiter.³ Indeed, the general rule that money paid under a mistake which there was no ground to claim in conscience may be recovered in an action for money had and received, was laid down without any restriction to mistake of fact.⁴ The doctrine that money paid by mistake of law could be recovered was not confined to obiter, however, but it was the basis of decision in early cases.⁵ Where A paid money to B to redeem a mortgage and by reason of a subsequent dispute B repaid such money to A, not knowing that the original payment had operated as a discharge of the mortgage, B was allowed to recover such money from A on learning that the original payment had operated as a discharge.⁶ The principle that a payment made under mistake of law could be recovered was applied in an action of account.⁷ In this form of action the court was not bothered by the necessity of finding a fictitious promise; but the duty of the party who had received such payment to restore it was the same whether the action was account or *assumpsit*. "And although he delivered them to the defendant as his own (monies), not knowing the law therein, supposing it to be no payment, yet in regard he did not give it otherwise nor upon other consideration, the defendant received them as the plaintiff's money and is accountable for them."⁸ In spite of these authorities, we find one judge denying the right to recover money paid upon a wager policy on the ground that *ignorantia juris non excusat*.⁹

² *Hewer v. Bartholomew*, Cro. Eliz. 614; *Bonnel v. Foulke*, 2 Sid. 4.

³ *Farmer v. Arundel*, 2 W. Bl. 824.

⁴ *Bize v. Dickason*, 1 T. R. 285.

⁵ *Hewer v. Bartholomew*, Cro. Eliz. 614.

⁶ *Hewer v. Bartholomew*, Cro. Eliz. 614.

⁷ *Hewer v. Bartholomew*, Cro. Eliz. 614.

⁸ *Hewer v. Bartholomew*, Cro. Eliz. 614.

⁹ *Lowry v. Bourdieu*, 2 Dougl. 468.

In this condition of authorities an action was brought for money had and received to recover a payment made by an insurer upon a policy which the insured had obtained by suppressing a material fact, but which amount the insurer had paid after the insured had made full disclosure of such suppression to the insurer. Lord Ellenborough asked the plaintiff's counsel whether he could state any case where, if a party paid money to a party voluntarily with full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law; and no answer being given, in spite of the foregoing authorities, the court cited the case in which such recovery had been denied,¹⁰ and held that a payment made by mistake of law could not be recovered on the ground that every man must be taken to be cognizant of the law—otherwise there would be no saying to what extent the excuse of ignorance might not be carried.¹¹ A subsequent case¹² seems to have settled the law in favor of the theory that a payment of money not justly due under a mistake of law can not be recovered, although of the four judges who decided the case, one took the position that a payment by mistake of law could not be recovered, the second took the position that payment by mistake of law could be recovered, a third took the position that the record did not show any ignorance of law, and the fourth based his decision entirely upon the ground that the person to whom the money was paid had expended it and that it would be contrary to *aequum et bonum* if he were obliged to repay it.

In spite of the various reasons given for the result, this case seems to have fixed the rule in English law; and since then it has been held in most jurisdictions that money paid with full knowledge of all material facts, under mistake of law, can not be recovered in the absence of other reasons for allowing such recovery.¹³ The same principles apply where there is full knowledge of facts,

¹⁰ *Lowry v. Bourdieu*, 2 Doug. 468.

¹¹ *Bilbie v. Lumley*, 2 East. 469.

¹² *Brisbane v. Dacres*, 5 Taunt 143.

¹³ *England. Bilbie v. Lumley*, 2 East. 469.

United States. Elliott v. Swartwout, 35 U. S. (10 Pet.) 137, 9 L. ed. 373; *United States v. Edmondston*, 181 U. S. 500, 45 L. ed. 971.

Alabama. Traweck v. Hagler (Ala.), 75 So. 152.

California. Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; *Holt v. Thomas*, 105 Cal. 273, 38 Pac. 891.

Colorado. Hallett v. Alexander, 50 Colo. 37, 34 L. R. A. (N.S.) 328, Ann. Cas. 1912B, 1277, 114 Pac. 490.

Illinois. Morgan Park (Village of) v. Knopf, 199 Ill. 444, 65 N. E. 322.

Indiana. McWhinney v. Logansport, 132 Ind. 9, 31 N. E. 449.

Iowa. Painter v. Polk Co., 81 Ia. 242, 25 Am. St. Rep. 489, 47 N. W. 65.

but one party subsequently wishes to avoid the transaction.¹⁴ Payments of this sort are merely examples, and the most common kind, of voluntary payments, and fall within the rule that voluntary payments can not be recovered.

As in cases of mistake for which it is sought to avoid an executory transaction,¹⁵ a foreign law is looked upon as a fact and not as law, so that a payment which is made by mistake as to a foreign law may be recovered.¹⁶ The fact that the mistake of law is due

Kansas. *Cherokee County v. Hubbard*, 8 Kan. App. 500, 65 Pac. 557.

Kentucky. *Louisville, etc., Ry. v. Hopkins Co.*, 87 Ky. 605, 9 S. W. 497.

Maine. *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564; *Bragdon v. Freedom*, 84 Me. 431, 24 Atl. 895; *Coburn v. Neal*, 94 Me. 541, 48 Atl. 178; *Stewart v. Ticonic National Bank*, 104 Me. 578, 72 Atl. 741.

Maryland. *Baltimore v. Lefferman*, 4 Gill (Md.) 425, 45 Am. Dec. 145.

Massachusetts. *Forbes v. Appleton*, 59 Mass. (5 Cush.) 115; *Alton v. Bank*, 157 Mass. 341, 34 Am. St. Rep. 285, 18 L. R. A. 144, 32 N. E. 228; *Taber v. New Bedford*, 177 Mass. 197, 58 N. E. 640.

Michigan. *Lamb v. Rathburn*, 118 Mich. 666, 77 N. W. 268.

Minnesota. *Erkens v. Nicolín*, 39 Minn. 461, 40 N. W. 567.

Missouri. *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251; *Kane v. Dauernheim*, 60 Mo. App. 64.

New Hampshire. *Strafford Savings Bank v. Church*, 69 N. H. 582, 44 Atl. 105.

New Jersey. *Camden v. Green*, 54 N. J. L. 591, 33 Am. St. Rep. 686, 25 Atl. 357.

New York. *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109; *Vanderbeck v. Rochester*, 122 N. Y. 285, 10 L. R. A. 178, 25 N. E. 408; *Newburgh Savings Bank v. Woodbury*, 173 N. Y. 55, 65 N. E. 858.

North Carolina. *Matthews v. Smith*, 67 N. Car. 374; *Commissioners v. Commissioners*, 75 N. Car. 240; *Devereux v.*

Ins. Co., 98 N. Car. 6, 3 S. E. 639; *First National Bank v. Taylor*, 122 N. Car. 569, 29 S. E. 831; *Pardue v. Abscher*, 174 N. Car. 676, 94 S. E. 414.

North Dakota. *Jacobson v. Mohall Telephone Co.*, 34 N. D. 213, L. R. A. 1916F, 532, 157 N. W. 1033.

Ohio. *Mays v. Cincinnati*, 1 O. S. 269; *Railroad Co. v. Iron Co.*, 46 O. S. 44, 1 L. R. A. 412, 18 N. E. 486; *Cincinnati v. Coke Co.*, 53 O. S. 278, 41 N. E. 239; *Phillips v. McConica*, 59 O. S. 1, 69 Am. St. Rep. 753, 51 N. E. 445.

South Carolina. *Robinson v. Charleston*, 2 Rich. L. (S. Car.) 317, 45 Am. Dec. 739.

South Dakota. *Evans v. Hughes County*, 3 S. D. 244, 580, 52 N. W. 1062, 54 N. W. 603.

Tennessee. *Hubbard v. Martin*, 14 Tenn. (8 Yerg.) 498.

West Virginia. *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

Wisconsin. *Birkhauser v. Schmitt*, 45 Wis. 316, 30 Am. Rep. 740.

See also, *Errett v. Wheeler*, 109 Minn. 157, 26 L. R. A. (N.S.) 816, 123 N. W. 414.

¹⁴ *Buckley v. Redmond*, 95 Mich. 282, 54 N. W. 771; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114.

¹⁵ See § 404.

¹⁶ *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *Haven v. Foster*, 26 Mass. (9 Pick.) 112, 19 Am. Dec. 353.

See also, *Osincup v. Henthorn*, 89 Kan. 58, 46 L. R. A. (N.S.) 174, Ann. Cas. 1914C, 1262, 130 Pac. 652.

to the adversary party, does not authorize the recovery of a payment made under a mistake of law if there is no relation of trust and confidence between the two parties.¹⁷ Money which is paid to the United States under a mistake of law, relying upon instructions of the Treasury Department, can not be recovered.¹⁸

§ 1565. Illustrations—Total failure of consideration. The principle that payments made under a mistake of law can not be recovered applies to payments made by one who was under no legal liability to make them, and who receives nothing in return therefor, although by reason of his mistake of law he believes that by such payments he is discharging a legal liability.¹ Thus one who pays under an erroneous construction of the contract,² as a misconstruction as to the rate of interest after maturity,³ or mistaking the liability of indorsers,⁴ or believing that he is legally liable for his minor child's tort,⁵ can not recover such payment. So if the holder of the legal title of stock pays an assessment thereon after insolvency,⁶ or if an executor, mistaking the law as to lapsed legacies, pays to an adopted child of testator's deceased daughter a legacy which had lapsed by the death of such daughter before testator,⁷ such payments can not be recovered. Thus A believed that he was liable as indorser on a check, whereas under the facts known to him he was not liable as a matter of law. He made a payment on such supposed liability and agreed to pay the rest. Subsequently he resisted liability on this promise successfully,⁸ and then sued to recover the payment already made. As such payment was made under a pure mistake of law, no recovery could be had.⁹ So a husband who as administrator of his deceased wife delivers certain securities to her son as his distributive share can not after-

¹⁷ *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. ed. 373.

¹⁸ *Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. ed. 373.

¹ *United States v. Edmondston*, 181 U. S. 500, 45 L. ed. 971; *Traweek v. Hagler* (Ala.), 75 So. 152; *Stewart v. Ticonic National Bank*, 104 Me. 578, 72 Atl. 741; *Strafford Savings Bank v. Church*, 69 N. H. 582, 44 Atl. 105.

² *Cincinnati v. Coke Co.*, 53 O. S. 278, 41 N. E. 239.

³ *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571.

⁴ *First National Bank v. Taylor*, 122 N. Car. 569, 29 S. E. 831.

⁵ *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251.

⁶ *Holt v. Thomas*, 105 Cal. 273, 39 Pac. 891.

⁷ *Phillips v. McConica*, 59 O. S. 1, 69 Am. St. Rep. 753, 51 N. E. 445.

⁸ *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348.

⁹ *Coburn v. Neal*, 94 Me. 541, 48 Atl. 178.

wards assert an interest in them as husband.¹⁰ So in the absence of duress, one who pays a license fee in excess of the amount fixed by law,¹¹ or pays an unauthorized tax, no duress existing,¹² can not recover the amount so paid. So a public officer who pays into the treasury fees which he is entitled to retain can not recover them.¹³ One who has paid taxes upon an entire tract of land in order to protect a lien upon an undivided interest therein, under a statute which authorizes the owner of any interest in or lien upon an undivided estate to pay his proportionate part of such tax, can not recover such excess payment from the owner of the other undivided interest.¹⁴ If A pays a debt to B upon which he is secondarily liable after judgment has been entered thereon, A can not recover such payment on discovering that such judgment was irregular and that it was set aside for such irregularity, if he knew all the facts when he made such payment and his mistake was one of law.¹⁵ If A has, through mistake of law, misunderstood the price at which public land is sold and has paid a price greater than that fixed by law, A can not recover the difference between the price which he paid and the price which was fixed by law.¹⁶

§ 1566. Doctrine that payment by mistake of law may be recovered. The practical results of the doctrine that money which is not justly due can not be recovered if it is paid under a mistake of law, have been so unjust and unfair that some courts have refused to recognize its existence, and they have, although possibly unconsciously, followed the original English doctrine; and they have held that money which is paid under a mistake of law may be recovered

¹⁰ *Hughes v. Pealer*, 80 Mich. 540, 45 N. W. 589. In this case the court found as a fact that the husband knew his rights.

¹¹ *Camden v. Green*, 54 N. J. L. 591, 33 Am. St. Rep. 686, 25 Atl. 357.

¹² *United States v. Elliott v. Swartwout*, 35 U. S. (10 Pet.) 137, 9 L. ed. 373.

Illinois. *Yates v. Ins. Co.*, 200 Ill. 202, 65 N. E. 726.

Kentucky. *Louisville, etc., Ry. v. Marion County*, 80 Ky. 531, 12 S. W. 1064.

Michigan. *Manistee Lumber Co. v. Springfield Township*, 92 Mich. 277, 52 N. W. 468.

Missouri. *Christy's Administrator v. St. Louis*, 20 Mo. 143.

¹³ *Wesson v. Collins*, 72 Miss. 844, 850; 18 So. 360, 917.

¹⁴ *Hallett v. Alexander*, 50 Colo. 37, 34 L. R. A. (N.S.) 328, Ann. Cas. 1912B, 1277, 114 Pac. 490.

¹⁵ *Stewart v. Ticonic National Bank*, 104 Me. 578, 72 Atl. 741.

¹⁶ *United States v. Edmondston*, 181 U. S. 500, 45 L. ed. 971.

if the party to whom it is paid is in no way entitled thereto, either in strict law or in equity and good conscience.¹

A member of a fraternal insurance society who through mistake of law has paid assessments in excess of the amount which he was legally bound to pay, may recover the difference between the assessments paid and the assessments which he was legally bound to pay.² If A enters into a contract with X through B, X's broker, to buy B's realty, and if A pays to B a sum of money in reliance on B's representation that he was entitled to such commission and that A was to pay the rest of such purchase price to X, A on learning that X was not to receive a commission from B and on being obliged to pay to B the entire purchase price, may recover from X the amount thus paid to him.³ An executor who pays a legacy under an erroneous construction of the will,⁴ or who pays debts in full under a

¹ *Mansfield v. Lynch*, 59 Conn. 320, 12 L. R. A. 285, 22 Atl. 313; *Bruner v. Stanton*, 102 Ky. 459, 43 S. W. 411; *Lyon v. Mason & Foard Co.*, 102 Ky. 594, 44 S. W. 135; *Scott v. New Castle*, 132 Ky. 616, 21 L. R. A. (N.S.) 112, 116 S. W. 788; *Polites v. Barlin*, 149 Ky. 376, 41 L. R. A. (N.S.) 1217, 149 S. W. 828; *Spalding v. Lebanon*, 156 Ky. 37, 49 L. R. A. (N.S.) 387, 160 S. W. 751; *Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Hartsfield v. Wray*, 181 Ky. 836, 205 S. W. 965; *Lichtwadt v. Murphy's Administrator* (Ky.), 206 S. W. 771.

"We mean distinctly to assert that when money is paid by one under a mistake of his rights and his duty, and which he was under no moral or legal obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of indebitatus assumpsit, whether the mistake be one of law or fact; and this we insist may be done both upon the principles of Christian morals and the common law." *Northrop v. Graves*, 19 Conn. 548, 354; 50 Am. Dec. 264 [quoted in *Mansfield v. Lynch*, 59 Conn. 320, 327; 12 L. R. A. 285, 22 Atl. 313].

"It is the settled rule in this state, adopted at an early date and followed by a long line of decisions, that whenever, by a clear or palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without consideration, which, in law, honor or conscience, was not due and payable, and which, in honor or good conscience ought not to be retained, it may and ought to be recovered." *Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906 [citing, *Ray v. Bank of Kentucky*, 42 Ky. (3 B. Mon.) 510]; *Gratz v. Redd*, 43 Ky. (4 B. Mon.) 178; *McMurtry v. Kentucky Central R. R. Co.*, 84 Ky. 462, 1 S. W. 815; *Titus v. Rochester German Insurance Co.*, 97 Ky. 567, 28 L. R. A. 478, 31 S. W. 127; *Kentucky Title Savings Bank & Trust Co. v. Langan*, 144 Ky. 46, 137 S. W. 846.

² *Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906.

³ *Gosswiller v. Jansen*, 179 Ia. 806, 162 N. W. 45.

⁴ *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

mistaken belief that certain other debts of whose existence he knows are not legally enforceable because not proved by writing signed by decedent,⁵ may recover such payments, or the amount thereof in excess of what should have been paid. So where one pays a license fee under the mistaken belief that the ordinance imposing it is valid, may recover such payment.⁶ The fact that the person who has paid a license fee through a mistake of law has acted under the license thus obtained, does not prevent him from recovering such payment since he could have acted in the same way with impunity without making such payment or securing such license.⁷ If A has paid money for a license in reliance upon a decision of a trial court, he may, when such decision is reversed, recover such part of the original payment as is proportioned to the remainder of the term.⁸ Where a public officer permits one in ignorance of the law to pay license fees for burial permits, which fees were not authorized by law, it has been held that such payments may be recovered as made by fraud.⁹ If A attempts to effect insurance, and without any fraud on A's part the insurance never takes effect,¹⁰ as where a mortgagee by mistake of law takes out insurance on the mortgaged property believing that it protects his interest,¹¹ or without fraud the insured makes a warranty broken when made, such as one concerning his occupation,¹² or the location of the property insured,¹³ A may recover the premiums paid. If the agent of the insurance company has misled both the insurance company and the insured, the right of the insured to recover the premiums paid in is clear.¹⁴ To keep them "would be an act of bad faith and of the grossest injustice and dishonesty."¹⁵ If an employe pays over to his employer tips which

⁵ *Manafield v. Lynch*, 59 Conn. 320, 12 L. R. A. 285, 22 Atl. 313.

⁶ *Bruner v. Stanton*, 102 Ky. 459, 43 S. W. 411; *Spalding v. Lebanon*, 156 Ky. 37, 49 L. R. A. (N.S.) 387, 160 S. W. 751.

"He is not presumed to know more than those who constitute the legislative and executive departments of the government under which he lives." *Louisville v. Anderson*, 79 Ky. 334, 340; 42 Am. Rep. 220 [quoted in *Bruner v. Stanton*, 102 Ky. 459, 461; 43 S. W. 411].

⁷ *Spalding v. Lebanon*, 156 Ky. 37, 49 L. R. A. (N.S.) 387, 160 S. W. 751.

⁸ *Scott v. New Castle*, 132 Ky. 616, 21 L. R. A. (N.S.) 112, 116 S. W. 788.

⁹ *Marcotte v. Allen*, 91 Me. 74, 40 L. R. A. 185, 39 Atl. 346.

¹⁰ *Metropolitan Life Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86.

¹¹ *Waller v. Assurance Co.*, 64 Ia. 101, 19 N. W. 865.

¹² *McDonald v. Ins. Co.*, 68 N. H. 4, 73 Am. St. Rep. 548, 38 Atl. 500.

¹³ *Jones v. Ins. Co.*, 90 Tenn. 604, 25 Am. St. Rep. 706, 18 S. W. 260.

¹⁴ *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934.

¹⁵ *Ins. Co. v. Wilkinson*, 80 U. S. (13 Wall.) 222, 233, 20 L. ed. 617 [quoted in

the employe has received from customers under a mistake of law as to his duty, he may recover such payment from his employer.¹⁶ A beneficiary who has permitted trustees to pay a proportion of his share of a trust fund over to persons not entitled thereto, in reliance upon their mistake as to the system of law which fixed the rights of the parties and as to the rights of the parties under such law, may compel the person to whom such fund has been paid to restore it if it is in existence and in reach of the court, by a proceeding in equity.¹⁷ Payment of a void judgment by one who is liable only as surety on a bond given to discharge a levy, may be recovered.¹⁸

This right of recovery of payment made under mistake of law is limited to cases where such payment should not have been made in morals and in good conscience. The mere non-existence of legal liability is not enough to justify recovery. Thus a husband conveyed land to his wife, B, and she agreed as part of the consideration to assume a debt of his. By reason of her coverture such agreement had no validity. Subsequently she paid such debt. It was held that she could not thereafter recover it, even though such payment could not have been compelled.¹⁹

In some jurisdictions in which the general rule seems to be that a payment made under a mistake of law can not be recovered, relief is occasionally given,²⁰ especially if the party who made such payment does not receive the benefit therefrom which he had supposed that he would receive.²¹ One who has paid money as a subscription to a public improvement under an unconstitutional law, may recover such payment if by reason of the unconstitutionality of such law the public improvement for which such subscription was made is not constructed.²² Money which is deposited as cash

McDonald v. Ins. Co., 68 N. H. 4, 6; 73 Am. St. Rep. 548, 38 Atl. 500].

¹⁶ Polites v. Barlin, 149 Ky. 376, 41 L. R. A. (N.S.) 1217, 149 S. W. 828.

¹⁷ Prince de Bearn v. Winans, 111 Md. 434, 74 Atl. 626.

¹⁸ Lichtwadt v. Murphy's Administrator (Ky.), 206 S. W. 771.

¹⁹ Ruppell v. Kissel (Ky.), 74 S. W. 220.

²⁰ Conway v. Grand Chute, 162 Wis. 172, 155 N. W. 953 [citing, Green Bay

& Miss. Canal Co. v. Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; Wisconsin Marine & Fire Insurance Co. Bank v. Mann, 100 Wis. 596, 76 N. W. 777, and Rowell v. Smith, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1].

²¹ Brasfield v. Milan, 127 Tenn. 561, 44 L. R. A. (N.S.) 1150, 155 S. W. 926; Conway v. Grand Chute, 162 Wis. 172, 155 N. W. 953.

²² Conway v. Grand Chute, 162 Wis. 172, 155 N. W. 953.

bail may be recovered if the law did not authorize cash bail for the appearance of one charged with a criminal offense.²³

Even where the courts still adhere to the rule forbidding recovery of money paid under mistake of law, they look upon it with marked disfavor,²⁴ and they refuse to apply the rule where it will produce an unjust result.²⁵

§ 1567. Mistake of law coupled with other operative facts. Other reasons may, however, enable the party who has paid money under mistake of law to recover it. Thus where the payment is obtained by B's knowing A's mistake and taking advantage of it;¹ or by actively causing A to make such mistake;² or by B's using A's mistake as a means of exerting undue influence over A,³ A may recover the money so paid. So where the probate judge rendered services in settling a will contest, contrary to a statute which forbade a probate judge to practice law, payment made to him by his client in ignorance of the law and under his influence may be recovered.⁴ The principle that a payment made by one person under a mistake of law, and received by one who knows that the other party is paying by reason of such mistake, may be recovered, is not limited to cases of payment to a public officer. Payment under such facts may be recovered from a private person to whom such payment is made.⁵ In case of a known mistake of law mere silence may be fraud.⁶ Under the civil code of California, § 1578, payment under a mistake of law, which is shared substantially by all the parties, may be recovered.⁷ So where the mortgagee's attorney advises the mortgagor that as the mortgage covers the rents and profits, the mortgagee is entitled to the proceeds of the

²³ *Alabama*. *Butler v. Foster*, 14 Ala. 323.

Kansas. *Applegate v. Young*, 62 Kan. 100, 61 Pac. 402.

Nebraska. *Snyder v. Gross*, 69 Neb. 340, 5 Ann. Cas. 152, 95 N. W. 636.

New York. *Eagan v. Stevens*, 39 Hun. 311.

Tennessee. *Brasfield v. Milan*, 127 Tenn. 561, 44 L. R. A. (N.S.) 1150, 155 S. W. 926.

²⁴ *Burlingame v. Hardin County*, 180 Ia. 919, 164 N. W. 115.

²⁵ *Burlingame v. Hardin County*, 180 Ia. 919, 164 N. W. 115.

¹ *Toland v. Corey*, 6 Utah 392, 24 Pac. 190.

² *Kinney v. Dodge*, 101 Ind. 573.

³ *Baehr v. Wolf*, 59 Ill. 470; *Evans v. Funk*, 151 Ill. 650, 38 N. E. 230.

⁴ *Evans v. Funk*, 151 Ill. 650, 38 N. E. 230.

⁵ *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556; *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564.

⁶ *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407.

⁷ *Gregory v. Clabrough's Executors*, 129 Cal. 475, 62 Pac. 72.

crops, and the mortgagor accordingly pays over the proceeds of the crop, such payment is made under a mistake of law shared by all parties and may be recovered.⁸ A public officer is paying out public funds and not his own. Even though the loss, if any, will ultimately fall on him personally, this fact is held, in most jurisdictions to entitle him, in his official capacity, to recover payments made under a mistake of law.⁹ Money paid by one public officer to another may be recovered even more readily than money paid by a public officer to one who is not.¹⁰ As long as the fund remains in the hands of officers in their official capacity, no harm can result from requiring it to be paid into the proper account, and much injustice can be prevented by so doing. The reasons, insufficient as they are, which are relied upon to justify the refusal to allow recovery of such payments as between individuals, have no application here. If a taxpayer may sue on behalf of the public, he may recover for the public money paid out by a public officer, voluntarily, but without authority of law.¹¹

Money paid under a statement that repayment is expected if it shall be determined that such payment was not due, may be recovered.¹²

⁸ *Gregory v. Clabrough's Executors*, 129 Cal. 475, 62 Pac. 72.

⁹ *United States. McElrath v. United States*, 102 U. S. 426, 26 L. ed. 189.

Alabama. Demopolis v. Marengo County, 195 Ala. 214, 70 S. W. 275.

District of Columbia. White v. United States, 38 D. C. App. 131.

Iowa. Pocahontas County v. Katz-Craig Contracting Co. (Ia.), 165 N. W. 422.

Michigan. Ellis v. State Auditor, 107 Mich. 528, 65 N. W. 577.

Missouri. State, ex rel., v. Scott, 270 Mo. 146, 192 S. W. 90.

Without denying this rule, it has been held that a payment to a de facto officer can not be recovered, as he is entitled to compensation for his services in good conscience. *Badeau v. United States*, 130 U. S. 439, 32 L. ed. 997.

¹⁰ *State, ex rel., v. Scott*, 270 Mo. 146, 192 S. W. 90.

¹¹ *Heath v. Albrook*, 123 Ia. 559, 98 N. W. 619.

¹² *Burlingame v. Hardin County*, 180 Ia. 919, 164 N. W. 115.

PART IV

PARTIES

CHAPTER XLV

PARTIES

§ 1568. Necessity of two adversary parties.

§ 1569. Abnormal status as affecting contractual capacity.

§ 1568. Necessity of two adversary parties. Since a genuine contract is an agreement which the law will enforce,¹ a contract can not exist unless there are two adversary parties to the contract.² A covenant by which A agrees to pay money to himself, or to perform some other act for his own benefit, has no legal effect.³ If A makes a note which is payable to himself, such note has no legal significance as long as it remains in A's hands.⁴ When A endorses

¹ See §§ 36 et seq. and 49.

² *De Tastet v. Shaw*, 1 B. & Ald. 664; *Ellis v. Kerr* [1910], 1 Ch. 529; *Canterberry v. Miller*, 76 Ill. 355; *Muhling v. Sattler*, 60 Ky. (3 Met.) 285, 77 Am. Dec. 172.

³ *England. Wood v. Mytton*, 10 Q. B. 805.

United States. Moses v. Lawrence County National Bank, 149 U. S. 298, 37 L. ed. 743.

Illinois. Canterbury v. Miller, 76 Ill. 355; *Kayser v. Hall*, 85 Ill. 511, 28 Am. Rep. 624.

Kentucky. Muhling v. Sattler, 60 Ky. (3 Met.) 285, 77 Am. Dec. 172.

Massachusetts. Pitcher v. Barrows, 34 Mass. (17 Pick.) 361, 28 Am. Dec. 306.

Tennessee. Moore v. Cary, 138 Tenn. 332, 197 S. W. 1093.

"The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself." *Faulkner v. Lowe*, 2 Exch. 595.

This principle has been invoked to

show that a state has no power to contract with one of its counties, since this would be "saying that the state has contracted with itself or its own agencies and creatures—a solecism in the law." *Watson Seminary v. Pike County Court*, 149 Mo. 57, 45 L. R. A. 675, 50 S. W. 880. This principle was not, however, necessary to the decision in this case, since the statute under discussion was a declaration of the will of the legislature and not a contract; and it could, therefore, be repealed at any time.

⁴ *England. Wood v. Mytton*, 10 Q. B. 805.

United States. Moses v. Lawrence County National Bank, 149 U. S. 298, 37 L. ed. 743.

Illinois. Kayser v. Hall, 85 Ill. 511, 28 Am. Rep. 624.

Massachusetts. Pitcher v. Barrows, 34 Mass. (17 Pick.) 361, 28 Am. Dec. 306.

Tennessee. Moore v. Cary, 138 Tenn. 332, 197 S. W. 1093.

such note to B for value and delivers it, the instrument takes effect,⁵ but it takes effect because of the contract between A and B, and not because of the contract made by A with himself. These principles have been codified in the Negotiable Instruments Law, and by the provisions of that statute a promise to pay to the order of the promisor has no legal effect until it is endorsed and delivered by the promisor.⁶ If A, as one of the parties, enters into a joint contract with A and B as the adversary parties, A is both promisor and promisee, both debtor and creditor; and the contract is regarded as without legal effect.⁷

The objection to a contract which a party has attempted to make with himself, is one of substance and not of mere form.⁸ It is inoperative at common law, but it is also inoperative in equity.⁹ On the one hand, no action upon such a contract can be brought if the same person is both plaintiff and defendant, and is seeking relief against himself;¹⁰ and on the other hand, such contract can not be used as a justification for retaining money in the hands of the defendant.¹¹ If A and B agree to sell goods to B and C, and if such goods are delivered to B and C under covenant by which the title to such goods is to remain in A and B until payment, C can not set up as a defense to an action of trover for his conversion of such goods the fact that B was both seller and buyer.

⁵ England. *Absolon v. Marks*, 11 Q. B. 19.

California. *Meyer v. Foster*, 147 Cal. 166, 81 Pac. 402.

...AND. *Roberts v. Lane*, 64 Me. 108, 13 Am. Rep. 242.

Massachusetts. *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335.

Ohio. *Ewan v. Brooks-Waterfield Co.*, 55 O. S. 596, 60 Am. St. Rep. 719, 35 L. R. A. 786, 45 N. E. 1094.

Wisconsin. *Roach v. Sanborn Land Co.*, 135 Wis. 354, 115 N. W. 1102.

⁶ *Davis v. Blakely First National Bank (Ala.)*, 68 So. 261; *People's National Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 763; *Jordan v. First National Bank (Ga.)*, 91 S. E. 287; *Moore v. Cary*, 138 Tenn. 332, 197 S. W. 1093.

⁷ *Faulkner v. Lowe*, 2 Exch. 595; *Ellis v. Kerr* [1910], 1 Ch. 529 [distinguishing,

Rose v. Poulton, 2 Barn. & Ad. 822, as an example of a joint and several covenant]; *Napier v. Williams* [1911], 1 Ch. 361.

⁸ *De Tastet v. Shaw*, 1 B. & Ald. 664; *Ellis v. Kerr* [1910], 1 Ch. 529; *Napier v. Williams* [1911], 1 Ch. 361.

⁹ *De Tastet v. Shaw*, 1 B. & Ald. 664; *Boyce v. Edbrooke* [1903], 1 Ch. 836; *Ellis v. Kerr* [1910], 1 Ch. 529; *Napier v. Williams* [1911], 1 Ch. 361.

¹⁰ *Faulkner v. Lowe*, 2 Exch. 595; *Ellis v. Kerr* [1910], 1 Ch. 529 [distinguishing, *Rose v. Poulton*, 2 Barn. & Ad. 822, as an example of a joint and several covenant]; *Napier v. Williams* [1911], 1 Ch. 361; *Canterberry v. Miller*, 76 Ill. 355; *Muhling v. Sattler*, 60 Ky. (3 Met.) 285, 77 Am. Dec. 172.

¹¹ *De Tastet v. Shaw*, 1 B. & Ald. 664.

One who acts in a special capacity, such as executor, was regarded at common law as having a personal interest and a personal liability in all such transactions. He was not treated as a corporation sole. Accordingly, a party can not enter into a contract with himself in a different capacity.¹² He can not in his personal capacity execute and deliver a note and mortgage to himself in his official capacity, even though it is to secure a debt which in his personal capacity he owes to the estate which he represents in his official capacity.¹³

§ 1569. Abnormal status as affecting contractual capacity. In the discussion of contracts up to this point we have assumed that both parties to the contract were of normal status and possessed full capacity. Many of the propositions of contract law have no application in cases in which one party or the other is of abnormal status or lacks full capacity. A discussion of the contracts of persons of abnormal status involves questions both of contract and of quasi-contract. The commoner types of natural persons of abnormal status or lacking full capacity will first be considered, then questions of partnership, agency, and of liability as that of trustees and the like, which is often confused with agency; and then the contracts of artificial persons, that is, of the government and of public and private corporations.

¹² Gorham v. Meacham, 63 Vt. 231, 22 Atl. 572 [sub nomine, Burditt v. Colburn, 13 L. R. A. 676].

¹³ Gorham v. Meacham, 63 Vt. 231, 22 Atl. 572 [sub nomine, Burditt v. Colburn, 13 L. R. A. 676]; Morley v. French, 56 Mass. (2 Cush.) 130.

CHAPTER XLVI

CONTRACTS OF INFANTS

- § 1570. Theory underlying doctrine of infancy.
- § 1571. The termination of minority at common law.
- § 1572. Effect of emancipation.
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- § 1622. Results of disaffirmance.
- § 1623. Theory that contract of infant is voidable only on full restitution.
- § 1624. Infant as bankrupt.
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§ 1570. Theory underlying doctrine of infancy. A child lacks the judgment and discretion necessary to make ordinary contracts. If his contracts were binding on him in all cases, extravagance in personal expenditures and recklessness in business ventures would often burden him before his majority with debts which he could never pay. The policy of our law deprives him in many cases of the control of his own property and transfers it to his guardian; and as a corollary the law is unwilling to allow him to bind himself by contracts concerning the management of his estate, since these are matters to which his guardian should attend. On the other hand, the law imposes certain obligations upon him, and these obligations are in no way weakened if the infant voluntarily promises to discharge them. The wise policy of the law, therefore, must hold that certain contracts are not binding upon the infant, at least if he wishes to escape liability; while others are binding, at least to the extent of the pre-existing liability of the infant. Whether such promises should be called contracts or not is a question of terminology.

As the object of the law is not solely the protection of the infant, but rather an adjustment of his rights and duties in such way as will promote the general well-being, a complicated set of questions is left for solution in cases where the infant has received something of value under the contract and his right to avoid his liability limits the right of the other party to recover his property. With these questions the following sections are concerned.

Since capacity is presumed, the burden is upon the party who alleges infancy to establish that fact.¹

§ 1571. The termination of minority at common law. The common law fixed the age of majority at twenty-one for both males and females. Persons under that age were infants or minors.¹ This rule is, of course, an arbitrary one. There is but little difference in the discretion of one on the day before and on the day after majority.² "A minor who has nearly attained his majority may be as able to protect his interests in a contract as one who has passed that period. But the law must necessarily fix some precise age at which persons shall be held sui juris. It can not measure the individual capacity in each case as it arises."³ Unless some arbitrary point of time is fixed by law, the capacity of the infant would necessarily be a question of fact in each case; and from the uncertainty and practical difficulty that would be thus caused the courts have always shrunk. The exact moment at which the age of twenty-one was reached and minority ended was settled at common law as the first moment of the day preceding the twenty-first anniversary of birth.⁴ "On the day before the twenty-first anni-

¹ *Gillam v. Richart* (Okla.), 150 Pac. 1037.

² *Anon.*, 1 Salk. 44, 1 Black. Com. 463; *Rowland v. McGuire*, 64 Ark. 412, 42 S. W. 1068. "An infant or minor (whom we call any that is under the age of 21 years * * *)." *Coke Litt.*, 2 b; *Harris v. Berry*, 82 Ky. 137.

This is said to be the common-law rule as to males. *International Text Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

The age of twenty-one has been adopted by statute as to males. *Jefferson v. Gallagher* (Okla.), 150 Pac. 1071.

³ *Ex parte McFerren*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, 63 So. 159; *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 83; *Harner v. Dipple*, 31 O. S. 72, 27 Am. Rep. 496.

⁴ *McCarty v. Carter*, 49 Ill. 53, 55; 95 Am. Dec. 572. "Whenever he arrives at majority, a time fixed by an arbitrary

rule, which in the nature of things can not affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence the law imposes on him full responsibility for all his acts and contracts." *Harner v. Dipple*, 31 O. S. 72, 74.

⁴ *England*. *Swineburne*, pt. 2, § 2, pl. 7; 2 *Kent Com.* 233; *Met. Cont.* 38; 7 *Wait Act. & Def.* 129; *Fitzhugh v. Dennington*, 6 *Mod.* 259; *Anon.* 1 Salk. 44.

Indiana. *Roe v. Hersey*, 3 *Wils.* 274; *Wells v. Wells*, 6 *Ind.* 447.

Kentucky. *Hamlin v. Stevenson*, 34 *Ky.* (4 *Dana*) 597.

Massachusetts. *Bardwell v. Purring-ton*, 107 *Mass.* 419.

New York. *Phelan v. Douglass*, 11 *How. Pr.* 193.

Texas. *Roas v. Morrow*, 85 *Tax.* 172, 16 *L. R. A.* 542, 19 *S. W.* 1090.

versary he is held to be twenty-one years of age."⁵ Thus limitations against an infant begins to run the day before his twenty-first birthday.⁶ This rule is said to rest upon the principle that the law does not recognize fractions of a day. It does not, however, follow from that principle at all; but it really rests on nothing but precedent. It is impossible to show why the rule ignoring fractions of a day is not complied with by making majority begin at the first moment of the twenty-first anniversary of birth. Still, although some authorities quoted in its favor are really not all clear on the point,⁷ though it has been ably and logically criticised, it is probably too well fortified to be shaken and is, though illogical, as convenient a rule as any.

§ 1572, Effect of emancipation. While the emancipation of an infant from parental control gives him a property in his own earnings from that time,¹ does not relate back so as to permit him to recover for services previously rendered,² and it does not in any way enlarge the contractual capacity of the infant.³ It often is, however, of practical importance in determining with whom the contract was made; and also in deciding many questions under the law of necessities. An infant who manages his own affairs, who is employed regularly, and who receives his own wages, does not

⁵ *Ross v. Morrow*, 85 Tex. 172, 175; 16 L. R. A. 542, 19 S. W. 1090.

⁶ *Ross v. Morrow*, 85 Tex. 172, 16 L. R. A. 542, 19 S. W. 1090.

⁷ In the earlier cases this rule is stated apparently as a mere dictum. *Anon.* 1 Salk. 44; *Fitzhugh v. Dennington*, 6 Mod. 259. The rule as given in the later cases is often based on Blackstone; but that author merely said, 1 Com. 4th "So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth * * *."

¹ *Jacobs v. Jacobs*, 130 Ia. 10, 114 Am. St. Rep. 402, 104 N. W. 489; *Clay v. Shirley*, 65 N. H. 644, 23 Atl. 521.

² *Kreider v. Fanning*, 74 Ill. App. 237.

³ *Georgia. Wickham v. Torley*, 136 Ga. 594, 36 L. R. A. (N.S.) 57, 71 S. E. 881.

Indiana. Burns v. Smith, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94.

Kentucky. Tandy v. Masterson's Admr., 4 Ky. (1 Bibb.) 330.

Massachusetts. Mason v. Wright, 54 Mass. (13 Met.) 306.

Michigan. Tyler v. Gallop, 68 Mich. 185, 13 Am. St. Rep. 336, 35 N. W. 902.

Rhode Island. Genereux v. Sibley, 18 R. I. 43, 25 Atl. 345.

Vermont. Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630. The effect of emancipation is "to enable him to make contracts for his own services and to apply his wages to the support of his family, otherwise it does not enlarge his power to contract, so that he is bound by his contracts except for actual necessities." *Burns v. Smith*, 29 Ind. App. 181, 184, 64 N. E. 94.

possess general contractual capacity.⁴ While the transaction of business by a minor who has neither parent nor guardian is rendered difficult by reason of his lack of capacity, the reasons for denying him capacity to bind himself exist in such a case to possibly an even greater extent than in the case of a minor who has parent or guardian to advise him. Accordingly, the lack of parent or guardian does not confer upon an infant capacity to make a contract.⁵

§ 1573. Assent of parent or guardian. Whatever authority a parent may have over the person of the child, and whatever authority a guardian may have over his property, they can not alter the capacity, or want thereof, which the law has conferred upon him.¹ The fact that an infant's father,² or guardian,³ knows of the infant's intention to make a contract and does not oppose it, does not make such contract binding upon him.

§ 1574. Statutes affecting capacity of minors. The legislature, under most American constitutions, has full power to modify the common-law rules of the capacity of infants as far as concerns transactions after the passage of the statute. Where special legislation is forbidden, special statutes affecting capacity are, of course, unconstitutional.¹ Without a clause in the constitution forbidding special legislation, an infant's disabilities may be removed by special statute.² The statutes affecting the common-law rules as to the incapacity of minors are of several kinds, three of which will be noticed here. First, in many states the age at which majority is reached has been changed, the most common modification being the reduction of the age of majority in females to eighteen.³ In North Dakota a contract of an infant over eighteen is subject to his right to disaffirm within one year. If not so disaffirmed it is as

⁴ Wickham v. Torley, 136 Ga. 594, 36 L. R. A. (N.S.) 57, 71 S. E. 881.

⁵ Wickham v. Torley, 136 Ga. 594, 36 L. R. A. (N.S.) 57, 71 S. E. 881.

¹ Cain v. Garner, 169 Ky. 633, L. R. A. 1916E, 682, 185 S. W. 122; Reynolds v. Garber-Buick Co., 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

² Cain v. Garner, 169 Ky. 633, L. R. A. 1916E, 682, 185 S. W. 122.

³ Reynolds v. Garber-Buick Co., 183

Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

¹ State, ex rel. Lamson v. Baker, 25 Fla. 598, 6 So. 445.

² Collins v. Park, 93 Ky. 6, 18 S. W. 1013.

³ California. Lee v. Hibernia Savings & Loan Society, — Cal. —, 171 Pac. 677.

Arkansas. Rowland v. McGuire, 64 Ark. 412, 42 S. W. 1068.

valid as if he were an adult.⁴ In some states, by statutory provisions, his contracts under the age of eighteen are void.⁵

Second, certain statutes provide that by a proceeding in a designated court the disabilities of a minor may be removed.⁶ The general effect of these statutes is the same, though there is some variance in the details. The record must show that the minor resides in the county where the application is made or the decree removing the disabilities is void.⁷ After the decree is made, it is valid in the county where made, and in other counties where a certified copy of the decree is filed.⁸ Since the statute authorizing the removal of the disabilities of a minor applies to those who are capable of managing their own business, an order of court removing the disabilities of a minor of fourteen is void.⁹ Since an infant over eighteen whose disabilities have thus been removed may bind himself by his undertakings, he may take the bar examination.¹⁰ While these statutes need not provide for notice of the application,¹¹ yet such formalities as they require must be complied with.¹² Third, other statutes remove the disability of the infant as to certain kinds of contracts. Thus in Georgia an infant who engages in business with the consent of his guardian may bind himself by contract for his business debts,¹³ even if such contract is made with such guardian after he is discharged from his trust.¹⁴ In Texas the marriage settlements of minors are binding, but this does not

Illinois. *Stevenson v. Westfall*, 18 Ill. 209.

Maryland. *Thorne v. Thorne*, 125 Md. 119, 93 Atl. 406.

Minnesota. *Cogel v. Ralph*, 24 Minn. 194.

Nebraska. *Kiplinger v. Joslyn*, 93 Neb. 40, 139 N. W. 1019.

Vermont. *Sparhawk v. Buell*, 9 Vt. 41.

⁴ *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848; *Casement v. Callaghan*, 35 N. D. 27, 159 N. W. 77.

⁵ *Gruba v. Chapman*, 36 S. D. 119, 153 N. W. 929.

⁶ *Cox v. Johnson*, 80 Ala. 22; *Wilkinson v. Buster*, 124 Ala. 574, 26 So. 940; *Hindman v. O'Connor*, 54 Ark. 627, 13 L. R. A. 490, 16 S. W. 1052; *Cooper v. Rhodes*, 30 La. Ann. 533; *Brown v.*

Wheelock, 75 Tex. 385, 12 S. W. 111, 841.

⁷ *Hindman v. O'Connor*, 64 Ark. 627, 13 L. R. A. 490, 16 S. W. 1052.

⁸ *Wilkinson v. Buster*, 124 Ala. 574, 26 So. 940.

⁹ *Doles v. Hilton*, 48 Ark. 305, 3 S. W. 193. To the same effect is *Pochelu's Emancipation*, 41 La. Ann. 331, 6 So. 541.

¹⁰ *State, ex rel. Lamson v. Baker*, 25 Fla. 598, 6 So. 445.

¹¹ *Hindman v. O'Connor*, 54 Ark. 627, 13 L. R. A. 490, 16 S. W. 1052.

¹² *Cox v. Johnson*, 80 Ala. 22.

¹³ *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. 312. So where his parents consent. *Jimmerson v. Lawrence*, 112 Ga. 340, 37 S. E. 371.

¹⁴ *Ullmer v. Fitzgerald*, 106 Ga. 815, 32 S. E. 869.

operate to make other contracts binding.¹⁶ In Iowa an infant who by reason of his engaging in business causes the other party to believe that he is an adult is liable on his contracts. This statute, however, does not apply to an infant who purchases realty while working as a farm-hand, such acts not constituting an "engaging in business."¹⁶ In Montana the validity and effect of an infant's contracts are determined by statute,¹⁷ and the rules of common law or of law-merchant upon this subject are entirely superseded.¹⁸

§ 1575. Infant married women. The disabilities of married women are elsewhere discussed.¹ The statutes which modify the common-law rules of coverture in some states specifically apply to infants and remove together the disabilities of infancy and coverture.² Thus in Nebraska the statute removes the disabilities of a married woman over sixteen years of age;³ while in Alabama the limit is eighteen years, and the statute applies to married women of that age even if married before they were eighteen.³ In states in which the statute removing the disabilities of a married woman does not specifically apply to infants, it is held that notwithstanding the statute, the disability of infancy remains.⁵ "Where the

¹⁶ *Burr v. Wilson*, 18 Tex. 367.

¹⁶ *Beickler v. Guenther*, 121 Ia. 419, 96 N. W. 895.

¹⁷ *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

¹⁸ *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

¹ See ch. LII.

² *Knight v. Colman*, 117 Ala. 266, 22 So. 974; *Daley v. Minnesota, etc., Co.*, 43 Minn. 517, 45 N. W. 1100; *Ward v. Lavery*, 19 Neb. 429, 27 N. W. 393; *Chubb v. Johnson*, 11 Tex. 469.

³ *Ward v. Lavery*, 19 Neb. 429, 27 N. W. 393.

⁴ *Knight v. Colman*, 117 Ala. 266, 22 So. 974.

⁵ *Canada. Confederation, etc., Association v. Kinnear*, 23 Ont. App. 497.

Arkansas. Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1.

California. Magee v. Welsh, 18 Cal. 155.

Illinois. Hoyt v. Swar, 53 Ill. 134.

Indiana. Law v. Long, 41 Ind. 586; *Losey v. Bond*, 94 Ind. 67.

Kentucky. Phillips v. Green, 10 Ky. (3 A. K. Mar.) 7, 13 Am. Dec. 124; *Prewitt v. Graves*, 28 Ky. (5 J. J. Mar.) 114.

Maine. Webb v. Hall, 35 Me. 336; *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456.

Massachusetts. Walsh v. Young, 110 Mass. 396.

Missouri. Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906.

New York. Sanford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

North Carolina. Epps v. Flowers, 101 N. Car. 158, 7 S. E. 680.

Ohio. Hughes v. Watson, 10 Ohio 127.

South Carolina. McMorris v. Webb, 17 S. Car. 558, 43 Am. Rep. 629.

party is an infant as well as feme covert, the disability arising from infancy remains, although she execute and acknowledge a deed in the form prescribed by statute."⁶ A proviso in a deed to a married woman that "nothing herein shall prevent her selling said land * * * by her husband uniting with her," does not remove the disability of infancy.⁷ A statute which provides that "any married woman of any age" may convey her realty without the joinder or assent of her husband, applies to a married woman who is a minor and prevents her from avoiding her conveyances when she reaches the age of majority.⁸

§ 1576. Original rule concerning the effect of an infant's contract. The common-law rule as to the effect and validity of an infant's contracts was that if the court could, as a matter of law, determine that the contract was prejudicial to the infant, it was void; if beneficial, as for necessities, it was valid; and if it was doubtful whether it was beneficial or prejudicial it was voidable.¹ Thus a contract clearly beneficial to the infant was held binding.² An apparent modification of this rule, though not always recognized as such by the courts, restricts void contracts to such as are clearly, certainly or necessarily to the prejudice of the infant.³ In

Tennessee. *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88.

¹ *Syllabus of Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285 [quoted in *Hughes v. Watson*, 10 Ohio 127, 134].

⁷ *Sewell v. Sewell*, 92 Ky. 500, 36 Am. St. Rep. 606, 18 S. W. 162.

⁸ *Fields v. Mitchell*, 112 Me. 368, 92 Atl. 293.

¹ **England.** *Harvey v. Ashley*, 3 Atk. 607; *Zouch v. Parsons*, 3 Burr. 1794; *Keane v. Boycott*, 2 H. Black. 512; *Baylis v. Dinely*, 3 Maule & S. 477.

United States. *Tucker v. Moreland*, 35 U. S. (10 Pet.) 58, 9 L. ed. 345.

Alabama. *Waugh v. Emerson*, 79 Ala. 295.

Iowa. *Green v. Wilding*, 59 Ia. 679, 44 Am. Rep. 696, 13 N. W. 761.

Louisiana. *Succession of Wilder*, 22 La. Ann. 219, 2 Am. Rep. 721.

Maine. *Lawson v. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526.

New Jersey. *Young v. Sterling Leather Works*, 91 N. J. L. 289, 102 Atl. 395.

New York. *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301.

Tennessee. *Wheaton v. East*, 9 Tenn. (5 Yerg.) 41, 26 Am. Dec. 251.

Of these cases *Keane v. Boycott*, 2 H. Bla. 511, while not the earliest is perhaps the one most often quoted.

² *Gadd v. Thompson* [1911], 1 K. B. 304; *Waugh v. Emerson*, 79 Ala. 295; *Nickerson v. Easton*, 29 Mass. (12 Pick.) 110; *Stone v. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654; *Breed v. Judd*, 67 Mass. (1 Gray) 455.

³ *Hastings v. Dollarhide*, 24 Cal. 195; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Bradford v. French*, 110 Mass. 365.

Robinson v. Weeks,⁴ a somewhat different classification from that given in the text, was set forth at length and the contracts of infants were divided into three classes: binding, if for necessities at fair and just rates; void, if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment or the like; and voidable, at the election of the minor, either during his minority or within a reasonable time after he becomes of age—including all the agreements of a minor which may be beneficial and are not for necessities until fully executed on both sides, and all executed contracts of this sort where the other party can be placed substantially in statu quo. An examination of the authorities cited will show that this rule was based on a line of dicta; and that the real decisions in almost all of the cases did not require the statement of the rule in the form given. The questions decided are generally presented where the infant has taken steps sufficient to avoid the contract, and it has thereby become unimportant whether the contract was originally void or merely voidable. Wherever questions of the possibility of ratification by the infant or the right of the adult to avoid have been raised the conclusion reached is consistent only with the view that the contract called "void" is really voidable.

§ 1577. Present standing of original rule. Before discussing the modern rule, it must be noticed that the old rule just given is not obsolete everywhere. It still persists in obiter.¹ The English courts still apply the test regularly in contracts for work and labor.² Thus a contract by which an infant, in consideration of a special rate of fare, agrees not to hold the railroad for its negligence is so manifestly prejudicial as to be not binding;³ and an apprenticeship deed containing a provision that the master was not to pay

⁴ 56 Me. 102.

¹ *Young v. Sterling Leather Works*, — N. J. —, 102 Atl. 395; *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101.

² *Fellows v. Wood*, 50 L. T. (N.S.) 513; *Reg v. Lord*, 12 Q. B. (Ad. & El. [N.S.]) 757; *Meakin v. Morris*, 12 L. R. Q. B. D. 352; *Corn v. Matthews* [1893], 1 Q. B. 310; *Flower v. Ry. Co.* [1894], 2 Q. B. 65; *Clements v. Ry. Co.* [1894], 2 Q. B. 482; *Evans v. Ware* [1892], 3 Ch. 502; *Gadd v.*

Thompson [1911], 1 K. B. 304. The test of the validity of such a contract is said to be "whether on the true construction of the contract as a whole it was for his advantage * * *. If it was for his advantage it was not a voidable contract but one binding on him, which he had no right to repudiate." *Clements v. Ry. Co.* [1894], 2 Q. B. 482, 489.

³ *Flower v. Ry. Co.* [1894], 2 Q. B. 65.

wages to the apprentice or to instruct him or teach him while his business was interrupted by "turn-outs," including lock-outs, was so much to the detriment of the infant as to be unenforceable.⁴ Unusual and oppressive covenants in employment contracts will not be enforced.⁵ A covenant by which a minor who is employed as reporter under a contract which may be ended by either party on a month's notice, agrees not to be connected in any way with a newspaper published within a certain territory, was held to be invalid, since it was shown that such restrictions were unusual.⁶

On the other hand, an agreement by an infant employe to accept a certain sum from a mutual insurance society in lieu of damages,⁷ and a promise by an infant that in consideration of employment he will not compete in business with the employer within a distance of five miles, and for a period of two years after the termination of the employment, are both for the benefit of the infant and enforceable.⁸ A covenant in a deed of apprenticeship which was entered into by a minor by which he agreed not to carry on the same trade as his master within a certain territory for a certain time after the apprenticeship terminated, was held to be valid and reasonable if it was shown that without such a covenant he could not have induced the master to enter into a contract of apprenticeship; and the minor will be enjoined from breach of such covenant.⁹ The English courts have intimated that this rule is not limited to labor contracts.¹⁰

Some American states still hold to the original rule, in its literal application.¹¹ Thus a deed from an infant without consideration was held void as being prejudicial; and so a covenant of seizing in a deed by the infant's grantee to another was broken as soon as

⁴ *Corn v. Matthews* [1893], 1 Q. B. 310.

⁵ *Leng v. Andrews* [1909], 1 Ch. 763.

⁶ *Leng v. Andrews* [1909], 1 Ch. 763. Possibly such a covenant would have been held to be invalid as against an adult.

⁷ *Clements v. Ry. Co.* [1894], 2 Q. B. 482.

⁸ *Evans v. Ware* [1892], 3 Ch. 502.

⁹ *Gadd v. Thompson* [1911], 1 K. B. 304.

¹⁰ "I will not attempt to say how far the rule extends but that it does apply to some contracts that are not

contracts of labor is clear from many decided cases." *Clements v. Ry. Co.* [1894], 2 Q. B. 482, 492.

¹¹ *Robinson v. Coulter*, 90 Tenn. 705, 25 Am. St. Rep. 708, 18 S. W. 250. Where the rule is reiterated as follows: "The rule governing the contracts of minors long established, is, that they are either void, voidable or valid, according as they shall appear prejudicial, uncertain, or beneficial. If to his benefit—as for necessities—they are valid; if of an uncertain character as to benefit or prejudice, they are voidable only, * * *."

made.¹² So a gratuitous release by an infant to a witness to restore his competency was held void, and of no effect on such competency.¹³

§ 1578. Modern rule concerning the effect of an infant's contracts. The modern rule, in force in a great majority of the different jurisdictions, also divides the contracts of infants into void, voidable and valid contracts; but the lines of distinction between the different classes of contracts are very different from those laid down by the common-law rule. Void contracts consist in many states of formal powers of attorney; in fewer still, of general appointments of agents; and in a very few of gratuitous gifts. Valid contracts consist of certain executed contracts of status and all promises by an infant to perform some legal obligation already imposed upon him; and all other contracts are voidable. These different classes of contracts will be discussed in detail in the following sections. The modern English statute makes an infant's contracts, except for necessities, void and incapable of ratification. Thus acceptances given by an infant debtor who is sued with others after majority are void.¹

§ 1579. Void contracts—Powers of attorney. A supplement to the original common-law rule already given was the rule originally laid down in conveyancing that grants made by an infant which did not take effect by delivery by his hand were void.¹ This rule survives in modified form and in many, perhaps the majority of jurisdictions, a power of attorney for the conveyance of real estate executed by an infant is said to be absolutely void.² The true mean-

¹² Robinson v. Coulter, 90 Tenn. 705, 25 Am. St. Rep. 708, 18 S. W. 250.

¹³ Langford v. Frey, 27 Tenn. (8 Humph.) 443.

See also, on the same point, Swafford v. Ferguson, 3 Lea 292, 31 Am. Rep. 639; Scobey v. Waters, 10 Lea 551.

¹ Smith v. King [1892], 2 Q. B. D. 543.

¹ Perkins on Conveyancing, § 12.

England. Zouch v. Parsons, 3 Burr. 1794; Doe v. Roberts, 16 M. & W. 778.

Ireland. Allen v. Allen, 2 Dru. & War. 307.

Kentucky. Phillips v. Green, 10 Ky.

(3 A. K. Mar.) 7, 13 Am. Dec. 124; Breckenridge's Heirs v. Ormsby, 24 Ky. (1 J. J. Mar.) 236, 19 Am. Dec. 71.

Maine. Dana v. Coombs, 6 Me. 89, 19 Am. Dec. 194.

New York. Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.

² England. Zouch v. Parsons, 3 Burr. 1794.

Alabama. Philpot v. Bingham, 55 Ala. 435; Flexner v. Dickerson, 72 Ala. 318.

Delaware. Waples v. Hastings, 3 Harr. (Del.) 403.

ing of this rule is, of course, that no rights of any sort pass under a deed delivered as an execution of such power. Many of these decisions would have resulted the same way if the power had been merely voidable. In others, it is purely obiter, not being called for in the least by the facts of the case.³ In the rest, however, the point is clearly and necessarily involved in the decision. The more rational view of an infant's power of attorney is that it is voidable and not void. Under our theory of the transfer of estates in realty there can be no logical distinction between delivery by the hand of the infant and by the hand of his agent. Accordingly, some courts have held that a power of attorney given by an infant was merely voidable, and might be ratified by him on arriving at majority.⁴ The validity of a power coupled with an interest, as one inserted in a mortgage, is also an unsettled question.⁵ Powers of attorney other than those for the conveyance of real estate have been said to be void.⁶ Thus an infant can not appoint an attorney to make affidavit for him in replevin.⁷ The more rational view is to look upon the power and the acts thereunder as being merely voidable.⁸

§ 1580. Void contracts—Appointments of agents. The rule given in the preceding section that powers of attorney are held void in many jurisdictions has been applied in some jurisdictions to all appointments of agents.¹ Such an appointment is said to be "abso-

Indiana. *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.

Kentucky. *Pyle v. Cravens*, 14 Ky. (4 Litt.) 18.

Ohio. *Lawrence v. McArter*, 10 Ohio 37.

Pennsylvania. *Knox v. Flack*, 22 Pa. St. 337.

³ *Cole v. Pennoyer*, 14 Ill. 158; *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596; *Mustard v. Wohlford's Heirs*, 56 Va. (15 Gratt.) 329, 76 Am. Dec. 209.

⁴ *Coursolle v. Weyerhauser*, 69 Minn. 323, 72 N. W. 697; *Ferguson v. Ry. Co.*, 73 Tex. 344, 11 S. W. 347.

⁵ In *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101, such a power was held voidable. In *Rocks v. Cornell*, 21 R. I. 532, 45 Atl. 552, it was said to be void.

⁶ *Fetrow v. Wiseman*, 40 Ind. 148; *Hustand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481; *Mustard v. Wohlford's Heirs*, 56 Va. (15 Gratt.) 329, 76 Am. Dec. 209.

⁷ *Turner v. Bondalier*, 31 Mo. App 582.

⁸ *Karcher v. Green*, 8 Houst. (Del.) 163, 32 Atl. 225. In this case a judgment on power of attorney signed by a minor was set aside.

¹ **Illinois.** *Cole v. Pennoyer*, 14 Ill. 158.

Indiana. *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94.

Kentucky. *Semple v. Morrison*, 23 Ky. (7 T. B. Mon.) 298.

Michigan. *Armitage v. Widoe*, 36 Mich. 124.

lutely void."² While in some of these cases this rule is obiter, in others it is specifically decided. Thus it has been held that the infant could not ratify the contract made by the agent, on reaching majority;³ and also, that no title passed by a sale made by the agent for the infant,⁴ or by an assignment of a note.⁵ It was also said that an infant can not adopt the act of an agent.⁶

The rule that an appointment of an agent by an infant is void is frequently applied to cases in which it is sought to hold an infant employer for the torts of his employe and in which the infant employer has sought to repudiate the contract of employment and his liability for the torts of such employe. Under these circumstances the infant can not be held for the acts of his employe;⁷ but since the infant is seeking to avoid the contract it does not seem to be necessary to hold that the contract was void from the beginning in order to reach the conclusion that he may repudiate the contract and thus avoid liability. Conversely, the negligence of the minor's employe can not be imputed to the minor.⁸

The clear weight of modern authority, however, seems to be that an appointment of an agent is voidable only, and not void.⁹ Thus an appointment of an agent, by an infant, to execute a promissory

Missouri. *Poston v. Williams*, 99 Mo. App. 513, 73 S. W. 1099.

New York. *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

Wisconsin. *Covault v. Nevitt*, 157 Wis. 113, 51 L. R. A. (N.S.) 1092, 146 N. W. 1115.

² *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94.

³ *Doe v. Roberts*, 16 Mee. & W. 777; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756.

⁴ *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

⁵ *Semple v. Morrison*, 23 Ky. (7 T. B. Mon.) 298.

⁶ *Armitage v. Widoe*, 36 Mich. 124. *Contra*, *Ward v. Steamboat Little Red*, 8 Mo. 358.

⁷ *Cunningham v. Illinois Central R. Co.*, 77 Ill. 178; *Burnham v. Seaverns*, 101 Mass. 360, 100 Am. Dec. 123;

Holden v. Curry, 85 Wis. 504, 55 N. W. 965; *Covault v. Nevitt*, 157 Wis. 113, 51 L. R. A. (N.S.) 1092, 146 N. W. 1115.

An infant owner of realty not liable for the negligence of his employe. *Covault v. Nevitt*, 157 Wis. 113, 51 L. R. A. (N.S.) 1092, 146 N. W. 1115. See, however, that an infant is liable for the torts of his agent if an adult would have been. *Smith v. Kron*, 96 N. Car. 392, 2 S. E. 533.

⁸ *Hampel v. Detroit, Grand Rapids & Western R. Co.*, 138 Mich. 1, 110 Am. St. Rep. 275, 100 N. W. 1002.

⁹ *California.* *Hastings v. Dollarhide*, 24 Cal. 195.

Maine. *Hardy v. Waters*, 38 Me. 450.

Massachusetts. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562; *Stiff v. Keith*, 143 Mass. 224, 9 N. E. 577; *Simpson v. Ins. Co.*, 184 Mass. 348, 68 N. E. 673.

note,¹⁰ or to indorse one,¹¹ even if non-negotiable,¹² or to rescind a contract,¹³ is merely voidable. The agent can not be sued on an implied breach of warranty of authority;¹⁴ nor can the adversary party avoid a contract made through an agent with an undisclosed principal who proves to be a minor.¹⁵ Hence, also an infant can bind himself through an agent for necessities.¹⁶

§ 1581. Other contracts held void. An infant's contract to arbitrate has been said to be absolutely void.¹ His gratuitous agreement to waive advertisement of sale of property bought on the installment plan is void,² at least if disadvantageous to him.³ While not strictly contracts, gratuitous transfers of property are in some jurisdictions held absolutely void and incapable of ratification.⁴ By statute in some jurisdictions the contracts of an infant under a certain age are void.⁵

§ 1582. Valid contracts—Marriage. The validity of certain contracts of minors depends in part on the legal effect of certain statutes—though this effect is not always expressed in the exact wording of the statutes—and in part upon common-law rules. At common law a male could contract a valid and binding marriage at the age of fourteen; a female at the age of twelve.¹ While this age is changed by statute in many states, persons under the age of infancy are by statute in almost all jurisdictions allowed to contract valid marriages.² From the common-law rule just given and

New Jersey. *Patterson v. Lippincott*, 47 N. J. L. 437, 54 Am. Rep. 178, 1 Atl. 506.

Texas. *Cummings v. Powell*, 8 Tex. 80; *Voglesang v. Null*, 67 Tex. 465, 8 S. W. 451; *Ferguson v. Ry. Co.*, 73 Tex. 344, 11 S. W. 347; *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101.

¹⁰ *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229.

¹¹ *Hardy v. Waters*, 38 Me. 450.

¹² *Hastings v. Dollarhide*, 24 Cal. 195.

¹³ *Towle v. Dresser*, 73 Me. 252.

¹⁴ *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506.

¹⁵ *Stiff v. Keith*, 143 Mass. 224, 9 N. E. 577; *Cummings v. Powell*, 8 Tex. 80.

¹⁶ *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146. See §§ 1586 et seq.

¹ *Millsaps v. Estes*, 134 N. Car. 486, 46 S. E. 988.

² *Ward v. Sharpe*, 140 Tenn. 347, 200 S. W. 974.

³ *Ward v. Sharpe*, 140 Tenn. 347, 200 S. W. 974.

⁴ *Robinson v. Coulter*, 90 Tenn. 706, 25 Am. St. Rep. 708, 18 S. W. 250.

⁵ Such as eighteen. *Gruba v. Chapman*, 36 S. D. 119, 153 N. W. 929.

¹¹ *Black Com.* 436; *Fisher v. Bernard*, 85 Vt. 663, 27 Atl. 316.

² Such a statute prevents a person above the common law age and under the statutory age from binding himself by a valid marriage, even if it does not specifically abolish the com-

from the various local statutes, it follows that an executed contract of marriage entered into by one below the age of full majority but above the age so fixed by law is absolutely valid.³ While such statutes generally require the consent of a parent or guardian if the party to be married is under the full age of majority, a marriage without such consent is perfectly valid,⁴ even if it is a misdemeanor to enter into such a marriage.⁵ By statute, a marriage under the ordinary age of consent may in certain cases be valid if all the requirements of the statute are complied with, and otherwise, void.⁶

An infant's executory contract of marriage, however, as it does not cause any change in status, is not binding upon him, but like his contracts in general, is voidable.⁷ While *Develin v. Riggsbee*,⁸ is often cited as contrary to this rule, it merely holds that a minor female may give a valid release from a promise to marry.

§ 1583. Valid contracts — Enlistment. The statutes of the United States allow minors over sixteen to enlist in the army if the

mon law rule. *Eliot v. Eliot*, 77 Wis. 634, 10 L. R. A. 568, 46 N. W. 806.

³ *Hunter v. Milam* (Cal.), 41 Pac. 332; *Parton v. Hervey*, 67 Mass. (1 Gray) 119; *Governor v. Rector*, 29 Tenn. (10 Humph.) 57; *Pool v. Pratt*, 1 Chip. (Vt.) 252.

⁴ *LaCoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836; *Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 16 L. R. A. 578, 31 N. E. 706; *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360; *Wilkinson v. Dellinger*, 126 N. Car. 462, 35 S. E. 819; apparently to this effect is *Western, etc., Co. v. Proctor*, 6 Tex. Civ. App. 300, 25 S. W. 811, where damages were allowed for failure to deliver a telegram forbidding the clerk to issue a license to the plaintiff's daughter.

Apparently contra, *Eliot v. Eliot*, 81 Wis. 295, 15 L. R. A. 239, 51 N. W. 81, where the boy who was under eighteen, the age of consent, represented that he was nineteen and it was held, first, that no estoppel could arise; and, second, that if there could be an es-

toppel, it could only have arisen from his misrepresentation that his parents had given their consent as required by statute.

⁵ *Hunter v. Milam* (Cal.), 41 Pac. 332.

⁶ *People v. Schoonmaker*, 119 Mich. 242, 77 N. W. 934. The statute involved in this case allowed a marriage under the age of consent, where the girl was seduced, the parents consented, and the parties lived together after the age of consent.

⁷ *Illinois. McConkey v. Barnes*, 42 Ill. App. 511.

Michigan. Frost v. Vought, 37 Mich. 65.

New York. Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475.

Ohio. Rush v. Wick, 31 O. S. 521, 27 Am. Rep. 523.

Tennessee. Warwick v. Cooper, 37 Tenn. (5 Sneed.) 659.

Texas. Wells v. Hardy, 21 Tex. Civ. App. 454, 51 S. W. 503.

Vermont. Pool v. Pratt, 1 Chip. (Vt.) 252.

⁸ 4 Ind. 464.

parent or guardian consents to such enlistment. This clearly recognizes the capacity of the minor to bind himself by a contract of enlistment.¹ The practical question arising most often under these statutes is whether in cases of enlistment without such written consent the infant can himself avoid the contract. The better line of authorities holds that he can not, and that the privilege of avoiding the contract belongs to the parent or guardian; accordingly, if he deserts, this does not avoid the contract and he may be punished therefor.² Other authorities hold that the minor may avoid such contract without being punished for desertion,³ and that he may avoid it either before or after he arrives at majority.⁴ In any event, one appointed guardian after the enlistment of a minor can not give the written consent required by statute,⁵ while the delay of a father who does not by habeas corpus procure the discharge of his son who was enlisted in the navy under the age of eighteen, before that age, does not validate the enlistment.⁶ Whether the same rules on this point apply to the volunteer service as to the regular army is in dispute.⁷ It has been held, under different statutes, that in the navy, a minor over eighteen, enlisting without consent of parent or guardian, can not be discharged on habeas corpus on suit of the parent.⁸

¹ *United States. Morrissey v. Perry*, 137 U. S. 157, 34 L. ed. 644; *Solomon v. Davenport*, 87 Fed. 318; *In re Dowd*, 90 Fed. 718.

Connecticut. Lanahan v. Birge, 30 Conn. 438.

Iowa. Ex parte Anderson, 16 Ia. 595.

North Carolina. In re Graham, 53 N. Car. (8 Jones L.) 416.

Pennsylvania. Commonwealth v. Gamble, 11 Serg. & R. (Pa.) 93.

Wisconsin. In re Tarble, 25 Wis. 390, 3 Am. Rep. 85.

² *United States. Morrissey v. Perry*, 137 U. S. 157, 34 L. ed. 644; *In re Zimmerman*, 30 Fed. 176; *In re Cosenow*, 37 Fed. 668; *In re Kaufman*, 41 Fed. 876; *Solomon v. Davenport*, 87 Fed. 318; *In re Dowd*, 90 Fed. 718.

Iowa. Ex parte Anderson, 16 Ia. 595.

North Carolina. In re Graham, 53 N. Car. (8 Jones L.) 416.

Pennsylvania. Commonwealth v. Gamble, 11 Serg. & R. (Pa.) 93.

Virginia. United States v. Blakeney, 44 Va. (3 Gratt.) 405.

³ *United States v. Hanchett*, 18 Fed. 26; *In re Davison*, 21 Fed. 618; *In re Baker*, 23 Fed. 36; *In re Chapman*, 37 Fed. 327, 2 L. R. A. 332; *In re Von Dieselskie*, 5 Mack. (D. C.) 485; *Commonwealth v. Fox*, 7 Pa. St. 336.

⁴ *In re Chapman*, 37 Fed. 327, 2 L. R. A. 332.

⁵ *In re Perrone*, 89 Fed. 150.

⁶ *In re Falconer*, 91 Fed. 649.

⁷ *That they do. In re Burns*, 87 Fed. 796.

Contra, Lanahan v. Birge, 30 Conn. 438.

⁸ *United States v. Bainbridge*, 1 Mason (U. S.) 71; *In re Doyle*, 18 Fed. 369; *In re Norton*, 98 Fed. 606; *Commonwealth v. Downes*, 41 Mass. (24 Pick.) 227.

§ 1584. **Valid contracts—Apprenticeship.** Under the old theory of an infant's contracts, a reasonable contract for teaching him a trade was for his benefit;¹ under the modern theory it is held to be a necessary.² For one or the other of these reasons, many authorities have held that a contract of apprenticeship executed by an infant is binding upon him at common law.³ In these cases, however, there were either statutes making such a contract valid, or the infant had not taken proper steps to avoid the contract. Other authorities have held that at common law in the absence of statute or local custom an infant's contract of apprenticeship is voidable and not valid.⁴ Under some statutes an infant is empowered to bind himself by a contract of apprenticeship.⁵ In England an apprenticeship deed executed by an infant apprentice is not enforceable against him if the covenants are detrimental to him;⁶ but otherwise it is enforceable.⁷ Under some of these statutes, a master may recover from an infant apprentice for damages for breach of his covenants,⁸ or for deferred premiums.⁹ Under other statutes no such action can be maintained against an infant who pleads infancy.¹⁰ If the infant does not sign the articles of apprenticeship it is void as to him.¹¹

Contra, *In re McNulty*, 2 Low. (U. S.) 270; *In re McLave*, 8 Blatch. (U. S.) 67 [disapproved in *In re Norton*, 98 Fed. 606].

¹ *Rex v. Wigston*, 3 B. & C. 484.

² *Walter v. Everard* [1891], 2 Q. B. 369; *Pardey v. American Ship Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. 706.

³ *England. Rex v. Arundel*, 5 M. & S. 257; *Cooper v. Simmons*, 7 H. & N. 707.

Canada. Rex v. Wigston, 3 B. & C. 484, 5 Dowl. & R. 339.

Pennsylvania. Bratzman v. Bunnell, 5 Whart. (Pa.) 128, 34 Am. Dec. 537.

Rhode Island. Pardey v. Ship Windlass Co., 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. 706.

South Carolina. Frazier v. Rowan, 2 Brev. (S. Car.) 47. So by local custom. *Horn v. Chandler*, 1 Mod. 271.

⁴ *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777; *Harney v. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662.

⁵ *Whitmore v. Whitcomb*, 43 Me. 458; *Harper v. Gilbert*, 59 Mass. (5 Cush.) 417; *Fisher v. Lunger*, 33 N. J. L. 100;

State v. Reuff, 29 W. Va. 751, 6 Am. St. Rep. 676, 2 S. E. 801.

⁶ *Corn v. Matthews* [1893], 1 Q. B. 310.

⁷ *Green v. Thompson* [1899], 2 Q. B. 1.

⁸ *Woodruff v. Logan*, 6 Ark. 276, 42 Am. Dec. 695.

⁹ *Walter v. Everard* [1891], 2 Q. B. 369. This case distinguishes *Gylbert v. Fletcher*, Cro. Car. 179, on the ground that in the latter case ample remedies for enforcing good behavior existed in the master's right of punishment, or if appealing to a justice of the peace; reasons which "do not apply to a covenant by an infant to pay a premium."

¹⁰ *Gylbert v. Fletcher*, Cro. Car. 179; *Lylly's Case*, 7 Mod. 15; *Moses v. Stevens*, 19 Mass. (2 Pick.) 332. Ordinary contracts for work and labor present different questions from contracts of apprenticeship which involve instruction, and are separately discussed.

¹¹ *Anderson v. Young*, 54 S. Car. 388, 44 L. R. A. 277, 32 S. E. 448.

§ 1585. Valid contracts—Performance of legal duty. If a liability is imposed upon an infant by common law, equity or statute, a fair and reasonable contract entered into for the purpose of discharging the liability is valid.¹ Thus if an infant holds the legal title to property in trust and agrees to and does execute the trust he can not thereafter avoid such executed agreement.² If property is conveyed to an infant as trustee with power to convey in accordance with the instructions of the beneficiary, the trustee can not avoid his conveyance in accordance with the instructions of the beneficiary by reason of the infancy of the trustee.³ So where a mortgage debt is discharged, an infant mortgagee is bound by his release;⁴ and an infant to whom the legal title is conveyed in order to defraud his father's creditors is bound by his conveyance at his father's direction,⁵ especially where he conveys for the benefit of the defrauded creditors.⁶ So an infant who by agreement with the executor buys land in his own name at the executor's sale and at once conveys it to the executor, can not afterward avoid such conveyance.⁷ Since an infant as well as an adult is subject to criminal law, it follows that bonds and other undertakings entered into pursuant to such laws are valid. Of this class are recognizances,⁸

¹ *Alabama*. *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

California. *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599.

Kentucky. *Stowers v. Hollis*, 83 Ky. 544.

Ohio. *Starr v. Wright*, 20 O. S. 97.

Oregon. *Burton v. Anthony*, 46 Or. 47, 79 Pac. 185.

Pennsylvania. *Williams v. Ivory*, 173 Pa. St. 536, 34 Atl. 291; *Hlawaty v. Zeock*, 253 Pa. St. 311, 98 Atl. 557.

Texas. *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506.

Virginia. *Clary v. Spain*, 119 Va. 58, 89 S. E. 130.

² *Alabama*. *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

California. *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599.

Iowa. *Prouty v. Edgar*, 6 Ia. 353.

(Where the minor conveyed the legal title.)

Nebraska. *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. 302. (Where the minor mortgaged the legal title.)

Pennsylvania. *Hlawaty v. Zeock*, 253 Pa. St. 311, 98 Atl. 557.

West Virginia. *Trader v. Jarvis*, 23 W. Va. 100. (Where the minor assigned his interest in an indemnity bond on being protected against loss.)

³ *Hlawaty v. Zeock*, 253 Pa. St. 311, 98 Atl. 557; *Clary v. Spain*, 119 Va. 58, 89 S. E. 130.

⁴ *Zouch v. Parsons*, 3 Burr. 1794.

⁵ *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

⁶ *Starr v. Wright*, 20 O. S. 97.

⁷ *Sheldon's Lessee v. Newton*, 3 Q. S. 494.

⁸ *State v. Weatherwax*, 12 Kan. 463; *McCall v. Parker*, 54 Mass. (13 Met.) 372, 46 Am. Dec. 735.

bonds to pay fines,⁹ and assignments to avoid arrest.¹⁰ Thus a minor who had fraudulently obtained goods by representing himself to be of full age, and who was lawfully arrested therefor on a civil suit, which arrest he avoided by making an assignment under the statute, can not avoid such assignment.¹¹ Further, an infant is subject to the statutes concerning bastardy as well as an adult; and therefore his undertakings under such statutes, such as bonds to the public, to support the child,¹² or agreements with the mother, by way of compromise, for its support,¹³ bind him, since their validity is based on legal duty rather than assent. Other examples of valid contracts are dissolving bonds or redelivery bonds, given by an infant to obtain possession of his property previously attached, or the proceeds thereof.¹⁴ So agreements for the discharge of valid liens are binding.¹⁵ So a male infant who marries is bound at common law for his wife's ante-nuptial debts.¹⁶

§ 1586. Valid contracts—Necessaries—Nature of liability. In some cases the courts have said that an infant's contract for necessaries is absolutely valid and binding;¹ and in others, they have gone to the opposite extreme and held that an infant could not be held on his contract for necessaries at all, but only on his legal liability to pay for them.² Both of these forms of expression are

⁹ *Dial v. Wood*, 68 Tenn. (9 Baxt.) 296.

¹⁰ *People v. Mullin*, 25 Wend. (N. Y.) 698; *Williams v. Ivory*, 173 Pa. St. 536, 34 Atl. 291.

¹¹ *Williams v. Ivory*, 173 Pa. St. 536, 34 Atl. 291, in which case the court said, citing and quoting *People v. Mullin*, 25 Wend. (N. Y.) 698, "an infant as well as an adult was entitled to the benefit of the act which is general in its terms, viz., 'every person may at any time petition,' etc. Besides the relief from imprisonment being so highly beneficial to the petitioner his act in making an assignment must in law be regarded as valid notwithstanding his nonage."

¹² *Bordentown v. Wallace*, 50 N. J. L. 13, 11 Atl. 267; *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272.

¹³ *Gavin v. Burton*, 8 Ind. 69; *Stowers v. Hollis*, 83 Ky. 544.

¹⁴ *Sanger v. Hibbard*, 2 Ind. Terr. 547, 53 S. W. 330.

¹⁵ Where there was a mortgage on land given to a minor by her father, and subsequently the father agreed with the mortgagee for an extension of time, the minor not objecting and the mortgage was then assigned, it was held that the assignee had a valid lien. *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506.

¹⁶ *Butler v. Breck*, 48 Mass. (7 Met.) 164, 39 Am. Dec. 768; *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258.

¹ *In re Pauly's Estate* (Ia.), 156 N. W. 355; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463. See effect of statute discussed in obiter, in *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

² *England*. *In re Soltyskoff* [1891], 1 Q. B. 413.

largely obiter and the true rule which is supported by the great weight of authority is that an infant's contract for necessities received by him may be the foundation of an action but that it differs from a valid contract of the ordinary type in that only the reasonable value of the necessities furnished and not the price contracted for, may be recovered.³ Even under a statute which provides that no contract of a person under guardianship shall be valid, a minor under guardianship is liable for necessities such as food and lodging furnished to herself and to her child.⁴ An agreement by a minor employe that his employer shall pay all his wages to dealers who supplied the family with which such minor boarded, is enforceable only to the extent of a reasonable support for such minor; and he can recover the excess of his wages above such support.⁵ Thus while a minor may repudiate a contract with his attorneys to pay half the sum recovered, he can not refuse a reasonable compensa-

Illinois. Bliss v. Perryman, 1 Scam. (2 Ill.) 484.

Indiana. Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759.

Kentucky. Beeler v. Young, 1 Bibb. (Ky.) 519.

Washington. Plummer v. Northern Pacific Ry. Co., 98 Wash. 67, 167 Pac. 73.

³ **England.** Walter v. Everard [1891], 2 Q. B. 369.

Alabama. Smoot v. Ryan, 187 Ala. 396, 65 So. 828; Sims v. Gunter, — Ala. —, 78 So. 62.

Connecticut. Barnes v. Barnes, 50 Conn. 572.

Delaware. Burton v. Willin, 6 Houst. (Del.) 522, 22 Am. St. Rep. 363.

Illinois. Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538.

Indiana. Price v. Sanders, 60 Ind. 310.

Maine. Kilgore v. Rich, 83 Me. 305, 23 Am. St. Rep. 780, 12 L. R. A. 859, 22 Atl. 176.

Massachusetts. Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761; Earle v. Reed, 51 Mass. (10 Met.) 387; Stone v. Dennison, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654.

Michigan. Welch v. Olmstead, 90 Mich. 492, 51 N. W. 541.

Mississippi. Epperson v. Nugent, 67 Miss. 45, 34 Am. Rep. 434.

New Hampshire. Locke v. Smith, 41 N. H. 346.

Rhode Island. Genereux v. Sibley, 18 R. I. 43, 25 Atl. 345; Pardey v. Windlass Co., 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. 706.

South Carolina. Rainwater v. Durham, 2 Nott. & McC. (S. Car.) 524, 10 Am. Dec. 637.

Texas. Askey v. Williams, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101; Smith v. Crohn (Tex. Civ. App.), 37 S. W. 469.

"An infant may make an express written contract for necessities upon which he may be sued, but * * * by showing the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessities received by him." Askey v. Williams, 74 Tex. 294, 297, 5 L. R. A. 176, 11 S. W. 1101.

⁴ **McConnell v. McConnell**, 75 N. H. 385, 74 Atl. 875.

⁵ **Genereux v. Sibley**, 18 R. I. 43, 25 Atl. 345.

tion.⁶ The right of a minor to refuse to pay an unreasonable contract price is especially true where an unfair advantage was taken of him by false representations as to the value of the goods.⁷ The liability of the minor, furthermore, "does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed upon an infant too young to understand the nature of a contract at all"⁸—and, accordingly, an infant may be held for necessities in the absence of any express contract.⁹ As a corollary, it follows that an executory contract for necessities—that is, for necessities not yet received by the infant—has none of the peculiarities of an executed contract for necessities, but is voidable like the ordinary contract of an infant.¹⁰ A minor who has agreed to lease a room for a certain period and who has abandoned it before the expiration of such period, paying rent for the time for which he occupied the room at the contract rate, is not liable for the rent for the remainder of such original period.¹¹ An infant who had contracted for a course in pharmacy and who had paid in advance may repudiate his contract, leave the college at which such instruction is given, and re-

⁶ *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821 (provided their services are necessities, or are beneficial). See § 1588.

⁷ *Welch v. Olmstead*, 90 Mich. 492, 51 N. W. 541.

⁸ *Connecticut*. *Gregory v. Lee*, 64 Conn. 407, 25 L. R. A. 618, 30 Atl. 53.

Massachusetts. *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761.

Mississippi. *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

New York. *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158.

North Carolina. *Hyman v. Cain*, 48 N. Car. (3 Jones L.) 111.

⁹ "The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies a promise to pay, from the necessities of his situation; just as in the case of a lunatic." *Trainer v.*

Trumbull, 141 Mass. 527, 530, 6 N. E. 761.

¹⁰ *Wallin v. Highland Park Co.*, 127 Ia. 131, 102 N. W. 839; *Jones v. Valentine's School*, 122 Wis. 318, 99 N. W. 1043; *Gregory v. Lee*, 64 Conn. 407, 25 L. R. A. 618, 30 Atl. 53. In this case an infant while attending college hired a room for ten months. He occupied it for four months and then left, after paying rent in full to the time of leaving. It was held that he was not liable for the rent beyond the time that he occupied the room. So of a lease of a house by a married infant. *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177. In *Pool v. Pratt*, 1 Chip. (Vt.) 252, 254, the court said, "If he contract to purchase articles ever so necessary, he is not holden by his contract to receive and pay for the articles."

¹¹ *Gregory v. Lee*, 64 Conn. 407, 25 L. R. A. 618, 30 Atl. 53.

cover the amount paid in by him less reasonable compensation for the tuition which he has actually received.¹²

The liability of an infant for necessities is one created by the law for the good of the infant, since if he could not bind himself in any way for necessities, a minor though owning property would be left to the charities of those who would, in reliance solely on his honor, provide him with the means of living.¹³

§ 1587. What are necessities. Whether the goods furnished to the infant may be necessities, and whether there is any evidence tending to show that the goods were necessities, is a question for the court to decide, and is usually treated as a question of law; whether under the circumstances of each particular case the goods furnished were necessities is a question of fact, and in jury cases is to be decided by the jury under proper instructions from the court.¹ Therefore precedents can not be followed rigidly, but full regard must be paid to the attending circumstances of the case under discussion, and of the case relied upon as a precedent. The general rule as to what may be necessities is that they are "those things that are conducive and fairly proper for his comfortable support and education according to his fortune and rank. So that what would be considered necessary in one case would not be so regarded in another. The rule is entirely relative in its operation."² While not a definite and exact rule, it can not safely be stated more

¹² Wallin v. Highland Park Co., 127 Ia. 131, 102 N. W. 839.

¹³ Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761; Squier v. Hydliff, 9 Mich. 274. "The liability of an infant for necessities is based on the necessity of his situation. As he must live, the law allows to any one supplying his wants a reasonable compensation. The law implies the promise to pay from the necessity of his situation." Epperson v. Nugent, 57 Miss. 45, 47, 34 Am. Rep. 434.

¹ England. Peters v. Fleming, 6 M. & W. 42; Ryder v. Wombell, L. R. 4 Ex. 32.

Illinois. McKanna v. Merry, 61 Ill. 177.

Indiana. Garr v. Haskett, 86 Ind. 373.

Massachusetts. Tupper v. Caldwell, 53 Mass. (12 Met.) 559, 46 Am. Dec. 704; Davis v. Caldwell, 66 Mass. (12 Cush.) 512.

Mississippi. Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

Nebraska. Englebert v. Troxell, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

North Carolina. Jordan v. Coffield, 70 N. Car. 110.

Pennsylvania. Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

Tennessee. Grace v. Hale, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296.

² Rivers v. Gregg, 5 Rich. Eq. (S. Car.) 274, 278.

exactly, and has been repeated often.³ It follows that the infant's station in life must be regarded in determining what are necessities.⁴

§ 1588. Examples of necessities. Lord Coke said, in a rule much quoted since, "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction whereby he may profit himself afterwards."¹ Much of the subsequent law of necessities is merely an amplification of this short rule. Thus food,² lodging,³ suitable clothing,⁴ medical attendance,⁵ and nursing in time of sickness,⁶ and services rendered by a dentist,⁷ may all be necessities.

³ England. *Peters v. Fleming*, 6 Mees. & W. 43; *Hanas v. Slaney*, 8 Term. R. 578.

Kentucky. *Smithpeters v. Griffin's Admr.*, 49 Ky. (10 B. Mon.) 259.

Massachusetts. *Tupper v. Caldwell*, 62 Mass. (12 Met.) 559, 46 Am. Dec. 704.

Mississippi. *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

New York. *International Text Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

North Carolina. *Brayshaw v. Eaton*, 7 Scott 183, 5 Bing. (N. Car.) 231.

⁴ England. *Hanas v. Slaney*, 8 T. R. 578.

Connecticut. *Strong v. Foote*, 42 Conn. 203.

Massachusetts. *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512.

South Carolina. *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274.

Vermont. *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537.

¹ Co. Litt. 172a.

² Connecticut. *Barnes v. Barnes*, 50 Conn. 572.

Indiana. *Price v. Sanders*, 60 Ind. 310.

Maine. *Kilgore v. Rich*, 83 Me. 305,

23 Am. St. Rep. 780, 12 L. R. A. 859, 22 Atl. 176.

Massachusetts. *Stone v. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761.

South Carolina. *Saunders v. Ott*, 1 McCord (S. Car.) 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274.

Vermont. *Bradley v. Pratt*, 23 Vt. 378.

³ Connecticut. *Gregory v. Lee*, 64 Conn. 407, 25 L. R. A. 618, 30 Atl. 53.

Indiana. *Price v. Sanders*, 60 Ind. 310.

Maine. *Kilgore v. Rich*, 83 Me. 305, 23 Am. St. Rep. 780, 12 L. R. A. 859, 22 Atl. 176.

Massachusetts. *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761.

South Carolina. *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274.

⁴ *Price v. Sanders*, 60 Ind. 310; *Stone v. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Saunders v. Ott*, 1 McCord (S. Car.) 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274.

⁵ *Price v. Sanders*, 60 Ind. 310; *Saunders v. Ott*, 1 McCord (S. Car.) 572.

⁶ *Werner's Appeal*, 91 Pa. St. 222.

⁷ *Strong v. Foote*, 42 Conn. 203.

A trade education,⁸ and a common school education,⁹ have been held to be necessities; but not a collegiate,¹⁰ or a professional education.¹¹ A correspondence school course in complete steam engineering which is to extend over a period of five years is *prima facie* not a necessity in the absence of evidence to show whether his father or guardian was not ready and willing to give him a suitable education by such means as the parent or guardian thought proper.¹² On the other hand, it has been held that a course in pharmacy is so far a necessary that an infant who repudiates his contract for a complete course before full performance of such contract, can recover only the amount paid in by him less reasonable compensation for the tuition received.¹³ The propriety of denying that a collegiate or a professional education may be a necessary for one not possessed of wealth, considerable social standing, or marked ability, is very doubtful in this country. It places preparation for teaching or for other learned professions on a less favored footing than preparation for a trade or for business life. In this country, at least, all honest occupations should be equally honorable and equally favored by the law.

Attorney's services rendered in defending an infant in a criminal action,¹⁴ or in a bastardy suit, where imprisonment may result,¹⁵ or in any proceeding involving personal liberty,¹⁶ or in bringing suit for a female infant for an indecent assault,¹⁷ are necessities. So in an extreme case are legal services in prosecuting a suit for breach of promise, where seduction was an aggravation of damages.¹⁸

⁸ *Walter v. Everard* [1891], 2 Q. B. 369; *Pardey v. American Ship-Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. 706.

⁹ *Peters v. Fleming*, 6 Mees. & W. 42; *Saunders v. Ott*, 1 McCord. (S. Car.) 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274. See the obiter to this effect in *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537.

¹⁰ *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537.

¹¹ *Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574; *Bouchell v. Clary*, 3 Brev. (S. Car.) 194.

¹² *International Text Book Co. v.*

Connelly, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

¹³ *Wallin v. Highland Park Co.*, 127 Ia. 131, 102 N. W. 839.

¹⁴ *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101.

¹⁵ *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160.

¹⁶ *McCrillis v. Bartlett*, 8 N. H. 569.

¹⁷ *Crafts v. Carr*, 24 R. I. 397, 96 Am. St. Rep. 721, 60 L. R. A. 128, 53 Atl. 275. (The action having resulted successfully.)

¹⁸ *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151. In this case the minor was pregnant and destitute. Her attorney instituted breach of promise

Attorneys' fees in a civil action,¹⁹ as in resisting the probate of a will by which an infant was disinherited,²⁰ or attorneys' fees in defending a foreclosure suit,²¹ or in searching records and advising the infant of his rights,²² or in recovering land,²³ are not necessities, the law preferring to compel parties to contract with the infant's guardian in matters pertaining to his property.

Contrary to the views just expressed, and in accordance with a principle hereafter discussed,²⁴ it has been held that any beneficial legal services which result in advantage to the infant's estate are necessities.²⁵ Services rendered to a minor by an attorney in an action to recover damages for personal injuries in which the minor recovers a judgment for such injuries,²⁶ or services rendered by an attorney to a minor in establishing a will under which such minor took, have been regarded as necessities so that the minor can not avoid payment for such services.

Recognizances,²⁷ and other contracts to procure release from lawful imprisonment,²⁸ are treated as necessities.

Since the law discourages an infant from incurring business debts, purchases for purposes of business,²⁹ such as a barber-shop

proceedings, which were compromised by her marriage with the defendant. The attorney then brought suit against her and her husband for reasonable attorney fees. It was held that he could recover. In *Petrie v. Williams*, 68 Hun (N. Y.) 589, it was held that a contract by an infant to pay her attorney half the amount recovered for her in a breach of promise suit was not enforceable beyond a reasonable fee.

¹⁹ *Slusher v. Weller*, 151 Ky. 203, 151 S. W. 684 (employment by minor's relatives, etc.); *McIsaac v. Adams*, 190 Mass. 117, 112 Am. St. Rep. 321, 5 Am. & Eng. Ann. Cas. 729, 76 N. E. 654 (employment by minor's relatives, etc.); *Marx v. Hefner*, 46 Okla. 453, 149 Pac. 207; *Watts v. Houston*, — Okla. —, 165 Pac. 128.

²⁰ *Watts v. Houston*, — Okla. —, 165 Pac. 128.

²¹ *Englebert v. Troxwell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177,

58 N. W. 852 (including services as guardian ad litem).

²² *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176.

²³ *Phelps v. Worcester*, 11 N. H. 51; *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 853.

²⁴ See § 1623.

²⁵ *Hickman v. McDonald*, 164 Ia. 50, 145 N. W. 322; *Sutton v. Heinzle*, 84 Kan. 756, 34 L. R. A. (N.S.) 238, 115 Pac. 560, 116 Pac. 614; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372.

²⁶ *Sutton v. Heinzle*, 84 Kan. 756, 34 L. R. A. (N.S.) 238, 115 Pac. 560, 116 Pac. 614; *Elk Valley Coal Mining Co. v. Willis*, 149 Ky. 449, 149 S. W. 849.

²⁷ *State v. Weatherwax*, 12 Kan. 463.

²⁸ *Buckinghamshire v. Drury*, 2 Eden. 60; *Clark v. Leslie*, 5 Esp. 28.

²⁹ *Covault v. Nevitt*, 157 Wis. 113, 51 L. R. A. (N.S.) 1092, 146 N. W. 1115.

and furnishings,³⁰ a horse,³¹ or food for horses,³² or a wagon to be used in farming,³³ or supplies for a plantation,³⁴ are not necessities. Articles purchased for business are, however, necessities as far as actually applied to the support of the minor.³⁵ So, as his property is best managed by his guardian, an infant's contracts for the preservation of his property, as for repairs,³⁶ even if required to preserve a dwelling-house,³⁷ though occupied by the infant,³⁸ are not necessities; nor are materials for the construction of a house,³⁹ nor fire insurance.⁴⁰ But while material used in erecting improvements upon an infant's realty is not looked upon at common law as a necessary, equity will subrogate the party who makes the improvements to the increased value of the premises due to such improvement,⁴¹ or to the increase in the rental value due there-

³⁰ *Ryan v. Smith*, 165 Mass. 303, 43 N. E. 109.

³¹ *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557; *Rainwater v. Durham*, 2 Nott. & McCord. (S. Car.) 524, 10 Am. Dec. 637; *Grace v. Hale*, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296.

Contra, *Mohney v. Evans*, 51 Pa. St. 80.

³² *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Mason v. Wright*, 44 Mass. (13 Met.) 306.

³³ *Paul v. Smith*, 41 Mo. App. 275.

³⁴ *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449.

³⁵ *Turberville v. Whitehouse*, 1 Car. & P. 94, 12 Price 693.

³⁶ *Tupper v. Caldwell*, 53 Mass. (12 Met.) 559, 46 Am. Dec. 704; *Horstmeyer v. Connors*, 56 Mo. App. 115; *Allen v. Lardner*, 78 Hun (N. Y.) 603; *Phillips v. Lloyd*, 18 R. I. 99, 25 Atl. 909.

³⁷ *Wallis v. Bardwell*, 126 Mass. 366; *Tupper v. Caldwell*, 53 Mass. (12 Met.) 559, 46 Am. Dec. 704.

³⁸ *Horstmeyer v. Connors*, 56 Mo. App. 115.

³⁹ *Price v. Sanders*, 60 Ind. 310; *Price v. Jennings*, 62 Ind. 111; *Warnock v.*

Loar (Ky.), 11 S. W. 438; *Freeman v. Bridger*, 49 N. Car. (4 Jones L.) 1, 67 Am. Dec. 258; *Shumate v. Harbin*, 35 S. Car. 521, 15 S. E. 270.

If the improvement is not authorized by infants who have a homestead interest only, it can not be charged against their interest. *Morris v. Mitchell* (Ky.), 39 S. W. 250.

Some cases seem to hold the infant liable for reasonable repairs made by his orders. *Chapman v. Hughes*, 61 Miss. 339.

⁴⁰ *New Hampshire, etc., Co. v. Noyes*, 32 N. H. 345. But the insurer can not avoid the contract. *Monaghan v. Ins. Co.*, 53 Mich. 238, 18 N. W. 797.

⁴¹ In *McGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326, money was loaned to pay off prior liens and to erect a building. The court held that the property should be sold and the proceeds applied: (1) to reimburse the lender for the amounts advanced for liens; (2) to pay to the infant the value of the realty less the amount of the liens and the value of the building; (3) to pay to the lender the residue which would represent the present value of the building. This modified, *Utermehle v. McGreal*, 1 D. C. App. 359, in which the entire loan was ordered repaid first,

to.⁴² An infant's contract for the employment of a janitor to work in a building which the infant owns, is not a contract for necessities.⁴³

Articles which are used by an infant as a means of diversion,⁴⁴ such as an automobile which is used for pleasure,⁴⁵ or a motorcycle,⁴⁶ or a horse and buggy which was bought by a clerk and was not shown to be used in his business,⁴⁷ or a bicycle,⁴⁸ as where bought by a female servant,⁴⁹ or by a girl of seventeen,⁵⁰ have been held in each case not to be necessities. But where the use of bicycles was common among persons of the infant's station in life in the surrounding neighborhood, it was held not error to find affirmatively that it was a necessary.⁵¹

Life insurance is not a necessary.⁵² Articles which are mere ornaments or luxuries, as betting books,⁵³ expensive dinners,⁵⁴ ex-

out of the proceeds of the sale. For a somewhat similar result, though with less clear reasoning, see *Rundle v. Spencer*, 67 Mich. 189, 34 N. W. 548. In *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805, a similar result was obtained, where the minor had bought land, subject to liens, and afterwards had borrowed money on a mortgage and thereby discharged the liens, by treating the sale of the land by the minor after majority as a ratification of the entire transaction, including the mortgage.

⁴² In *Shumate v. Harbin*, 35 S. Car. 521, 15 S. E. 270, the party furnishing materials was, however, subrogated to the increased rents due to the improvement to be applied on his debt. The contract, further, was made by the infant's guardian by nature.

⁴³ *Covault v. Nevitt*, 157 Wis. 113, 51 L. R. A. (N.S.) 1092, 146 N. W. 1115.

⁴⁴ *Howard v. Simpkins*, 70 Ga. 322; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420; *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813; *Raymond v. General Motorcycle Sales Co.*, 230 Mass. 54, 119 N. E. 359.

⁴⁵ *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

⁴⁶ *Raymond v. General Motorcycle Sales Co.*, 230 Mass. 54, 119 N. E. 359.

⁴⁷ *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420. So as to a buggy. *Howard v. Simpkins*, 70 Ga. 322.

⁴⁸ *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813.

⁴⁹ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775.

⁵⁰ *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703, 47 L. R. A. 303, 55 N. E. 275. In this case the court of appeals assumed, without expressly deciding, that the bicycle was not a necessary.

⁵¹ *Clyde Cycle Co. v. Hargreaves (Q. B.)*, 78 Law T. N. S. 296. In this case a minor earning 21 shillings a week bought a racing bicycle for £12 10s., with which he won some racing prizes and which he used on the road somewhat. A road wheel would have cost a little more.

⁵² *Simpson v. Ins. Co.*, 184 Mass. 348, 68 N. E. 673.

⁵³ *Jenner v. Walker*, 19 L. T. 398.

⁵⁴ *Brooker v. Scott*, 11 Mees. & W. 67.

pensive jewelry,⁵⁵ an expensive chronometer,⁵⁶ or "liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddlestrings, etc., amounting to \$111.53½,"⁵⁷ are not necessities.

In general, whatever would be necessities if for the infant himself, are necessities if supplied to his wife and children if he is married,⁵⁸ or even to his illegitimate children, if he is not.⁵⁹

§ 1589. Effect of special circumstances. The examples given in the preceding section illustrate prima facie rules only. Special circumstances may bring within the class of necessities, articles which ordinarily do not belong to it. Thus the direction of a physician to take horse-back exercise may make a horse a necessary.¹ Sickness may make expensive fruits necessary.² Expensive jewelry may be necessary as an engagement present,³ and expensive goods furnished at a wedding may be necessities, though they would not ordinarily be so classed.⁴

§ 1590. Effect of excessive supply of articles. To allow a recovery against an infant, the articles furnished must not only be such as may be necessities, but they must also be in fact necessary for the infant under the actual circumstances. Accordingly, goods which would be necessities if furnished in reasonable quantity may be furnished in such excess as not to be necessities, at least as to the excess over a reasonable amount;¹ while if the infant is in fact furnished with the articles sold, the vendor can not recover for the additional supply as for necessities.² The better view of the infant's liability in the latter case is that it depends upon the fact that he is not supplied with the articles furnished, and not upon the good faith or the careful inquiry into the facts made by the party sup-

⁵⁵ *Ryder v. Wombell*, L. R. 4 Ex. 32.

⁵⁶ *Berolles v. Ramsey*, Holt N. P. 77.

⁵⁷ *Saunders v. Ott* (S. Car.), 1 McCord 572.

⁵⁸ *Cantine v. Phillips' Admr.*, 5 Harr. (Del.) 428; *Price v. Sanders*, 60 Ind. 310; *Chapman v. Hughes*, 61 Miss. 339; *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875.

⁵⁹ *Stowers v. Hollis*, 83 Ky. 544.

¹ *Hart v. Prater*, 1 Jur. 623.

² *Wharton v. Mackenzie*, 5 Q. B. 606.

³ *Jenner v. Walker*, 19 L. T. 398.

⁴ *Garr v. Haskett*, 86 Ind. 373; *Sams v. Stockton*, 53 Ky. (14 B. Mon.) 232; *Jordan v. Coffield*, 70 N. Car. 110.

¹ *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

² *England*. *Bainbridge v. Pickering*, 2 W. Bla. 1325; *Cook v. Deaton*, 3 Car. & P. 114; *Barnes v. Toye*, L. R. 13 Q. B. D. 410.

Illinois. *McKanna v. Merry*, 61 Ill. 177.

Massachusetts. *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118; *Swift v.*

plying the goods.³ While it is sometimes said that one furnishing goods to an infant should inquire into his circumstances,⁴ this is merely good business advice and not a rule of law. If the goods are in fact necessities the party can recover without showing any previous inquiry;⁵ while if they are not necessities, no amount of careful inquiry will aid the vendor in recovering for necessities. If the infant is supplied with sufficient money for necessities, but instead purchases on credit, the vendor can not recover as for necessities.⁶

§ 1591. Effect of existence of parent or guardian. The existence of a parent or guardian complicates the liability of the infant for necessities. If credit is extended to the parent, the infant can not afterwards be held liable.¹ If the parent or guardian actually supplies the infant with necessities, additional goods are not necessities.² Where the infant lives with his parents, there is a prima

Bennett, 64 Mass. (10 Cush.) 436; Davis v. Caldwell, 66 Mass. (12 Cush.) 512; Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371.

Mississippi. Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

New York. Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652.

Pennsylvania. Guthrie v. Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681.

Tennessee. Elrod v. Myers, 39 Tenn. (2 Head.) 33; Nichol v. Steger, 2 Tenn. Ch. 328 [affirmed, 6 Lea 393].

"If a tradesman trusts an infant he does it at his peril and he can not recover if it turns out that the party has been properly supplied by his friends," per Tenterden, C. J., in Story v. Perry, 4 C. & P. 526, 527; 19 E. C. L. 508.

³Story v. Perry, 4 Car. & P. 526; Barnes v. Toye, L. R. 13 Q. B. D. 410; McKanna v. Merry, 61 Ill. 180; Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371; Perrin v. Wilson, 10 Mo. 451.

⁴"The plaintiff ought to have made inquiry." Cook v. Deaton, 3 C. & P. 114, 14 E. C. L. 232.

⁵Dalton v. Gibb, 7 Scott 117, 5 Bing.

(N. Car.) 198. It has been said "whether inquiry were made or not, the question for the jury would still be the same." Brayshaw v. Eaton, 7 Scott 183, 186; 5 Bing. (N. Car.) 231. In a case of a husband's liability for goods furnished to his wife, the court, in discussing the necessity of inquiry, said: "The report states that the plaintiffs had no knowledge of the circumstances of the husband or the necessities of the wife. That is immaterial. The burden of proof is upon them to show facts which create the defendant's liability. If they sold goods upon his credit without his express authority, they took the risk of being able to prove an authority by implication of law." Eames v. Sweetser, 101 Mass. 78, 80.

⁶Nicholson v. Spencer, 11 Ga. 607; Nicholson v. Wilborn, 13 Ga. 467; Brent v. Williams, 79 Miss. 355, 30 So. 713; Rivers v. Gregg, 5 Rich. Eq. (S. Car.) 274.

Contra, in England, Burghart v. Hall, 4 Mees. & W. 727.

¹Thorp v. Connelly, 48 Mo. App. 59.

²See § 1590.

facie presumption that he is supplied with necessaries.³ It seems to be generally held that a minor living with his parents, who is actually in want by reason of their inability to supply his needs, may be held liable for necessaries furnished.⁴ However, it has been held that where the father was poor and unable to procure medical attendance, the infant was not liable therefor;⁵ but in the same state, where the infant's father was in a soldiers' home, his mother in a reformatory and he himself in an almshouse, the infant is liable to one who furnishes him with support and education.⁶ So an infant may be personally liable for attorney's fees in a damage suit for an indecent assault, as it is not the parent's duty in law to pay for such attorney's services.⁷

§ 1592. Money as a necessary. Money expended for necessaries for an infant,¹ or advanced to pay off a pre-existing debt for necessaries,² is itself a necessary. So is money advanced for a discharge from jail.³ Money itself, contrary to ordinary experience, is not regarded by the common law as a necessary, even if the infant actually expends it for necessaries.⁴ The reason generally given for this absurd but well-settled rule is that the liability of the infant is fixed at the moment of the loan; and since the fund is not a necessary or expended for necessaries at that moment, his subse-

³ Perrin v. Wilson, 10 Mo. 451; State v. Cook, 34 N. Car. (12 Ired. L.) 67; Freeman v. Bridger, 49 N. Car. (4 Jones L.), 67 Am. Dec. 258; Connolly v. Assignees of Hull, 3 McCord. (S. Car.) 6, 15 Am. Dec. 612.

Contra, that such presumption does not exist, Parsons v. Keys, 43 Tex. 567.

⁴ See preceding note. Goodman v. Alexander, 165 N. Y. 289, 55 L. R. A. 781, 59 N. E. 145. In Kline v. L'Amoreux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652, it was said that an infant under the care and control of a parent or guardian, able and willing to furnish him with necessaries, can not bind himself therefor without the consent of such parent or guardian.

⁵ Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371. This case can not be reconciled with the general principles of this doctrine.

⁶ Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761.

⁷ Crafts v. Carr, 24 R. I. 397, 96 Am. St. Rep. 721, 60 L. R. A. 128, 53 Atl. 275.

¹ Randall v. Sweet, 1 Denio (N. Y.) 460.

² Hedgeley v. Holt, 4 Car. & P. 104 (obiter as in this case the articles were not necessaries); Swift v. Bennett, 64 Mass. (10 Cush.) 436; Gilgore v. Rich, 83 Me. 305, 23 Am. St. Rep. 780, 12 L. R. A. 859, 22 Atl. 176.

³ In case of a civil claim, at least if the claim is for necessaries. Clark v. Leslie, 5 Esp. 28.

⁴ Earle v. Peale, 1 Salk. 386, 10 Mod. 67; Darly v. Boucher, 1 Salk. 279; Price v. Sanders, 60 Ind. 310; Bent v. Manning, 10 Vt. 225.

quent investment of it in necessities does not increase his liability. In equity, however, a more rational rule is adopted, and the party lending the money is subrogated as to so much thereof as is expended by the infant for necessities, to the rights of the party furnishing the same.⁵ A loan of money to discharge prior valid liens on realty owned by the minor is not a necessary at law; that is, no personal judgment can be rendered against the minor for such indebtedness;⁶ but in equity the lender is subrogated to the rights of the holder of the prior valid liens, which have been paid off by the money advanced.⁷ This right does not exist where it is not shown that the lien thus discharged was valid as to the infant.⁸ Money loaned to an infant and not expended by him for necessities is, of course, not a necessary.⁹

§ 1593. Voidable contracts. The remaining contracts of an infant are neither valid nor void, but are voidable.¹ He may avoid

⁵ *Marlow v. Pittfield*, 1 P. Wms. 558; *Watson v. Cross*, 2 Dur. (Ky.) 147; *Hickman v. Hall's Admrs.*, 5 Litt. (Ky.) 338.

⁶ *Magee v. Welsh*, 18 Cal. 155; *Bicknell v. Bicknell*, 111 Mass. 265. (In this case the loan was made at the request of the guardian, not of the infant.)

⁷ *McGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326; *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. 564; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037. "These debts having been paid by Mrs. U., the appellees are entitled in equity to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. U. for the loan of \$8,000 to be used in meeting those debts and improving the lot in question." *MacGreal v. Taylor*, 167 U. S. 688, 701, 42 L. ed. 326 [reversing in part on another point, *Utermehle v. MacGreal*, 1 D. C. App. 359].

Contra, *Burton v. Anthony*, 46 Or. 47, 114 Am. St. Rep. 847, 68 L. R. A. 826, 79 Pac. 185.

⁸ *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

⁹ *Root v. Stevenson's Admr.*, 24 Ind. 115; *Kennedy v. Doyle*, 92 Mass. (10 All.) 161; *Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574.

¹ *United States*. *McGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326.

Alabama. *Shropshire v. Burns*, 46 Ala. 108; *Carpenter v. Carpenter*, — Ala. —, 75 So. 472; *Sims v. Gunter*, — Ala. —, 78 So. 62.

Arizona. *Arizona Eastern R. Co. v. Carillo*, 17 Ariz. 115, 149 Pac. 313.

Arkansas. *Savage v. Lichlyter*, 59 Ark. 1, 26 S. W. 12; *Davie v. Padgett*, 117 Ark. 544, 176 S. W. 333.

Illinois. *Cole v. Pennoyer*, 14 Ill. 158; *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045; *Strain v. Hinds*, 277 Ill. 598, 115 N. E. 563.

Indiana. *Alvey v. Reed*, 115 Ind. 148, 7 Am. St. Rep. 418, 17 N. E. 265.

Kansas. *Phipps v. Phipps*, 39 Kan. 495, 18 Pac. 707.

Kentucky. *Breckinridge v. Ormsby*, 24 Ky. (1 J. J. Mar.) 236, 19 Am. Dec. 71; *Henderson v. Clark*, 163 Ky. 192, 173 S. W. 367; *Cain v. Garner*, 169 Ky. 633, L. R. A. 1916E, 682, 185 S. W. 122.

Maryland. *Crew-Levick Co. v. Hull*, 125 Md. 6, 93 Atl. 208.

on the ground of infancy alone without showing fraud.² This implies that they may be disaffirmed or ratified by the infant, the methods and legal consequences of which will be discussed subse-

Massachusetts. *Reed v. Batchelder*, 42 Mass. (1 Met.) 559; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Owen v. Long*, 112 Mass. 403; *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228, 6 L. R. A. 146, 23 N. E. 222; *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17; *Benson v. Tucker*, 212 Mass. 60, 41 L. R. A. (N.S.) 1219, 98 N. E. 589.

Michigan. *Tyler v. Gallop*, 68 Mich. 185, 13 Am. St. Rep. 336, 35 N. W. 902; *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. 166; *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690; *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

Minnesota. *Johnson v. Insurance Co.*, 56 Minn. 365, 43 Am. St. Rep. 473, 26 L. R. A. 187, 59 N. W. 992, 57 N. W. 934.

Mississippi. *Gambrel v. Harper*, 113 Miss. 715, 74 So. 623.

Missouri. *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

Nebraska. *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

New Hampshire. *Danville v. Mfg. Co.*, 62 N. H. 133.

New Jersey. *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506; *La Rosa v. Nichols*, 91 N. J. L. 355, 105 Atl. 201.

New York. *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; *Campbell v. Stokes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

North Dakota. *Casement v. Callaghan*, 35 N. D. 27, 159 N. W. 77.

Ohio. *Harner v. Dipple*, 31 O. S. 72, 27 Am. Rep. 496; *Rush v. Wick*, 31 O. S. 521, 27 Am. Rep. 523.

Oregon. *Burton v. Anthony*, 46 Or. 47, 114 Am. St. Rep. 847, 68 L. R. A. 826, 79 Pac. 185.

Pennsylvania. *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305.

Tennessee. *Scott v. Buchanan*, 30 Tenn. (11 Humph.) 468; *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

Texas. *Cummings v. Powell*, 8 Tex. 80; *Bonner v. Bryant*, 79 Tex. 540, 23 Am. St. Rep. 361, 15 S. W. 49.

Vermont. *Patchin v. Cromach*, 13 Vt. 330.

Virginia. *Mustard v. Wohlford*, 48 Va. (15 Gratt.) 329, 76 Am. Dec. 209; *Clary v. Spain*, 119 Va. 58, 89 S. E. 130.

West Virginia. *Hobbs v. Hinton, Foundry, Machine & Plumbing Co.*, 74 W. Va. 443, 82 S. E. 267.

"Many text-writers state the proposition that the contract of an infant is void, but upon a careful examination of the cases cited by them we are of the opinion that they do not support such a doctrine. * * * To hold the executory contract of a minor void would unsettle the law in many of its branches. It would necessitate the holding that the promise of a minor can not furnish a consideration for the promise of an adult, and the latter's promise would be void, both for want of consideration and for lack of mutuality, whereas the contrary is the settled law based upon the proposition that the infant's contract is only voidable." *Brown v. Bank*, 88 Tex. 265, 274; 33 L. R. A. 350, 31 S. W. 285.

² *Arizona Eastern R. Co. v. Carillo*, 17 Ariz. 115, 149 Pac. 313.

quently.³ By the great weight of authority not only executory contracts,⁴ but also contracts fully performed by one or both of the parties thereto,⁵ are voidable. A contract by which an infant advances money to a broker for the purchase of stocks may be avoided by the infant after such money has been invested in accordance with the infant's instructions and after the broker has executed all orders which the infant gave to him.⁶ An infant's assignment of an insurance policy is voidable only, and not void.⁷ It will be seen from the special classes of contracts hereafter discussed that

³ See §§ 1602 et seq.

⁴ **Alabama.** *Sims v. Gunter*, — Ala. —, 78 So. 62.

Arkansas. *Savage v. Lichlyter*, 59 Ark. 1, 26 S. W. 12.

Connecticut. *Gregory v. Lee*, 64 Conn. 407, 25 L. R. A. 618, 30 Atl. 53.

Illinois. *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045.

Iowa. *Des Moines Ins. Co. v. McIntire*, 99 Ia. 50, 68 N. W. 565.

New Hampshire. *Danville v. Mfg. Co.*, 62 N. H. 133.

Ohio. *Harner v. Dipple*, 31 O. S. 72, 27 Am. Rep. 496; *Rush v. Wick*, 31 O. S. 521, 27 Am. Rep. 523.

⁵ **Alabama.** *Sims v. Gunter*, — Ala. —, 78 So. 62.

Arkansas. *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

Georgia. *Walker v. Pope*, 101 Ga. 665, 29 S. E. 8.

Kentucky. *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447.

Massachusetts. *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228, 6 L. R. A. 146, 23 N. E. 222; *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577; *Benson v. Tucker*, 212 Mass. 60, 41 L. R. A. (N.S.) 1219, 98 N. E. 589.

Michigan. *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. 166; *Barney v. Rutledge*, 104 Mich. 289, 62 N. W. 369.

Minnesota. *Nichols, etc., Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516.

Missouri. *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

Montana. *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

Nebraska. *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 832.

North Carolina. *Hogan v. Utter*, 175 N. Car. 332, 95 S. E. 565.

Pennsylvania. *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114.

Tennessee. *Grace v. Hale*, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296; *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

Texas. *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101.

Virginia. *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542.

Wisconsin. *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115; *In re Kane's Estate*, — Wis. —, 168 N. W. 402.

"It is wholly immaterial whether the contract of an infant is executed or executory. He has the right to avoid it." *Leacox v. Griffith*, 76 Ia. 89, 94; 40 N. W. 109.

⁶ *Benson v. Tucker*, 212 Mass. 60, 41 L. R. A. (N.S.) 1219, 98 N. E. 589.

⁷ *Union, etc., Ins. Co. v. Hilliard*, 63 O. S. 478, 81 Am. St. Rep. 644, 53 L. R. A. 462, 59 N. E. 230.

these contracts are voidable even if advantageous to the infant,⁸ as where he sold the goods, purchased by him, without loss,⁹ or profited by the services of an attorney in defending a foreclosure suit,¹⁰ or if the avoidance of such contracts is disastrous to the adversary party, as where he relied on the infant's contract and by delay lost his claim against the estate of the infant's father.¹¹

The dissenting view which holds certain fair, reasonable and executed contracts of a minor to be valid is hereafter discussed.¹²

On sound legal principle and by the better reasoning, an infant's contract, whether executed or executory, is to be treated as binding until it is disaffirmed by him or some one authorized by law to act for him.¹³ Omission of an infant to ratify or to affirm, therefore, leaves the contract in effect.¹⁴ This is on the theory that disaffirmance is a privilege which may be exercised by the infant at his discretion, but that subject to this right, a voidable contract of an infant stands on the same footing as any valid contract.

The courts have said, however, in many cases, that an executory contract of an infant is not valid until it is ratified.¹⁵ An examination of these cases will, however, show that in every case this proposition is a mere dictum, as the contract in each case has been avoided

⁸ California. *Magee v. Welsh*, 18 Cal. 155.

Indiana. *Price v. Jennings*, 62 Ind. 111.

Kentucky. *Warnock v. Loar* (Ky.), 11 S. W. 438.

Massachusetts. *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577; *Tupper v. Caldwell*, 53 Mass. (12 Met.) 559, 46 Am. Dec. 704.

New Hampshire. *Phelps v. Worcester*, 11 N. H. 51.

⁹ *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577.

¹⁰ *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

¹¹ *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228, 6 L. R. A. 146, 23 N. E. 222.

¹² See § 1623.

¹³ England. *Viditz v. O'Hagan* [1899], 2 Ch. 569, 68 L. J. Ch. N. S. 553.

Alabama. *American, etc., Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292.

Florida. *Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N.S.) 33, 55 So. 844.

Maryland. *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071.

Missouri. *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

Nebraska. *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

Pennsylvania. *Logan v. Gardner*, 136 Pa. St. 568, 20 Am. St. Rep. 939, 20 Atl. 625.

¹⁴ *Casement v. Callaghan*, 35 N. D. 27, 159 N. W. 77.

¹⁵ *Morton v. Steward*, 5 Ill. App. 533; *Minock v. Shortridge*, 21 Mich. 304; *Tyler v. Gallop*, 68 Mich. 185, 13 Am. St. Rep. 336, 35 N. W. 902; *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349; *State v. Plaisted*, 43 N. H. 413; *Beardsley v. Hotchkiss*, 96 N. Y. 201.

by the infant in a proper manner. It may be doubted if even these courts really mean all that they say. If the infant's executory contract were of no validity until he affirmed, there would be no consideration for the promise of the adversary party, and he would be able to defeat any action against him by the infant—a conclusion to which no court has come. What is probably meant by this form of statement is that an executory contract, unless ratified, is subject to the defense of infancy until the right of disaffirmance is barred by lapse of time.¹⁶ This right exists, therefore, either for a reasonable time or for the period prescribed by the Statute of Limitations. In the latter case, the right to plead infancy will not be extinguished until the right to sue on the contract is extinguished. In the former case it might be possible that the right to disaffirm would cease before the right of action on the contract would be lost. The doctrine of a reasonable time is generally applied only to executed conveyances. If two infants contract with each other, either has the same right to disaffirm that he has in contracting with an adult.¹⁷

§ 1594. Examples of voidable contracts—Transfers of property. An infant's executory contract to convey realty,¹ or to purchase it;² a lease by him,³ or to him;⁴ and his deed passing realty,⁵ including

¹⁶ See §§ 1611 et seq.

¹⁷ *Drude v. Curtis*, 183 Mass. 317, 62 L. R. A. 755, 67 N. E. 317; *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

¹ Georgia. *White v. Sikes*, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228. Illinois. *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045.

Mississippi. *Yeager v. Knight*, 60 Miss. 730.

Rhode Island. *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

Virginia. *Mustard v. Wohlford*, 48 Va. (15 Gratt.) 329, 76 Am. Dec. 209.

² *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84.

³ *Slator v. Trimble*, 14 Ir. C. L. 342; *Slator v. Brady*, 14 Ir. C. L. 61.

⁴ *Flexner v. Dickerson*, 72 Ala. 318; *Ex parte McFerrer*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, 63 So. 159; *Gregory*

v. Lee, 64 Conn. 407, 25 L. R. A. 618, 30 Atl. 53; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429.

He may recover rent which he has paid if he was not, in fact, in possession of the property. *Ex parte McFerrer*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, 63 So. 159.

⁵ Canada. *McDonald v. Salmon Club*, 33 N. B. 472.

United States. *Tucker v. Moreland*, 35 U. S. (10 Pet.) 58, 9 L. ed. 345.

Alabama. *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732.

California. *Hastings v. Dollarhide*, 24 Cal. 195.

Georgia. *Walker v. Pope*, 101 Ga. 665, 29 S. E. 8.

Illinois. *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; *Strain v. Hinds*, 277 Ill. 598, 115 N. E. 563.

a trust deed,⁶ and his conveyance of his equitable interest,⁷ are all voidable. They are not absolutely void.⁸ His right to avoid is not affected by the fact that adult grantors joined with him as being co-owners,⁹ or by the fact that the property sold has passed into the hands of a bona fide purchaser for value.¹⁰ Thus an infant remainderman assented to a sale of the realty and payment of the proceeds to the life-tenant. It was held that he could repudiate this agreement at the death of the life-tenant, even if the title had passed to an innocent purchaser.¹¹ An infant who makes a settlement of her realty in immediate contemplation of her marriage may avoid such

Indiana. *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041.

Iowa. *Green v. Wilding*, 59 Ia. 679, 44 Am. Rep. 696, 13 N. W. 761.

Kentucky. *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Hoffert v. Miller*, 96 Ky. 572, 6 S. W. 447; *Clay v. Thomas*, 178 Ky. 199, 198 S. W. 762.

Maine. *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318.

Massachusetts. *Kendall v. Lawrence*, 39 Mass. (22 Pick.) 540.

Missouri. *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

Nebraska. *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

New Hampshire. *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38.

New York. *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635 [affirming, 1 Edw. Ch. (N. Y.) 301].

Ohio. *Drake's Lessee v. Ramsey*, 5 Ohio 251; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

Pennsylvania. *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114.

South Carolina. *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 468.

Tennessee. *Wheaton v. Easton*, 11 Tenn. (5 Yerg.) 41, 26 Am. Dec. 251;

Scott v. Buchanan, 30 Tenn. (11 Humph.) 468.

Texas. *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101; *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 47 L. R. A. 326, 54 S. W. 661.

Vermont. *Digelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589.

Virginia. *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542; *Smith v. Smith's Executor*, 107 Va. 112, 122 Am. St. Rep. 831, 12 L. R. A. (N.S.) 1184, 57 S. E. 577.

West Virginia. *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

⁶*Lee v. Hibernia Savings & Loan Society*, 177 Cal. 630, 171 Pac. 677.

⁷*Clay v. Thomas*, 178 Ky. 199, 1 A. L. R. 738, 198 S. W. 762.

⁸*Hogan v. Utter*, 175 N. Car. 332, 95 S. E. 565; *In re Kane's Estate*, — Wis. —, 168 N. W. 402.

⁹*Dunn v. Wheeler*, 86 Me. 238, 29 Atl. 985; *Clapp v. Byrnes*, 155 N. Y. 535, 50 N. E. 277.

See also, *Clay v. Thomas*, 178 Ky. 199, 1 A. L. R. 738, 198 S. W. 762.

¹⁰*Walker v. Pope*, 101 Ga. 665, 29 S. E. 8; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372.

¹¹*Walker v. Pope*, 101 Ga. 665, 29 S. E. 8.

settlement.¹² A contract by which an infant heir agrees with other heirs to keep the estate together is voidable.¹³

Where, however, the rights of the infant and of the co-owners are inseparable, as where they were the heirs to certain realty which was subject to a conditional oil lease, and the adult owner on behalf of all sought to forfeit the lease for a breach of condition, it was held that the minor heirs could repudiate the acts of an adult co-heir in forfeiting such oil lease if it is in fraud of their rights or by mistake but not if for their advantage.¹⁴ So an infant's mortgage of his realty is voidable,¹⁵ even if for necessities.¹⁶ If an infant agrees to buy certain realty from A, and thereafter while still a minor surrenders his interest in such realty for a team of horses, this is a sale of his equity and not a rescission of his original contract to buy the realty; and on coming of age he may repudiate the contract by which he surrendered such interest in realty.¹⁷ His executory contracts to sell personalty,¹⁸ executed sales by him,¹⁹ even if the property has passed into the hands of a bona fide pur-

¹² *Smith v. Smith's Executor*, 107 Va. 112, 122 Am. St. Rep. 831, 12 L. R. A. (N.S.) 1184, 57 S. E. 577.

¹³ *Carpenter v. Carpenter*, — Ala. —, 75 So. 472.

¹⁴ *Wilson v. Goldstein*, 152 Pa. St. 524, 25 Atl. 493. (Hence the minors could not on reaching majority sue on the lease.) In *Springer v. Gas Co.*, 145 Pa. St. 420, 22 Atl. 986, it was held that if a guardian could forfeit an oil lease on behalf of his wards, he could not bind adult co-owners..

¹⁵ *Maine. Hubbard v. Cummings*, 1 Me. 11.

Maryland. Monumental, etc., Association v. Herman, 33 Md. 128.

Massachusetts. Mansfield v. Gordon, 144 Mass. 168, 10 N. E. 773.

New Hampshire. Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

Tennessee. McGan v. Marshall, 26 Tenn. (7 Humph.) 121.

¹⁶ *McGan v. Marshall*, 26 Tenn. (7 Humph.) 121; *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101.

¹⁷ *Beickler v. Guenther*, 121 Ia. 419, 96 N. W. 895.

¹⁸ *Petrie v. Williams*, 68 Hun (N. Y.) 589.

¹⁹ *Florida. Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N. S.) 33, 55 So. 844. *Indiana. White v. Branch*, 51 Ind. 210.

Maine. Williams v. Brown, 34 Me. 594.

Massachusetts. Kingman v. Perkins, 105 Mass. 111.

Michigan. Holmes v. Rice, 45 Mich. 142.

Missouri. Downing v. Stone, 47 Mo. App. 144.

South Carolina. Rainwater v. Durham, 2 Nott. & McCord. (S. Car.) 524, 10 Am. Dec. 637.

Tennessee. Grace v. Hale, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296; *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

Vermont. Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

chaser,²⁰ his delivery of his goods to pay his father's debt,²¹ executed purchases by him other than necessities,²² and chattel mortgages made by him,²³ are alike voidable. The proposition that an infant's purchases are voidable has been qualified by one of our ablest text-book writers. "If an infant goes upon the streets of a city, shopping, he can not afterward retrace his steps and get back the money he paid, even though he tenders the goods in return; for to permit it would render shopkeeping impossible."²⁴ But no authorities are given for this proposition and none appear on investigation. If the goods are necessities and the price is reasonable, the contract is binding; and, in other cases, shopkeeping is perfectly possible without the patronage of minors.

§ 1595. Contracts for work and labor. By the weight of authority a minor may avoid a contract of service entered into by him after performing it in whole or in part and recover the reasonable value of his services.¹ Thus a minor may avoid a contract to forfeit two weeks' wages unless two weeks' notice of leaving is

²⁰ *Downing v. Stone*, 47 Mo. App. 144. There is "no such thing as an innocent purchaser of a minor's property." *Englebert v. Troxell*, 40 Neb. 195, 212; 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

²¹ *Gambrell v. Harper*, 113 Miss. 715, 74 So. 623.

²² *Connecticut. Riley v. Mallory*, 33 Conn. 201.

Indiana. House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420.

Kentucky. Butler v. Stark (Ky.), 79 S. W. 204.

Maine. Robinson v. Weeks, 56 Me. 102.

Massachusetts. McCarthy v. Henderson, 138 Mass. 310.

Michigan. Barney v. Rutledge, 104 Mich. 289, 62 N. W. 369; *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690; *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

Minnesota. Nichols, etc., Co. v. Snyder, 78 Minn. 502, 81 N. W. 516.

Vermont. Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678.

²³ *Barney v. Rutledge*, 104 Mich. 289, 62 N. W. 369; *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407, 2 N. W. 942; *Cogley v. Cushman*, 16 Minn. 397; *Chapin v. Shafer*, 49 N. Y. 407.

²⁴ *Bishop on Contracts, Enlarged Edition*, § 921.

¹ *United States. The Cubadist*, 252 Fed. 658.

Illinois. Ray v. Haines, 52 Ill. 485.

Indiana. Dallas v. Hollingsworth, 3 Ind. 537; *Van Pelt v. Corwine*, 6 Ind. 363; *Haugh, etc., Works v. Duncan*, 2 Ind. App. 264, 28 N. E. 334.

Kentucky. Cain v. Garner, 169 Ky. 633, L. R. A. 1916E, 682, 185 S. W. 122.

Maine. Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; *Derocher v. Mills*, 58 Me. 217, 4 Am. Rep. 286.

Massachusetts. Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St.

given;² or a contract requiring him to work for six months or to give two weeks' notice if he quit, to enable him to recover anything,³ and if he contracts to accept goods for his wages he may avoid this contract and demand money.⁴ The contrary view has been expressed that if an infant receives what he agreed to take for his services he can not recover more.⁵ Of course in any event the amount already paid to the infant should be credited as a part payment.⁶ In Massachusetts a different view is entertained. Thus where A, a minor employe, agreed with his employer that articles not necessities purchased by him should be deducted from A's wages, A afterwards disposed of such articles advantageously. On reaching majority A could repudiate the agreement and recover full wages.⁷ So where a minor worked under a contract that his wages were to be applied to paying off a debt due to his employer from his father's estate, it was held that on his failure to receive anything from his father's estate he could repudiate the contract and recover full wages.⁸ While some courts have practically nullified the right of a minor to avoid such a contract by holding that the employer can also set off against the value of the infant's services, all damages caused by his repudiating his contract,⁹ the better reasoning is that such damages can not be so set off, as the infant has the right to avoid his contract without being liable to any

Rep. 228, 6 L. R. A. 146, 23 N. E. 222; *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577.

Michigan. *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. 923.

Missouri. *Thompson v. Marshall*, 50 Mo. App. 145.

New Hampshire. *Danville v. Mfg. Co.*, 62 N. H. 133; *Hagerty v. Lock Co.*, 62 N. H. 578.

New Jersey. *Voorhees v. Wait*, 15 N. J. L. 343.

Rhode Island. *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3.

Vermont. *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228.

² *Danville v. Mfg. Co.*, 62 N. H. 133.

³ *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286.

⁴ *Abell v. Warren*, 4 Vt. 140.

⁵ *Wilhelm v. Hardman*, 13 Md. 140.

So by statute, *Murphy v. Johnson*, 45 Ia. 57.

⁶ *Waugh v. Emerson*, 79 Ala. 295; *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. 923; *Hagerty v. Lock Co.*, 62 N. H. 578. A minor of nineteen whose father is dead, whose mother is married again and who has no guardian may bind himself by a contract of employment and his employer will be released to the extent of the money and goods furnished the infant in part payment. *Waugh v. Emerson*, 79 Ala. 295.

⁷ *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577.

⁸ *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228, 6 L. R. A. 146, 23 N. E. 222.

⁹ *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 229; *Hoxie v. Lincoln*, 25 Vt. 206; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690.

penalty.¹⁰ The entire value of his services for the entire time worked is recoverable; and this statement, of course, implies that any misconduct or negligence of the infant by which his services are less valuable than they otherwise would be must be allowed for.¹¹ A generally recognized exception to the rule that a minor's contract of service is voidable, is that a contract to work for necessities, if fair and reasonable, can not be avoided as far as it has been executed,¹² and this principle has been applied to a contract for necessities and money,¹³ or necessities and other property;¹⁴ but if his services are reasonably worth more than his board he may recover a reasonable value for his services less board furnished.¹⁵

§ 1596. Contracts of suretyship. Some of the cases which followed the early rule as to the validity of an infant's contracts,¹ took a contract of suretyship as the clearest example of a contract prejudicial to an infant, and declared it void; and this rule has been repeated in later cases in dicta.² In most of these cases the result would have been the same if the contract had been held to be merely voidable, as where a mortgage was given by an infant married woman to secure a partnership,³ or an individual debt.⁴ So a court after saying that a contract of suretyship of a minor was "absolutely void," recognized it as capable of ratification.⁵ The weight of modern authority is that an infant's contract of suretyship is not void, but voidable.⁶ Thus becoming surety in a civil action for

¹⁰ *The Cubadist*, 252 Fed. 658; *De-rocher v. Mills*, 58 Me. 217, 4 Am. Rep. 236; *Danville v. Mfg. Co.*, 62 N. H. 133; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

¹¹ *Vehue v. Pinkham*, 60 Me. 142.

¹² *Squier v. Hydliff*, 9 Mich. 274; *Stone v. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654; *Mountain v. Fisher*, 22 Wis. 93.

¹³ *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. 923.

¹⁴ *Wilhelm v. Hardman*, 13 Md. 140.

¹⁵ *Locke v. Smith*, 41 N. H. 346.

¹ See § 1576.

² *Hastings v. Dollarhide*, 24 Cal. 195; *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686; *Cronise v. Clark*, 4 Md. Ch. 403; *Wheaton v. East*, 11 Tenn. (5 Yerg.) 41, 26 Am. Dec. 251. So

under the early Connecticut statute, *Maples v. Wightman*, 4 Conn. 376, 10 Am. Dec. 149.

³ *Cronise v. Clark*, 4 Md. Ch. 403.

⁴ *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686.

⁵ *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305.

⁶ *Indiana*. *Fetrow v. Wiseman*, 40 Ind. 148.

Kentucky. *Wills v. Evans* (Ky.), 38 S. W. 1090.

Massachusetts. *Owens v. Long*, 112 Mass. 403.

Nebraska. *Johnson v. Storie*, 32 Neb. 610, 49 N. W. 371.

Ohio. *Harner v. Dipple*, 31 O. S. 72, 27 Am. Rep. 496.

Vermont. *Reed v. Lane*, 61 Vt. 481, 17 Atl. 796.

the appearance of the defendant,⁷ or for stay of execution,⁸ or on a note,⁹ are all voidable.

§ 1597. Compromise and arbitration. An infant's contract in compromise of a claim due to him, whether contract,¹ or tort,² is voidable. On his avoiding such contract whatever he has received under the compromise is to be credited upon his claim.³ So a contract by an infant to allow a note given by her to a deceased testator to be deducted from a legacy given to her by the will of such testator is voidable.⁴ It has even been held that the return of the property received under the compromise is a condition precedent to avoiding it.⁵ Moreover, although an infant is liable for his torts, his contract in compromise of a claim against him for his tort is voidable, and upon his avoiding it he may recover whatever he has parted with thereunder, leaving the other party to his original right of action.⁶ A release given by an infant to her guardian on taking his note by way of settlement of her claim against him has been said to be void, and hence not to release the sureties on his bond.⁷ Since even an executed contract of compromise is voidable,

⁷ Reed v. Lane, 61 Vt. 481, 17 Atl. 796.

⁸ Harner v. Dipple, 31 O. S. 72, 27 Am. Rep. 496.

⁹ Fetrow v. Wiseman, 40 Ind. 148; Owens v. Long, 112 Mass. 403; Johnson v. Storie, 32 Neb. 610, 49 N. W. 371.

¹ Commonwealth v. Hantz, 2 Pen. & W. (Pa.) 333.

² England. Mattei v. Vautro (Q. B.), 78 L. T. Rep. 682.

Arizona. Arizona Eastern R. Co. v. Carillo, 17 Ariz. 115, 149 Pac. 313.

Arkansas. St. Louis, etc., Ry. v. Higgins, 44 Ark. 293.

Illinois. Pittsburg, etc., Ry. v. Haley, 170 Ill. 610, 48 N. E. 920. (Settlement made by next friend without leave of court.)

Massachusetts. Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88.

South Carolina. Worthy v. Jonesville Oil Mill, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634.

Texas. Bonner v. Bryant, 79 Tex. 540, 23 Am. St. Rep. 361, 15 S. W. 491.

³ Arizona Eastern R. Co. v. Carillo, 17 Ariz. 115, 149 Pac. 313; Worthy v. Jonesville Oil Mill, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634. See cases cited in two preceding notes.

⁴ In re Cummings' Estate, 120 Ia. 421, 94 N. W. 1117; Murray v. Thompson, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

⁵ Lane v. Coal Co., 101 Tenn. 581, 48 S. W. 1094. See §§ 1617 et seq.

⁶ Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290. In opposition to this view, Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519, holds that an infant's note given in a fair compromise of a tort committed by him is valid.

⁷ Fridge v. State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463. In this case the decision was placed on the ground that the release as distinguished from a

a contract to arbitrate is also voidable;⁸ and some authorities have even said that it is void.⁹

§ 1598. Instruments negotiable in form. While not always clearly expressed, the early view of an infant's negotiable contracts seems to have been that if valid at all, they must be strictly negotiable and subject to no defense in the hands of a bona fide holder for value before maturity. Since under this theory it was impossible for such contracts to be voidable, as they must be either absolutely void or strictly valid, the courts held them void,¹ at least if in the hands of an indorsee.² In these cases, however, the only question involved was whether the infant could not avoid his contract.³ The modern view of such contracts is that while negotiable in form they are not negotiable in law. Minority may always be set up as a defense, even as against a bona fide holder. Accordingly, such contracts are voidable, unless for necessities.⁴ Thus an infant's promise to pay loan from a bank is not void; hence, the promise of his surety is collateral only, not original.⁵ An infant's liability to a surety on his note is also voidable unless for necessities;⁶ but if

mere receipt was prejudicial to the infant. The same result would have followed from holding it voidable.

¹ *Jones v. Payne*, 41 Ga. 23; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Barnaby v. Barnaby*, 2 Mass. (1 Pick.) 221; *Jones v. Bank*, 8 N. Y. 228.

² *Millsaps v. Estes*, 134 N. Car. 486, 46 S. E. 988; *Britton v. Williams*, 20 Va. (6 Munf.) 453.

³ *Burgess v. Merrill*, 4 Taunt. 468; *Swasey v. Vanderheyden's Admr.*, 10 Johns. (N. Y.) 33; *McMinn v. Richmonds*, 10 Tenn. (6 Yerg.) 9.

⁴ *Morton v. Steward*, 5 Ill. App. 533. (In this case the consideration was necessities furnished.)

⁵ Except *Burgess v. Merrill*, 4 Taunt. 468, where it was held that the holder of a bill accepted by an adult and a minor should sue the adult alone.

⁶ *Indiana*. *La Grange, etc., Institute v. Anderson*, 63 Ind. 367, 30 Am. Rep. 224.

Iowa. *Keokuk, etc., Bank v. Hall*, 106 Ia. 540, 76 N. W. 832.

Kentucky. *Best v. Givens*, 42 Ky. (3 B. Mon.) 72; *Stern v. Freeman*, 61 Ky. (4 Met.) 309.

Massachusetts. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Baker v. Stone*, 136 Mass. 405.

Michigan. *Minock v. Shortridge*, 21 Mich. 304.

New Hampshire. *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349.

New Jersey. *Houston v. Cooper*, 3 N. J. L. 866 (where a note of an infant was said to be "invalid").

Texas. *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101; *Brown v. Bank*, 88 Tex. 265, 33 L. R. A. 359, 31 S. W. 285.

Vermont. *Patchin v. Cromach*, 13 Vt. 330. As to contracts for necessities, see §§ 1586 et seq.

⁸ *Brown v. Bank*, 88 Tex. 265, 33 L. R. A. 359, 31 S. W. 285.

⁹ *Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109. In this case the executor became surety for an infant heir on a note and was secured by a chattel

for a reasonable value for necessities he must reimburse the surety.⁷ While it is ordinarily no defense to a surety that the principal is a minor,⁸ a surety on a minor's note is not liable where the minor disaffirms and returns the consideration.⁹ An infant's contract of endorsement is voidable only.¹⁰ It is not void, since the maker can not refuse to pay the indorsee;¹¹ and it is not valid, since the infant can avoid his liability to the indorsee,¹² and before payment by the maker he can avoid the indorsement and recover from the maker.¹³ Whether he can avoid his indorsement and recover of the maker after payment by the maker to the indorsee is a point upon which is found no direct authority and conflicting dicta.¹⁴ Of course if an infant's contracts are made void by statute, this will include

mortgage. The infant sold the property before the mortgage was recorded and the surety had to pay the note. To reimburse him the infant released to him his claims against the estate. This was held voidable. *Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109.

⁷ *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Haines Admr. v. Tarrant*, 2 Hill (S. Car.) 400.

Contra, *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759.

⁸ *Hesser v. Steiner*, 5 Watts & S. (Pa.) 476; *Hodgins v. Northwestern Finance Co.*, 46 Okla. 95, 148 Pac. 717.

⁹ *Keokuk, etc., Bank v. Hall*, 106 Ia. 540, 76 N. W. 832 [citing and following, *Baker v. Kennett*, 54 Mo. 82; *Patterson v. Cave*, 61 Mo. 439].

¹⁰ *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

¹¹ *England. Jones v. Darch*, 4 Price 300.

Indiana. Frazier v. Massey, 14 Ind. 382.

Maine. Hardy v. Waters, 38 Me. 450.

Massachusetts. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101. However, early authority holds under the old rule given in § 1576 that an indorsement made by one for

an infant even in her presence and with her consent is void, so that it passes no title even though the infant does nothing to avoid it. Hence the holder can not use it as a set-off. *Sample v. Morrison*, 23 Ky. (7 T. B. Mon.) 298.

¹² *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Dulty v. Brownfield*, 1 Pa. St. 497; *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

¹³ *Hastings v. Dollarhide*, 24 Cal. 195; *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

¹⁴ In *Briggs v. McCabe*, 27 Ind. 327, the court said that in such case the infant could recover, prefacing their remarks with "as to what would be the effect of payment by the maker of a note to the assignee of an infant payee before disaffirmance, it is not now necessary for us to decide." In *Welch v. Welch*, 103 Mass. 562, quoting from *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101, is a dictum that in such a case the minor could not recover; but in *Nightingale v. Withington* there was no revocation; and in *Welch v. Welch* the court held that one who had on order of an infant paid over the infant's money to the necessary support of the infant's father could not be compelled to pay it again to the infant.

commercial paper. Thus in England an infant can not bind himself by the acceptance of a bill of exchange given for necessaries under such a statute.¹⁵

The provision of the Negotiable Instruments Act to the effect that endorsement by an infant passes title to a negotiable instrument does not prevent the infant from disaffirming his endorsement.¹⁶

§ 1599. Contracts of partnership. An infant's contract of partnership usually presents one of four points for adjudication: (1) Can an infant empower his partners to bind him? (2) Can an infant be held personally liable by the partnership creditors? (3) Can an infant recover his property contributed to the partnership as against the rights of partnership creditors? (4) Can an infant recover such property as against his partners? As we have seen,¹ an infant's appointment of an agent is by the better view voidable and not void. Hence, his authority to his partners to bind him is voidable.² Until avoided the contract is valid. Hence, it may be dissolved and a receiver appointed,³ and an assignment of the property of a firm which is largely indebted but not insolvent may be avoided by an infant partner.⁴ It is well settled, moreover, that an infant can avoid his contract of partnership to the extent of relieving himself from his individual liability for partnership debts.⁵ So a continuing partner who assumes all the firm liabilities can not recover from a minor partner his share of a firm note excluded from such liabilities.⁶ He may even disaffirm his individual liability without disaffirming his contract with his partners.⁷

¹⁵ *In re Soltykoff* [1891], 1 Q. B. 413.

¹⁶ *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

¹ See § 1580.

² *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Dunton v. Brown*, 31 Mich. 182; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201.

³ *Bush v. Linthicum*, 59 Md. 344.

⁴ *Foot v. Goldman*, 68 Miss. 529, 10 So. 62.

⁵ *England. Lovell v. Beauchamp* [1894], A. C. 607; *Goode v. Harrison*, 5 Barn. & Ald. 147.

Indiana. Conklin v. Ogborn, 7 Ind. 553.

Iowa. Mehlhop v. Rae, 90 Ia. 30, 57 N. W. 650.

Maine. Neal v. Berry, 86 Me. 193, 29 Atl. 987.

Massachusetts. Mason v. Wright, 54 Mass. (13 Met.) 306; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27.

Michigan. Osburn v. Farr, 42 Mich. 134, 3 N. W. 299.

Minnesota. Folds v. Allardt, 35 Minn. 488, 29 N. W. 201.

⁶ *Neal v. Berry*, 86 Me. 193, 29 Atl. 987.

⁷ *Mehlhop v. Rae*, 90 Ia. 30, 57 N. W. 650; *Conary v. Sawyer*, 92 Me. 463, 69 Am. St. Rep. 525, 43 Atl. 27; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27.

Whether on disaffirming he can recover property contributed by him to the partnership assets, to the prejudice of partnership creditors, is not so clear. In some cases it has merely been held that the proceeding in question was not a proper one for asserting such a right, without always deciding whether the right existed.⁸ Thus pleading infancy in a suit on a partnership debt,⁹ suing the assignee in insolvency to recover one-half of the partnership assets,¹⁰ or suing to renounce the partnership and have a receiver appointed, with a prayer for priority in payment of money advanced,¹¹ have each been held not to permit the infant to recover his share of the assets to the prejudice of the firm creditors. But where the courts have expressed an opinion on this point they have denied the existence of this right.¹² The weight of authority clearly is that an infant can not on rescinding his contract on that ground alone

Apparently contra, *Miller v. Sims*, 2 Hill (S. Car.) 479; *Salinas v. Bennett*, 33 S. Car. 285, 11 S. E. 968.

⁸ "If an infant partner can repudiate his contract and call for a return of his share of the capital, without regard to the account of profit and loss, it must be upon some proceeding instituted for that purpose, and on which the rights of the other partners and of creditors of the firm may be considered and protected." *Gay v. Johnson*, 32 N. H. 167, 169.

⁹ *Gay v. Johnson*, 32 N. H. 167.

¹⁰ *Conary v. Sawyer*, 92 Me. 463, 69 Am. St. Rep. 525, 43 Atl. 27.

¹¹ *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

¹² *Indiana*. *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

Maine. *Conary v. Sawyer*, 92 Me. 463, 69 Am. St. Rep. 525, 43 Atl. 27.

Maryland. *Bush v. Linthicum*, 59 Md. 344.

Massachusetts. *Pelletier v. Couture*, 148 Mass. 269, 1 L. R. A. 863, 19 N. E. 400.

New York. *Yates v. Lyon*, 61 N. Y. 344 [reversing, *Yates v. Lyon*, 61 Barb. (N. Y.) 205]. "The plaintiff, however, contends that inasmuch as he was a

minor and had disaffirmed his personal liability for the debts of the firm, he has an individual interest in such of the partnership property as had been fully paid for at the time when insolvency proceedings were instituted. We do not think that such a contention is maintainable either on principle or on authority * * *. It will be observed that he did not and does not disaffirm his contract of copartnership, but only his liability for firm debts. He claims title to the goods sued for as a partner, such goods having been paid for by the firm and being partnership assets." *Conary v. Sawyer*, 92 Me. 463, 467, 69 Am. St. Rep. 525, 43 Atl. 27. "It is not too much to say that if an infant goes into a mercantile venture which proves unsuccessful he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been cajoled into any waste of his capital, it hardly seems equitable that the creditor of his firm should, either directly or indirectly, be called upon for reimbursement." *Yates v. Lyon*, 61 N. Y. 344, 346 [reversing, *Yates v. Lyon*, 61 Barb. (N. Y.) 205]. But *Yates v. Lyon* is

recover from his partners what he has advanced to the assets of the firm, but only his proportionate share after payment of all debts.¹³ This, of course, eliminates the question of fraud and the like. Thus a loss of capital must be divided equally, and not be borne exclusively by the adult partners.¹⁴ Unfortunately, many of the decided cases rest on the proposition that a minor can not recover money paid by him; and sound reason seems to be with the minority view that the minor may recover money advanced by him.¹⁵

§ 1600. Infant as member of corporation. The courts are divided as to whether an infant can be a member of a mutual or assessment corporation.¹ So there is a conflict of authority as to whether an infant can be an incorporator of an ordinary stock cor-

poration on this point, as the question was whether an assignment by a firm of which an infant was a member was void. The distinction suggested by the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 569, 604, one of the clearest discussions of the rights of infants yet written, between creditors who have disposed of property to the firm which it still retains and others, is ignored in *Conary v. Sawyer*, 92 Me. 463, 69 Am. St. Rep. 525, 43 Atl. 27.

¹³ *Ex parte Taylor*, 8 De Gex, M. & G. 254; *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, 8 Atl. 664; *Moley v. Brine*, 120 Mass. 324; *Page v. Morse*, 128 Mass. 99; *Breed v. Judd*, 67 Mass. (1 Gray) 455.

¹⁴ *Moley v. Brine*, 120 Mass. 324. "Whilst fully recognizing the privilege which the law accords minors in regard to contracts made during their minority, yet in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remains a partner for a given time, he ought not to be allowed to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the

appellant." *Adams v. Beall*, 67 Md. 53, 59, 1 Am. St. Rep. 379, 8 Atl. 664.

¹⁵ *Sparman v. Keim*, 83 N. Y. 245. In *Heath v. Stevens*, 48 N. H. 251, an agreement by A to pay the fare of B, a minor, to New York, and if he was not accepted for enlistment, to pay his expenses home again; if B was accepted and received a bounty, B was to pay A \$200. B was accepted, received a bounty of \$700, and paid A \$200. B subsequently sued to rescind, and he was allowed to do so, and to recover \$200 less his expenses to New York. The facts of this case resemble *Breed v. Judd*, 67 Mass. (1 Gray) 455, in which the infant was sent to California for a third of his earnings; but the result was exactly opposite.

¹ In *Chicago, etc., Association v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55, it was held that he could be a member of such a corporation. In *In re Globe, etc., Association*, 135 N. Y. 280, 17 L. R. A. 547, 32 N. E. 122 [affirming, 63 Hun (N. Y.) 263], it was held that the statutes contemplated only members who could not avoid their contracts; and hence an infant could not be a member or incorporator.

poration. It has been held that he might be an incorporator as far as collateral attack was concerned;² but on direct attack it has been held that he could not be an incorporator.³ As between vendor and vendee, there is no difference between a sale of corporation stock and other chattels, but the minor may disaffirm.⁴ This is true even if the vendor is the corporation itself, which issues its shares to the infant to take up shares in a dissolved corporation whose property has been transferred to the corporation issuing stock.⁵ An infant who has subscribed for stock in a corporation and has paid therefor may return such stock and recover the purchase price.⁶ It has been held that the directors may refuse to allow a transfer to a minor to be made on the books of the company;⁷ but if they do, the transfer is merely voidable,⁸ is good until avoided,⁹ and can not afterward be ignored by the corporation;¹⁰ and a corporation which makes transfer on its books of shares of stock sold by a minor is not liable therefor.¹¹ Under the English statutes, an avoidance by a minor relieves him from liability for calls on his stock bought or subscribed for by him,¹² if in a reasonable time,¹³ and subject to the rule that he can not retain the shares and repudiate his liability for calls.¹⁴ He must avoid the whole contract to escape this liability.¹⁵ Of course if he ratifies his contract after

² *In re Nassau Phosphate Co.*, 2 Ch. Div. 610; *In re Saxon* [1892], 3 Ch. 555; but in these cases the validity of the corporation was not directly attacked by the state, but collaterally.

³ *In Hamilton, etc., Co. v. Townsend*, 13 Ont. App. 534, 16 Am. & Eng. Corp. Cas. 645, it was held that a statute authorizing five persons to form a corporation meant five persons of full age, and that if one was a minor, even if he ratified his act after majority, the incorporation was defective.

⁴ *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Robinson v. Weeks*, 56 Me. 102.

⁵ *White v. Cotton-Waste Corporation*, 178 Mass. 20, 59 N. E. 642.

⁶ *Wuher v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. (N.S.) 128, 89 N. E. 796.

⁷ *Symon's Case*, L. R. 5 Ch. App. C 298.

⁸ *Maguire's Case*, 3 De Gex & S. 31; *Lumsden's Case*, L. R. 4 Ch. App. C. 31; *Ebbett's Case*, L. R. 5 Ch. App. C. 302; *Baker's Case*, L. R. 7 Ch. App. C. 115.

⁹ *In re Nassau Phosphate Co.*, 2 Ch. Div. 610.

¹⁰ *Hart's Case*, L. R. 6 Eq. 512; *Wilson's Case*, L. R. 8 Eq. 240; *Mitchell's Case*, L. R. 9 Eq. 363; *Creed v. Bank*, 1 O. S. 1.

¹¹ *Smith v. Ry. Co.*, 91 Tenn. 221, 18 S. W. 546.

¹² *Newry, etc., Ry. v. Coombe*, 3 Ex. 565; *Northwestern Ry. v. McMichael*, 5 Ex. 114.

¹³ *Dublin, etc., Ry. v. Black*, 8 Ex. 181.

¹⁴ *Leed, etc., Ry. v. Fearnley*, 4 Ex. 26.

¹⁵ *Northwestern Ry. v. McMichael*, 5 Ex. 114.

majority he can not escape liability.¹⁶ It may undoubtedly be provided by statute that the property of a minor in the hands of his guardian may be taken on his stock liability; and under such a statute his real estate may be levied on.¹⁷ Of course one subscribing for stock in the name of minors, who himself receives the benefit of stock is personally liable for the debt.¹⁸

§ 1601. Concealment or misrepresentation of minority. Mere omission to disclose minority does not estop the infant to avoid the contract, or give to the adversary party any right of action, either in law or equity.¹ No estoppel can arise out of representations which were made after the transaction in question.² If an infant grantor attempts to ratify while still an infant, the fact that at the time of such attempted ratification he represents himself to be of age does not operate as an estoppel.³ Where A conveyed realty to B when a minor, and thereafter brought suit to have such deed set aside on the ground of fraud, alleging that he was of age when such conveyance was made, he is not estopped to allege thereafter in a subsequent suit that he was a minor.⁴ Where the infant has made false representations as to his age, no estoppel can arise where the other party is not in fact deceived thereby.⁵ So no estoppel can arise out of a representation of infancy made to the

¹⁶ *Cork, etc., Ry. v. Cazenove*, 10 Q. B. 935 (10 Ad. & El.). This case has been criticised, but on the question whether the act of retaining stock after majority was a ratification.

¹⁷ *Mansur v. Pratt*, 101 Mass. 60.

¹⁸ *Castleman v. Holmes*, 27 Ky. (4 J. J. Mar.) 1; *Roman v. Fry*, 28 Ky. (5 J. J. Mar.) 634.

¹ *Canada. Confederation Loan Association v. Kinnear*, 23 Ont. App. 497.

Illinois. Davidson v. Young, 38 Ill. 145.

Indiana. Price v. Jennings, 62 Ind. 111; *Alvey v. Reed*, 115 Ind. 148, 7 Am. St. Rep. 418, 17 N. E. 265.

Kentucky. Sewell v. Sewell, 92 Ky. 500, 36 Am. St. Rep. 606, 18 S. W. 162; *Bailey v. Barnberger*, 50 Ky. (11 B. Mon.) 113.

Massachusetts. Baker v. Stone, 136 Mass. 405; *Raymond v. General Motor-*

cycle Sales Co., 230 Mass. 54, 119 N. E. 359.

Mississippi. Brantley v. Wolf, 60 Miss. 420.

New Hampshire. Stack v. Cavanaugh, 67 N. H. 149, 30 Atl. 350.

Pennsylvania. Waugh v. Beck, 114 Pa. St. 422, 60 Am. Rep. 354, 6 Atl. 923.

Tennessee. Bible v. Wisecarver (Tenn. Ch. App.), 50 S. W. 670.

See, *The Liability of an Infant Who Represents Himself of Age*, by Henry A. L. Hall, 8 Yale Law Journal, 235.

² *Lee v. Hibernia Savings & Loan Society*, 177 Cal. 656, 171 Pac. 677.

³ *Lee v. Hibernia Savings & Loan Society*, 177 Cal. 656, 171 Pac. 677.

⁴ *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

⁵ *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Bradshaw v. Van Winkle*,

agent of the mortgagee and known to him to be false,⁶ or where before his conveyance a minor testified that he was of full age, it not being shown that grantee knew of and relied on such statement.⁷ Even where the adversary party is deceived, no estoppel can arise in an action at law,⁸ except where the common law is modified by statute.⁹ If a minor sues in ejectment to recover property conveyed by a deed which was executed during minority, the fact that the grantee was induced to accept such deed by the fraudulent representations of the minor that he was of age, is not a defense.¹⁰ A misrepresentation by an infant that his disability to contract has been removed by decree of court does not estop him

133 Ind. 134, 32 N. E. 877; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. 564.

⁶ *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. 564.

⁷ *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. 877.

⁸ *United States. Burdett v. Williams*, 30 Fed. 697.

Alabama. *Oliver v. McClelland*, 21 Ala. 675.

Arkansas. *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

Illinois. *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676.

Indiana. *Alvey v. Reed*, 115 Ind. 148, 7 Am. St. Rep. 418, 17 N. E. 265.

Kentucky. *Vallandingham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Wilson v. Wilson* (Ky.), 50 S. W. 260.

Massachusetts. *Merriman v. Cunningham*, 65 Mass. (11 Cush.) 40.

Minnesota. *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9.

Missouri. *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

New Hampshire. *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146.

New Jersey. *Houston v. Cooper*, 3 N. J. L. 866.

New York. *Studwell v. Shapter*, 54 N. Y. 249; *Conroe v. Birdsall*, 1 Johnson's Cases (N. Y.) 127, 1 Am. Dec. 105; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

North Carolina. *Carolina, etc., Association v. Black*, 119 N. Car. 323, 26 S. E. 975.

Ohio. *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

Oklahoma. *Collins Investment Co. v. Beard*, 46 Okla. 310, 148 Pac. 846.

Vermont. *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678.

Wisconsin. *Eliot v. Eliot*, 81 Wis. 295, 15 L. R. A. 259, 51 N. W. 81.

⁹ *First National Bank v. Casey*, 158 Ia. 349, 138 N. W. 897; *Dillon v. Burnham*, 43 Kan. 77, 22 Pac. 1016.

In Kansas a minor who by representations that he is of full age, or by engaging in business as an adult, deceives the other party, can not rescind. *Dillon v. Burnham*, 43 Kan. 77, 22 Pac. 1016.

¹⁰ *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

from pleading infancy as a defense.¹¹ In some jurisdictions the doctrine of estoppel seems to be applied in such cases, even at law.¹²

It is said, in some jurisdictions, that, in equity, an infant who by representations or by conduct misleads the other party into believing that the infant is of full age, is estopped to allege his infancy,¹³ as where a minor obtained a settlement with his guardian by representing that he was of age,¹⁴ or where the infant has induced a purchaser of realty to buy it from him by representing that he is of age,¹⁵ or where the infant, in order to induce the purchaser to buy, has made affidavit that he was of age.¹⁶ The fact that the grantee who has bought from a minor in reliance upon his representation as to his age, has not exercised reasonable care and has had notice that such representation is false, does not prevent the application of the doctrine of estoppel if such representation did in fact deceive the grantee.¹⁷ In Minnesota, it has been held that a minor is not estopped to avoid a mortgage by his representation that he is of age.¹⁸ The same result has been reached under the California statute.¹⁹

¹¹ *Wilkinson v. Buster*, 124 Ala. 574, 26 So. 940.

¹² *Damron v. Commonwealth*, 110 Ky. 268, 96 Am. St. Rep. 453, 61 S. W. 459; *Sackett v. Asher* (Ky.), 22 L. R. A. (N.S.) 453, 112 S. W. 833; *La Rosa v. Nichols*, 91 N. J. L. 355, 105 Atl. 201.

¹³ *Kentucky. Schmitheimer v. Eiseman*, 70 Ky. (7 Bush.) 298.

Mississippi. Ferguson v. Bobo, 54 Miss. 121; *Ostrander v. Quin*, 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257. (The proceeds of the loan to the infant were, in this case, used by the infant for the purchase of necessities.)

Missouri. Ryan v. Growney, 125 Mo. 474, 484, 28 S. W. 189, 755.

New Jersey. Hayes v. Parker, 41 N. J. Eq. 630, 7 Atl. 511; *Pemberton, etc., Association v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280; *La Rosa v. Nichols*, 91 N. J. L. 355, 105 Atl. 201.

Oklahoma. International Land Co. v. Marshall, 22 Okla. 693, 19 L. R. A. (N.S.) 1056, 98 Pac. 951.

Tennessee. Adams v. Fite, 62 Tenn. (3 Baxt.) 69.

Texas. Harsein v. Cohen (Tex. Civ. App.), 25 S. W. 977. On rehearing in *Ryan v. Growney*, 125 Mo. 474, 28 S. W. 189, the court on account of the insufficiency of the record finally on motion for rehearing remanded the case "in order that the lower court may rehear the case, unbound by anything said in the original opinion."

¹⁴ *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511.

¹⁵ *Commander v. Brazil*, 88 Miss. 668, 9 L. R. A. (N.S.) 1117, 41 So. 497.

¹⁶ *Schmitheimer v. Eiseman*, 70 Ky. (7 Bush.) 298; *Ryan v. Growney*, 125 Mo. 474, 484, 28 S. W. 189, 755.

¹⁷ *International Land Co. v. Marshall*, 22 Okla. 693, 19 L. R. A. (N.S.) 1056, 98 Pac. 951.

¹⁸ *Alt v. Groff*, 65 Minn. 191, 68 N. W. 9. This case was brought at law, but the validity of the mortgage was raised by the answer and denied by the reply, and raised a question in equity.

¹⁹ *Lee v. Hibernia Savings & Loan Soc.*, 177 Cal. 656, 171 Pac. 677.

In some jurisdictions the distinction between law and equity with reference to estoppel by reason of the fraudulent representations of an infant concerning his agent, is repudiated.²⁰

Whether an infant who falsely represents himself as being of full age and thereby induces one to sell him chattels is liable in an action for fraud, is a question on which the authorities are in conflict. In the majority of cases it has been held that he is not liable;²¹ nor is he liable for the money which he has received under such contract,²² but in other cases it has been held that he is liable.²³ It has been held that if the infant has induced the adversary party to enter into the contract by a fraudulent representation as to the age of the infant, he must account for the consideration even if he has wasted it.²⁴

The act of the guardian can not operate as an estoppel of the infant.²⁵

§ 1602. Ratification—Who can ratify. The proposition that an infant's contracts in general are voidable implies that they may be ratified. This can not be done by an infant before reaching majority as his ratification would have no greater effect than his original contract.¹ A minor's receipt of the proceeds of a sale made without

²⁰ *Commander v. Brazil*, 88 Miss. 668, 9 L. R. A. (N.S.) 1117, 41 So. 497.

²¹ *England*. *Johnson v. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. (N.S.) 258; *De Roo v. Foster*, 12 C. B. (N.S.) 272.

Connecticut. *Geer v. Hovy*, 1 Root (Conn.) 179; *Brown v. Dunham*, 1 Root (Conn.) 272.

Georgia. *Burns v. Hill*, 19 Ga. 22.

Massachusetts. *Slayton v. Barry*, 175 Mass. 513, 78 Am. St. Rep. 510, 49 L. R. A. 560, 56 N. E. 574; *Brooks v. Sawyer*, 191 Mass. 151, 114 Am. St. Rep. 594, 76 N. E. 953; *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40.

Pennsylvania. *Wilt v. Welsh*, 6 Watts (Pa.) 9.

Texas. *Kilgore v. Jordan*, 17 Tex. 341.

Vermont. *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659; *Nash v. Jewett*, 61 Vt. 501, 15 Am. St. Rep. 931, 4 L. R. A. 561, 18 Atl. 47.

²² *Brooks v. Sawyer*, 191 Mass. 151, 114 Am. St. Rep. 594, 76 N. E. 953.

²³ *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420; *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Wallace v. Morss*, 5 Hill (N. Y.) 391.

²⁴ *Pemberton, etc., Association v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280. See obiter in *Petty v. Roberts*, 70 Ky. (7 Bush.) 410.

²⁵ *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

¹ *United States*. *Sanger v. Hibbard*, 104 Fed. 455, 43 C. C. A. 635.

authority of law by the administrator of his father's estate is inoperative.² Upon coming of age, the infant may make a valid ratification.³ In case the infant dies before reaching majority his personal representative may affirm,⁴ even before the infant would have reached majority had he lived.⁵ Like other agreements, a valid ratification must be made by one who is competent to contract and free from restraint.⁶ Hence, a ratification is ineffectual if made after majority by one who has been put under guardianship as a spendthrift, the statute making void his contracts after the appointment of a guardian.⁷ A threat of a civil action does not prevent a ratification from being binding.⁸ By the better reasoning it has been held that a ratification after majority is valid though the former infant did not know that by law infancy was a defense.⁹ The amount of legal knowledge possessed by any one at a given

Alabama. *Ex parte McFerren*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, Ann. Cas. 1915B, 672, 63 So. 159.

California. *Lee v. Hibernia Savings & Loan Soc.*, 177 Cal. 656, 171 Pac. 677.

Maine. *Dana v. Coombs*, 6 Greenleaf (Me.) 89, 19 Am. Dec. 194.

Massachusetts. *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

Michigan. *Corey v. Burton*, 32 Mich. 30.

Missouri. *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *Orchard v. Wright-Dalton-Bell-Anchor Store Co. (Mo.)*, 197 S. W. 42.

South Carolina. *Cheshire v. Barrett*, 4 McCord. (S. Car.) 241, 17 Am. Dec. 735.

Wisconsin. *O'Dell v. Rogers*, 44 Wis. 136.

² *Orchard v. Wright-Dalton-Bell-Anchor Store Co. (Mo.)*, 197 S. W. 42.

³ **Alabama.** *Sims v. Gunter*, — Ala. —, 78 So. 62.

Georgia. *Bates v. Burden*, — Ga. —, 96 S. E. 178.

Oklahoma. *Perkins v. Middleton*, — Okla. —, 166 Pac. 1104.

Oregon. *Haldeman v. Weeks*, 90 Or. 201, 175 Pac. 445.

West Virginia. *North American Coal & Coke Co. v. O'Neal*, — W. Va. —, 95 S. E. 822.

Wisconsin. *In re Kane's Estate*, — Wis. —, 168 N. W. 402.

⁴ *Bozeman v. Browning*, 31 Ark. 364.

⁵ *Shropshire v. Burns*, 46 Ala. 108.

⁶ *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

⁷ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

⁸ *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

⁹ **Alabama.** *American, etc., Co. v. Wright*, 101 Ala. 658, 14 So. 399.

Connecticut. *Bestor v. Hickey*, 71 Conn. 18, 41 Atl. 555.

Indiana. *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774.

Massachusetts. *Morse v. Wheeler*, 86 Mass. (4 All.) 570.

Ohio. *Anderson v. Soward*, 40 O. S. 325, 48 Am. Rep. 687. "The contract of a minor, including the power, on coming of age, without any new consideration, to make the contract binding on him, is a transaction sui generis, and is not strictly analogous to any other known to the law. The nature and validity of the contract depend on

time in the past is a question almost impossible to determine from evidence, as the person himself is usually the only one who knows how much he knew, and the rule just given is a wise and safe one; yet it must be admitted that a considerable number of cases, mostly, however, in mere dicta, hold that a ratification is invalid unless made with knowledge that infancy was a defense.¹⁰

§ 1603. Nature and effect of ratification. Ratification is not the making of a new contract, but is an election by the infant between his two antagonistic rights of treating a pre-existing contract as void or valid, in favor of treating it as valid.¹ No new consideration is therefore necessary,² and on ratification the contract becomes valid from the date on which it was made, and not merely

the acts of a minor who has the capacity to assent, but not the capacity to bind himself during minority; the right to enforce the contract depends on the acts of an adult who has no special incapacities nor privileges. When he exercises his option, which results from his contract made while a minor, to bind or not to bind himself by the contract to which he has assented, he stands as every one else stands in the performance of a voluntary act; he is presumed to know the law. So in the present case, the defendant knew he had, while a minor, agreed, for a fair consideration which he had received and enjoyed, to pay the amount in question to the plaintiff, and voluntarily, in specific terms, promised to pay that sum. This promise bound him to make the payment by force of the same law that exempted him from liability until the promise was made. It is immaterial whether he knew or did not know the law; if such knowledge could affect his act, he is charged with the knowledge, and can not be permitted to show the contrary." *Bestor v. Hickey*, 71 Conn. 181, 186, 41 Atl. 555.

¹⁰ *England. Harmer v. Killing*, 5 Esp. 102.

United States. Tucker v. Moreland, 35 U. S. (10 Pet.) 58, 9 L. ed. 345.

Kentucky. Petty v. Roberts, 70 Ky. (7 Bush.) 410.

Massachusetts. Owen v. Long, 112 Mass. 403.

Pennsylvania. Hinely v. Margaritz, 3 Pa. St. 428.

Tennessee. Scott v. Buchanan, 30 Tenn. (11 Humph.) 468.

Vermont. Hatch v. Hatch, 60 Vt. 160, 13 Atl. 791.

¹ *Perkins v. Middleton*, — Okla. —, 166 Pac. 1104.

The act of an infant in making valid his prior voidable contract is said to be "analogous either to a waiver or a ratification or a new contract. Such a promise is frequently indicated by all these names; they have been indifferently used in several of our decisions as terms of convenience and partial illustration, but it certainly can not be accurately described by either." *Bestor v. Hickey*, 71 Conn. 181, 187, 41 Atl. 555.

² *Sims v. Gunter*, — Ala. —, 78 So. 62; *American, etc., Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292; *Conklin v. Ogborn*, 7 Ind. 553; *Grant v. Beard*, 50 N. H. 129.

from the date of the ratification.³ Hence, a deed when ratified prevails over a gratuitous conveyance of the same property made between the original deed and the ratification.⁴ A ratification once made without fraud, duress, and the like, is final, and the former infant can not thereafter rescind.⁵ The proposition has been advanced that a ratification, after suit was brought, is of no effect. The reason given is that "there must be a subsisting right of action at the time of suing out the plaintiff's writ, which right of action no subsequent promise can give."⁶ Evidently this reasoning misapprehends the real nature of ratification, and rests upon the fallacy that an infant's executory contract is of no effect until ratified.⁷ It is even said that a "promise can not relate back * * * so as to make the original contract a good foundation for an action from the beginning."⁸ An examination of the cases usually cited in support of this proposition shows that in some it is a dictum, as there was no valid ratification at all, either before or after suit;⁹ while in others it is apparently necessary to the decision.¹⁰ Even in some of the cases last cited it seems from somewhat incomplete statements of fact that the facts relied on as a

³ *Alabama*. *American, etc., Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292.

Maryland. *Hall v. Jones*, 21 Md. 439.

Michigan. *Minock v. Shortridge*, 21 Mich. 304; *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521.

New Hampshire. *Hoit v. Underhill*, 10 N. H. 220, 34 Am. Dec. 148; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307.

Ohio. *Harner v. Dipple*, 31 O. S. 72, 27 Am. Rep. 496.

South Carolina. *Cheshire v. Barrett*, 4 McCord, (S. Car.) 241, 17 Am. Dec. 735.

Mississippi. *Edmunds v. Mister*, 58 Miss. 765.

⁴ *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

⁵ *Alabama*. *McCarthy v. Nierosi*, 72 Ala. 332, 47 Am. Rep. 418; *Voltz v. Voltz*, 75 Ala. 555.

California. *Hastings v. Dollarhide*, 24 Cal. 195.

Georgia. *Bates v. Burden*, — Ga. —, 96 S. E. 178.

New York. *Youmans v. Forsyth*, 86 Hun (N. Y.) 370.

North Dakota. *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848.

Oklahoma. *Perkins v. Middleton*, — Okla. —, 166 Pac. 1104.

West Virginia. *North American Coal & Coke Co. v. O'Neal*, — W. Va. —, 95 S. E. 822.

Wisconsin. *In re Kane's Estate*, — Wis. —, 168 N. W. 402.

⁶ *Hale v. Gerrish*, 8 N. H. 374, 375.

⁷ See §1593.

⁸ *Merriam v. Wilkins*, 6 N. H. 432, 433, 25 Am. Dec. 472.

⁹ *Thing v. Libbey*, 16 Me. 55; *Ford v. Phillips*, 18 Mass. (1 Pick.) 202.

¹⁰ *Freeman v. Nichols*, 138 Mass. 313; *Hale v. Gerrish*, 8 N. H. 374; *Merriam v. Wilkins*, 6 N. H. 432, 25 Am. Dec. 472.

ratification occurred after a disaffirmance of liability by a plea of infancy.

If an infant is induced by fraud to sell property, he may, on reaching his majority, affirm the transaction, both as to his infancy and as to the fraud;¹¹ and he may, thereupon, maintain an action at law for the tort.¹²

§ 1604. What constitutes ratification—Express ratification. An express promise by the former infant to comply with the terms of the contract amounts to ratification.¹ An oral promise to perform a bond to convey realty and a request for a payment thereon;² a promise after majority to pay the note given for land and take the land, if the vendor will remit the accrued interest;³ and an oral statement of satisfaction with a deed executed during minority,⁴ have each been held to be a ratification. But where A, while a minor, gave notes secured by a real estate mortgage, then married, and after coming of age executed an instrument without any consideration, reciting that she took "pride and pleasure in ratifying, affirming and indorsing the said acts as fully" as if she had been of age, this did not affirm the mortgage, because it was not executed in the method prescribed by the Tennessee statute for the conveyance by married women of their interests in realty.⁵ While good as against the infant, an oral affirmance has, under recording statutes, been held invalid as to subsequent purchasers for value who know of the deed made by the infant, but are ignorant of his ratification.⁶

¹¹ *Marshall v. Gustin*, 89 Or. 53, 170 Pac. 312, 173 Pac. 461.

¹² *Marshall v. Gustin*, 89 Or. 53, 170 Pac. 312, 173 Pac. 461.

¹ *Connecticut. Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

Illinois. Barlow v. Robinson, 174 Ill. 317, 51 N. E. 1045.

Massachusetts. Martin v. Mayo, 10 Mass. 137, 6 Am. Dec. 103; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229.

Michigan. Tyler v. Gallop, 68 Mich. 185, 13 Am. St. Rep. 336, 35 N. W. 902.

Minnesota. Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541.

New Hampshire. Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349.

Vermont. Hatch v. Hatch, 60 Vt. 160, 13 Atl. 791.

² *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045.

³ *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541.

⁴ *Ferguson v. Bell*, 17 Mo. 347.

⁵ *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458.

⁶ *Black v. Hills*, 36 Ill. 376, 87 Am. Dec. 224.

If an express promise is relied on as a ratification, it must be made to the adversary party or his agent, not to a stranger.⁷ Hence, it may be made to an attorney with whom the debt is placed for collection,⁸ or his clerk,⁹ even if there is nothing to show that the former infant knew of his agency.¹⁰

If a conditional ratification is made, the offer must be accepted and the condition complied with to make it a valid ratification.¹¹ Thus neither a promise by a minor, after coming of age, to pay if he was ever to do so without inconvenience,¹² nor an offer after majority to execute a deed of confirmation on payment of the balance of the purchase money,¹³ is a ratification. So to enforce a contract which the former infant promised to perform, if able, it must be shown that he is able.¹⁴

§ 1605. Form of express ratification. At common law an infant's ratification may be made orally;¹ but by statutes of certain states this rule is modified and an infant's express ratification must be in writing.² Under such a statute the infant's conduct in keeping the property which he has purchased, and treating it as his own after he has reached his majority, does not amount to ratification.³

The express promise must be absolute. A conditional promise to pay an open account, contained in a letter written after majority,

⁷ *Hoit v. Underhill*, 9 N. H. 436, 32 Am. Dec. 380; *Chandler v. Glover*, 32 Pa. St. 509.

⁸ *Hodges v. Hunt*, 22 Barb. (N. Y.) 150.

⁹ *Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 190.

¹⁰ *Hoit v. Underhill*, 10 N. H. 220, 34 Am. Dec. 148.

¹¹ *Craig v. Van Bebber*, 100 Mo. 584, 10 Am. St. Rep. 569, 13 S. W. 906; *State v. Binder*, 57 N. J. L. 374, 31 Atl. 215; *Bresee v. Stanley*, 119 N. Car. 278, 25 S. E. 870.

¹² *Bresee v. Stanley*, 119 N. Car. 278, 25 S. E. 870.

¹³ *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906.

¹⁴ *Proctor v. Sears*, 86 Mass. (4 All.) 95; *Thompson v. Lay*, 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325.

¹ *Alabama*. *Jeffords v. Ringgold*, 6 Ala. 544; *West v. Penny*, 16 Ala. 186. *Arkansas*. *Vaughan v. Parr*, 20 Ark. 600.

Kentucky. *Phillips v. Green*, 21 Ky. (5 T. B. Mon.) 344.

Tennessee. *Wheaton v. East*, 11 Tenn. (5 Yerg.) 41, 26 Am. Dec. 251.

Wisconsin. *Stokes v. Brown*, 4 Chand. (Wis.) 39, 3 Pinney (Wis.) 311.

² *Hartley v. Wharton*, 11 Ad. & El. 934; *Stern v. Freeman*, 61 Ky. (4 Met.) 309; *Thurlow v. Gilmore*, 40 Me. 378; *Bird v. Swain*, 79 Me. 529, 11 Atl. 421; *Nesl v. Berry*, 86 Me. 193, 29 Atl. 987; *Lamkin v. Le Doux*, 101 Me. 581, 8 L. R. A. (N.S.) 104, 64 Atl. 1048; *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518.

³ *Lamkin v. Le Doux*, 101 Me. 581, 8 L. R. A. (N.S.) 104, 64 Atl. 1048.

is not a compliance with the Virginia statute.⁴ These statutes do not apply to contracts ratified by the conduct of the infant, as by selling⁵ or retaining possession of the property purchased.⁶

§ 1606. Ratification by acts and conduct showing unequivocal intent. Conduct which shows an unequivocal intention to affirm,¹ such as keeping realty purchased, and treating it as his own after he comes of age,² or selling it,³ or mortgaging it,⁴ or a suit for, and receipt of purchase price after majority,⁵ is a ratification, even if made after a suit to disaffirm the contract.⁶ Thus a sale of property which an infant bought, subject to liens, and on which the infant gave a mortgage to raise money to discharge the liens, is a ratification of the entire transaction including the mortgage.⁷ So is a recital in a mortgage given after majority, that the realty is subject to the lien of another mortgage given during minority.⁸ Where the property is sold before majority, giving a deed therefor after majority, is a ratification.⁹ So is the retention and use of the proceeds after majority.¹⁰

⁴ Ward v. Scherer, 96 Va. 318, 31 S. E. 518.

⁵ Hilton v. Shepherd, 92 Me. 180, 42 Atl. 387.

⁶ McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312.

Contra, Lamkin v. Le Doux, 101 Me. 581, 8 L. R. A. (N.S.) 104, 64 Atl. 1048.

¹ Perkins v. Middleton, — Okla. —, 166 Pac. 1104; Gulf, Colorado & Santa Fe Ry. Co. v. Lemons, — Tex. —, 206 S. W. 75.

² Alabama. American, etc., Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292.

Mississippi. Ellis v. Alford, 64 Miss. 8, 1 So. 155.

Oklahoma. Perkins v. Middleton, — Okla. —, 166 Pac. 1104.

Texas. Gulf, Colorado & Santa Fe Ry. Co. v. Lemons, — Tex. —, 206 S. W. 75.

Vermont. Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429.

³ Indiana. Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538.

Iowa. Leathers v. Ross, 74 Ia. 630, 38 N. W. 516.

Maine. Dana v. Coombs, 6 Greenl. (Me.) 89, 19 Am. Dec. 194.

Nebraska. Uecker v. Koshn, 21 Neb. 559, 59 Am. Rep. 849, 32 N. W. 583.

New York. Lynde v. Budd, 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84.

⁴ Perkins v. Middleton, — Okla. —, 166 Pac. 1104.

⁵ Lathrop v. Doty, 82 Ia. 272, 47 N. W. 1089.

⁶ Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538.

⁷ Langdon v. Clayson, 75 Mich. 204, 42 N. W. 805. In this case the infant on reaching majority quit-claimed the land to A, and afterward made a warranty deed to A, reciting therein that it was for the purpose of "expressly revoking all former deeds and mortgages made by me before I became of age."

⁸ Ward v. Anderson, 111 N. Car. 115, 15 S. E. 933.

⁹ Wall v. Mines, 130 Cal. 27, 62 Pac. 386; Haldeman v. Weeks, 90 Or. 201, 175 Pac. 445.

¹⁰ Waters v. Lyon, 141 Ind. 170, 40 N. E. 662. In Owens v. Phelps, 95 N.

Conduct of the infant in keeping personalty and using it as his own after majority,¹¹ or demanding and receiving it after majority,¹² or selling it,¹³ or exchanging it,¹⁴ is a ratification. Thus an infant partner can not retain partnership property transferred to him on his promise to pay partnership debts and refuse to pay such debts.¹⁵ Performance of a contract of compromise for sixteen months after reaching majority and accepting the benefits of such contract is a ratification.¹⁶

§ 1607. Acts and conduct not showing unequivocal intent. Conduct which does not show an unequivocal intention to affirm does not amount to ratification. If the infant has elected unequivocally to disaffirm the contract the rights of the parties are fixed, and the fact that the infant subsequently sells such property after litigation has begun does not operate as ratification.¹ Retaining possession for three months, notice of rescission being promptly given, is not ratification;² nor is retaining property if claimed by a different title, as where the property in question was partnership property which was attached, sold, bought in by the infant's grandfather, and sold by him to the infant.³ The fact that one who has bought property when he is an infant, gives a bond after he becomes of

Car. 286, this was said to be admissible in evidence, though not of itself a ratification.

Contra, in *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654; retention of the proceeds of the sale of real estate was held not to ratify a mortgage given thereon during minority.

¹¹ *Georgia*. *White v. Sikes*, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228; *Wickham v. Torley*, 136 Ga. 594, 36 L. R. A. (N.S.) 57, 71 S. E. 881.

Maine. *Lawson v. Lovejoy*, 8 Greenl. (Me.) 405, 23 Am. Dec. 526.

New York. *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617.

South Carolina. *Cheshire v. Barrett*, 4 McCord (S. Car.) 241, 17 Am. Dec. 735; *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 468.

Texas. *Nanny v. Allen*, 77 Tex. 240 [sub nomine, *Manney v. Allen*, 13 S. W. 989].

West Virginia. *Hobbs v. Hinton Foundry, Machine & Plumbing Co.*, 74 W. Va. 443, 92 S. E. 267.

Contra, *Paul v. Smith*, 41 Mo. App. 275. (Retaining property did not amount to ratification in conformity with Missouri statute.)

¹² *Nanny v. Allen*, 77 Tex. 240 [sub nomine, *Manney v. Allen*, 13 S. W. 989].

¹³ *Hilton v. Shepherd*, 92 Me. 160, 42 Atl. 387.

¹⁴ *Curry v. Plow Co.*, 55 Ill. App. 82.

¹⁵ *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101.

¹⁶ *Baltimore & Ohio Ry. Co. v. Duke*, 38 D. C. App. 164, Ann. Cas. 1913E, 832.

¹ *Lambrech v. Holsapple*, 164 Wis. 465, 160 N. W. 168.

² *Scott v. Scott*, 29 S. Car. 414, 7 S. E. 911.

³ *Todd v. Clapp*, 118 Mass. 495.

age to secure the release of such property from attachment, does not amount to a ratification.⁴ Acting as a partner for a few days after majority, by drawing profits, has been held not to be a ratification of individual liability if in ignorance of outstanding debts,⁵ but otherwise it is.⁶ Mere failure to disaffirm promptly is not a ratification.⁷ Thus continuing to live with his parents after majority is not a ratification by an infant of an application by his father of such infant's wages to the rent.⁸ However, silence, where circumstances impose on the minor the duty of speaking, may operate as a ratification,⁹ as where he stands by, knowing that the grantee,¹⁰ or the vendee of his grantee,¹¹ is making valuable improvements on realty sold by him, in reliance on the title. The mere erection of valuable improvements, unknown to the minor, as where he was absent from the state, does not affect his right to disaffirm.¹²

§ 1608. Acknowledgment or part payment. By the weight of authority the rule in ratification of an infant's contracts, different from that in waiving the Statute of Limitations, is that a mere acknowledgment that the obligation has been incurred,¹ or even a part payment thereon,² is not a ratification. Even payment of

⁴ *Lamkin v. Le Doux*, 101 Me. 581, 8 L. R. A. (N.S.) 104, 64 Atl. 1048.

⁵ *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27.

⁶ *Salinas v. Bennett*, 33 S. Car. 285, 11 S. E. 968.

⁷ *Hill v. Nelms*, 86 Ala. 442, 5 So. 796; *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908.

⁸ *Lymanville Co. v. Nieber*, 19 R. I. 398, 36 Atl. 1133.

Contra, obiter, *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

⁹ *Wheaton v. East*, 11 Tenn. (5 Yerg.) 41, 26 Am. Dec. 251; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589.

¹⁰ *Davis v. Dudey*, 70 Me. 236, 35 Am. Rep. 318.

¹¹ *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206. (In this case the infant also received part of the purchase price after majority.)

¹² *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

¹ *Indiana*. *Fetrow v. Wiseman*, 40 Ind. 148.

Massachusetts. *Martin v. Mayo*, 10 Mass. 137, 6 Am. Dec. 103 (obiter).

New York. *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

Tennessee. *Reed v. Boshears*, 36 Tenn. (4 Sneed) 118.

Vermont. *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. 791.

² *England*. *Thrupp v. Fielder*, 2 Esp. 628.

Colorado. *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245.

Connecticut. *Catlin v. Haddox*, 49 Conn. 492, 44 Am. Rep. 249.

Massachusetts. *Barnaby v. Barnaby*, 18 Mass. (1 Pick.) 221.

New York. *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

interest, part payment of principal, and a mere acknowledgment of the debt,³ or a statement, "I owe a debt, and you will get your pay," was held not to be a ratification,⁴ nor is an acknowledgment of the debt coupled with a statement that he would not pay it,⁵ or with an offer to compromise, if not accepted.⁶ A provision in a will directing just debts to be paid, does not authorize the executors to pay debts contracted during infancy.⁷

§ 1609. Who can disaffirm. The infant may elect the other alternative and rescind the contract. This privilege is personal to himself and his representatives.¹ The adversary party to the contract can not avoid it because of such infancy.² Thus insurance of a property of a minor is enforceable where the party taking insur-

Pennsylvania. *Hinely v. Margaritz*, 3 Pa. St. 428.

Texas. *Rapid, etc., Co. v. Sanford*. (Tex. Civ. App.), 24 S. W. 587.

But in *Little v. Duncan*, 9 Rich. Law (S. Car.) 55, 64 Am. Dec. 760, it was held that admitting that the transaction was just and giving a watch to be taken as part payment if it kept good time was a ratification.

³ *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245.

⁴ *Hale v. Gerrish*, 8 N. H. 374.

⁵ *Minock v. Shortridge*, 21 Mich. 304.

⁶ *Bennett v. Collins*, 52 Conn. 1.

⁷ *Jackson v. Mayo*, 11 Mass. 147, 6 Am. Dec. 167; *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28.

Contra, *Merchants', etc., Ins. Co. v. Grant*, 2 Edw. Ch. (N. W.) 544.

¹ **Arizona.** *Arizona Eastern R. Co. v. Carillo*, 17 Ariz. 115, 149 Pac. 313.

Arkansas. *Davie v. Padgett*, 117 Ark. 544, 176 S. W. 333.

Indiana. *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

Massachusetts. *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101.

New Jersey. *Hoey v. Superior Laundry Co.*, 85 N. J. L. 119, 88 Atl. 823.

New York. *Beardsley v. Hotchkiss*, 96 N. Y. 201.

² **England.** *Holt v. Clarencieux*, Str. 937.

Colorado. *Seaton v. Tohill*, 11 Colo. App. 211, 53 Pac. 170.

Iowa. *Gooden v. Rayl*, 85 Ia. 592, 52 N. W. 506; *Resso v. Lehan*, 96 Ia. 45, 64 N. W. 689.

Louisiana. *Arnous v. Lesassier*, 10 La. 592, 29 Am. Dec. 470.

Massachusetts. *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134.

New Jersey. *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506.

New York. *Hunt v. Peake*, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

North Carolina. *Hicks v. Beam*, 112 N. Car. 642, 34 Am. St. Rep. 521, 17 S. E. 490.

Ohio. *Withers v. Ewing*, 40 O. S. 400.

South Carolina. *Assignees of Hull v. Connolly*, 3 McCord (S. Car.) 6, 15 Am. Dec. 612.

Tennessee. *Warwick v. Cooper*, 37 Tenn. (5 Sneed) 659.

Texas. *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871.

West Virginia. *Plate v. Durat*, 42 W. Va. 63, 32 L. R. A. 404, 24 S. E. 580.

Wisconsin. *Johnson v. Insurance Co.*, 93 Wis. 223, 67 N. W. 416.

ance had no notice of a rule not to insure property of minors.³ So an employer of an infant can not avoid his contract on the ground of infancy.⁴ So a vendee of realty can not disaffirm a contract for the purchase thereof because the vendor is a minor.⁵ A stranger to the contract can not avoid it.⁶ Thus an insurance company can not refuse to pay a policy on the ground that it was assigned to the holder by a minor, the minor having died during minority;⁷ nor can a railroad company plead the infancy of the owner of property which it has destroyed.⁸ So a surety on a note given by an infant for a premium for an insurance policy can not avoid the insurance policy.⁹ The infant's blood representatives, such as his heirs;¹⁰ or his personal representatives, such as his executor or administrator;¹¹ or a beneficiary of insurance taken by a minor,¹²

³ *Johnson v. Insurance Co.*, 93 Wis. 223, 67 N. W. 416.

⁴ *Hicks v. Beam*, 112 N. Car. 642, 34 Am. St. Rep. 521, 17 S. E. 490.

⁵ *Dentler v. O'Brien*, 56 Ark. 49, 19 S. W. 111.

⁶ *Alabama. Hooper v. Payne*, 94 Ala. 223, 10 So. 431.

Indiana. La Grange College v. Anderson, 63 Ind. 367, 30 Am. Rep. 224.

Kentucky. Cannon v. Alsbury, 8 Ky. (1 A. K. Mar.) 76, 10 Am. Dec. 709; *Beeler v. Bullitt*, 10 Ky. (3 A. K. Mar.) 280, 13 Am. Dec. 161.

Massachusetts. Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; *Thompson v. Hamilton*, 29 Mass. (12 Pick.) 425, 23 Am. Dec. 619.

Missouri. Mott v. Purcell, 98 Mo. 247, 11 S. W. 564; *Hill v. Taylor*, 125 Mo. 331, 28 S. W. 599.

New Jersey. Bordentown v. Wallace, 50 N. J. L. 13, 11 Atl. 267.

New York. Grogan v. Insurance Co., 90 Hun (N. Y.) 521.

Ohio. Curtiss v. McDougal, 26 O. S. 66.

West Virginia. Blankenship v. Ry. Co., 43 W. Va. 135, 27 S. E. 355.

⁷ *Grogan v. United States, etc., Insurance Co.*, 90 Hun (N. Y.) 521.

⁸ *Blankenship v. Ry. Co.*, 43 W. Va. 135, 27 S. E. 355.

⁹ *Union Central Life Ins. Co. v. Hilliard*, 63 O. S. 478, 81 Am. St. Rep. 644, 53 L. R. A. 462, 59 N. E. 230.

¹⁰ *Arkansas. Bozeman v. Browning*, 31 Ark. 364.

Illinois. Illinois, etc., Co. v. Bonner, 75 Ill. 315.

Indiana. Gillenwaters v. Campbell, 142 Ind. 529, 41 N. E. 1041.

Massachusetts. Hill v. Keyes, 92 Mass. (10 All.) 258.

Missouri. Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411.

South Carolina. Ihley v. Padgett, 27 S. Car. 300, 3 S. E. 468.

Tennessee. Walton v. Gaines, 94 Tenn. 420, 29 S. W. 458.

¹¹ *Alabama. Shropshire v. Burns*, 46 Ala. 108.

Arkansas. Vaughn v. Parr, 20 Ark. 600.

Massachusetts. Hussey v. Jewett, 9 Mass. 100; *Hill v. Keyes*, 92 Mass. (10 All.) 258.

Missouri. Parsons v. Hill, 8 Mo. 135.

New Hampshire. Roberts v. Wiggins, 1 N. H. 73, 8 Am. Dec. 38.

Rhode Island. Tillinghast v. Holbrook, 7 R. I. 230.

Vermont. Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630.

¹² *O'Rourke v. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643, 57 L. R. A. 496, 50 Atl. 834.

may avoid his contracts. Those who have merely acquired the infant's estate by bargain and sale,¹³ or by purchase at a foreclosure sale,¹⁴ can not avoid the infant's contracts with reference to such property. An infant's guardian appointed on the ground of infancy, can not avoid a contract of the infant;¹⁵ but a guardian appointed after majority on the ground that the former minor is a spend-thrift may avoid a conveyance made by the infant.¹⁶ The fact that a guardian conveys his ward's land while she is a minor, does not operate as a disaffirmance of a mortgage which she had executed before such conveyance.¹⁷ So it has been held that neither an infant's assignee in insolvency,¹⁸ nor his trustee,¹⁹ can avoid his contract. A parent can not avoid a contract of employment made by the infant.²⁰ An infant can not avoid a contract for his employment made by his father.²¹

The principle that the right to disaffirm a contract on the ground of infancy is personal to the infant has no application after the infant has disaffirmed the contract.²² Upon his disaffirmance any party who has any interest in the transaction may take advantage of such disaffirmance.²³ If the principal debtor disaffirms, his surety may take advantage of such disaffirmance.²⁴

§ 1610. Time for disaffirmance—Minority. An infant can disaffirm any contract during minority,¹ except a contract executed by the conveyance of real estate, which can be disaffirmed only

¹³ *Curtiss v. McDougal*, 26 O. S. 66.

¹⁴ *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

¹⁵ *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134. In this case the above proposition was limited to contracts beneficial to the infant. So in case of a mortgage of realty. *Shreeves v. Caldwell*, 135 Mich. 323, 106 Am. St. Rep. 396, 97 N. W. 764.

Contra, *Benson v. Tucker*, 212 Mass. 60, 41 L. R. A. (N.S.) 1219, 98 N. E. 589.

¹⁶ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

¹⁷ *Shreeves v. Caldwell*, 135 Mich. 323, 106 Am. St. Rep. 396, 97 N. W. 764.

¹⁸ *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773.

¹⁹ *Des Moines Insurance Co. v. McIntire*, 99 Ia. 50, 68 N. W. 565.

²⁰ *Ping, etc., Co. v. Grant*, 68 Kan. 732, 75 Pac. 1044.

²¹ *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211, 18 S. W. 262.

²² *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 863.

²³ *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 863.

²⁴ *Evants v. Taylor*, 18 N. M. 371, 60 L. R. A. (N.S.) 1113, 137 Pac. 583.

¹ *Alabama*. *Ex parte McFerrer*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, Ann. Cas. 1915B, 672, 63 So. 159.

Illinois. *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. (N.S.) 128, 89 N. E. 796.

after he reaches majority.² On reaching majority he can disaffirm a deed given by him during minority.³ His right to disaffirm contracts concerning personalty during minority has been limited to cases where such a course was evidently necessary to protect his interests,⁴ but this rule has been abandoned and he can now disaffirm such contracts at any time before minority that he sees fit.⁵

Even if an infant may not avoid a contract until he comes of age, if he seeks to avoid it on the ground of infancy, he is not thus restricted if he seeks to avoid it on some other ground as well,⁶

Indiana. *Carpenter v. Carpenter*, 45 Ind. 142; *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420, *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

Iowa. *Childs v. Dobbins*, 55 Ia. 205, 7 N. W. 496.

Kentucky. *Bailey v. Barnberger*, 50 Ky. (11 B. Mon.) 113.

Maryland. *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, 8 Atl. 664.

Michigan. *Bloomington v. Chittenden*, 74 Mich. 698, 42 N. W. 166.

New Hampshire. *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Woolridge v. Lavoie*, — N. H. —, 104 Atl. 346.

Oklahoma. *Ryan v. Morrison*, 40 Okla. 49, 135 Pac. 1049.

South Carolina. *Worthy v. Jonesville Oil Mill*, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634.

Tennessee. *Grace v. Hale*, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296.

Vermont. *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194. He may disaffirm at the trial of an action against him. *Woolridge v. Lavoie*, — N. H. —, 104 Atl. 346. It is said that a compromise of personal injuries can not be avoided by the infant during minority. *Lansing v. R. R.*, 126 Mich. 663, 86 Am.

St. Rep. 567, 86 N. W. 147 [citing, *Dunton v. Brown*, 31 Mich. 182; *Armistage v. Widoe*, 36 Mich. 124; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299].

² **England.** *Prout v. Cock* [1896], 2 Ch. 808.

Indiana. *Welch v. Bunce*, 83 Ind. 382.

Kentucky. *Phillips v. Green*, 10 Ky. (3 A. K. Mar.) 7, 13 Am. Dec. 124.

Missouri. *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. 754; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

New York. *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654.

North Carolina. *Baggett v. Jackson*, 160 N. Car. 26, 76 S. E. 86.

Pennsylvania. *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939, 20 Atl. 625.

Tennessee. *Scott v. Buchanan*, 30 Tenn. (11 Humph.) 468.

Contra, *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409 (obiter).

³ *Shroyer v. Pittinger*, 31 Ind. App. 156, 67 N. E. 475.

⁴ *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327.

⁵ See cases cited in note 1 of this section. And see *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803.

⁶ *Stoll v. Hawks*, 179 Mich. 571, 51 L. R. A. (N.S.) 28, 146 N. W. 229.

such as fraud.⁷ An infant who has been induced to buy personal property by the fraud of the seller may rescind during minority.⁸

Rescission, if properly made during minority is final, and the infant or his representatives can not thereafter rescind such rescission. Thus if an infant surrenders a life insurance policy taken out by him and accepts cash therefor, his administrator can not avoid such surrender and enforce payment of the policy, since the surrender is a rescission by the infant.⁹ So stringent is the rule that conveyances of realty can not be avoided during minority that a minor can not redeem realty mortgaged by his father and devised to himself and his mother, of which the mortgagee has obtained possession by acquiring the widow's estate.¹⁰ But an infant at majority may avoid a deed of his interest in remainder, though the life estate has not expired.¹¹ With reference to his executed contracts for conveying realty, it has been held that he could at least enter during minority and take the rents and profits,¹² but this view seems illogical and has been stoutly denied.¹³

§ 1611. Theory of reasonable time after reaching majority.

With reference to the rule as to the length of time allowed to an infant in which to disaffirm his contracts and conveyances after reaching majority, it must be admitted that the decisions are sharply at variance. The English courts, followed by a very considerable number of American courts, hold that the infant must rescind within a reasonable time after majority;¹ and this conclusion is in

⁷ *Stoll v. Hawks*, 179 Mich. 571, 51 L. R. A. (N.S.) 28, 146 N. W. 229; *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

⁸ *Stoll v. Hawks*, 179 Mich. 571, 51 L. R. A. (N.S.) 28, 146 N. W. 229; *Patterson v. Kasper*, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

⁹ *Pippen v. Ins. Co.*, 130 N. Car. 23, 57 L. R. A. 505, 40 S. E. 822.

¹⁰ *Prout v. Cock* [1896], 2 Ch. 808.

¹¹ *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 468.

¹² *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Cummings v. Powell*, 8 Tex. 80.

¹³ *Sibley v. Bunn*, 125 Mo. 445, 28 S. W. 754.

¹ *England. Edwards v. Carter* [1893], A. C. 360; *Viditz v. O'Hagan* [1899], 2 Ch. 569, 68 L. J. Ch. N. S. 553; *McDonald v. Salmon Club*, 33 N. B. 472.

Alabama. Smoot v. Ryan, 187 Ala. 396, 65 So. 828.

Arkansas. Watson v. Billings, 38 Ark. 278, 42 Am. Rep. 1; *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270.

California. Hastings v. Dollarhide, 24 Cal. 195.

Connecticut. Kline v. Beebe, 6 Conn. 494.

Delaware. Wallace v. Lewis, 4 Harr. (Del.) 75.

Illinois. Tunnison v. Chamberlin, 88 Ill. 378.

Indiana. Stringer v. Ins. Co., 82 Ind. 100; *Buchanan v. Hubbard*, 96 Ind. 1.

some states the result of specific statutory provisions.² By analogy to the Statute of Limitations, some courts have fixed a reasonable time at the time prescribed by such statute for recovering such property.³

The rule that an infant must rescind in a reasonable time after reaching the age of majority is insisted on with especial force in contracts relating to personalty,⁴ but it also applies to realty.⁵ What a reasonable time is, is a question of fact, depending on the circumstances of each case. It may be said at the outset that if any acts of ratification have taken place, the question of the lapse

Kansas. *Ralph v. Ball*, 100 Kan. 460, 164 Pac. 1081.

Kentucky. *Petty v. Roberts*, 80 Ky. (7 Bush.) 410.

Maine. *Boody v. McKenney*, 23 Me. 517.

Maryland. *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071.

Minnesota. *Goodnow v. Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798, 18 N. W. 283.

Nebraska. *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 302.

North Carolina. *Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 580; *Hogan v. Utter*, 175 N. Car. 332, 95 S. E. 565.

Pennsylvania. *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114.

Tennessee. *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458.

Texas. *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801; *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; *Simkins v. Searcy*, 10 Tex. Civ. App. 406, 32 S. W. 849.

Vermont. *Richardson v. Boright*, 9 Vt. 368.

West Virginia. *Adams v. Adams*, 70 W. Va. 546, 95 S. E. 859.

Wisconsin. *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

² **Georgia.** *Bentley v. Greer*, 100 Ga. 35, 27 S. E. 974.

Iowa. *Green v. Wilding*, 59 Ia. 679, 44 Am. Rep. 696, 13 N. W. 761.

Kansas. *Brown v. Staab*, 103 Kan. 611, 176 Pac. 113.

Montana. *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

Nebraska. *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

³ *Hogan v. Utter*, 175 N. Car. 332, 95 S. E. 565.

For the theory that the Statute of Limitations, as such, controls, see § 1612.

⁴ **Georgia.** *McKamey v. Cooper*, 81 Ga. 679, 8 S. E. 312.

Kentucky. *Deason v. Boyd*, 31 Ky. (1 Dana) 45; *Robinson v. Hoskins*, 77 Ky. (14 Bush.) 393.

New York. *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617.

⁵ **Indiana.** *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

Iowa. *Green v. Wilding*, 59 Ia. 679, 44 Am. Rep. 696, 13 N. W. 761.

Kansas. *Ralph v. Ball*, 100 Kan. 460, 164 Pac. 1081.

North Carolina. *Weeks v. Wilkins*, 134 N. Car. 516, 47 S. E. 24.

Texas. *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372.

Wisconsin. *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

of time becomes wholly immaterial. Where there are no circumstances to show a ratification, a delay of thirty-two days,⁶ of three and a half months,⁷ of four months,⁸ or of eighteen months,⁹ has in each case been held reasonable. Delay for a much greater time has been held not to be unreasonable where there are circumstances to explain the delay. Thus where coverture prevents the wife from suing without the consent of her husband, a delay after majority, if due to coverture, of nineteen years,¹⁰ of twenty-eight years,¹¹ of thirty-two years,¹² or of thirty-five years,¹³ has in each case been held reasonable. Since an infant can not disaffirm a conveyance of realty before coming of age, an infant who has conveyed realty and has married before coming of age is not precluded from disaffirming by a delay until both disabilities of infancy and coverture have been removed, at least if there has been no act of ratification.¹⁴ Where there are no special circumstances to explain or excuse the delay, a delay of forty-three years,¹⁵ especially if improvements upon the property have been made;¹⁶ a delay of forty years after executing a deed, and five years after the disability of coverture is removed;¹⁷ a delay of fifteen years after majority, with the erection of improvements and the appreciation of the value of the realty;¹⁸ a delay of fourteen years;¹⁹ a delay of six years, together with treating the property purchased by him as his own;²⁰ a delay of five years;²¹ a delay of four years;²² a delay of three years and a half;²³

⁶ *Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109.

⁷ *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

⁸ *Rapid, etc., Co. v. Sanford* (Tex. Civ. App.), 24 S. W. 587.

⁹ *Johnson v. Storie*, 32 Neb. 610, 49 N. W. 371.

¹⁰ *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

¹¹ *McMorris v. Webb*, 17 S. Car. 556, 43 Am. Rep. 629.

¹² *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709. But in Virginia the infant has the entire period fixed by the Statute of Limitations in which to disaffirm. See § 1612.

¹³ *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 283.

¹⁴ *Smith v. Smith's Executor*, 107 Va.

112, 122 Am. St. Rep. 831, 12 L. R. A. (N.S.) 1184, 57 S. E. 577.

¹⁵ *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270.

¹⁶ *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270.

¹⁷ *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071.

¹⁸ *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114.

¹⁹ *Ihley v. Padgett*, 27 S. Car. 300, 3 S. E. 468.

²⁰ *Land Co. v. Nixon* (Tenn. Ch. App.), 48 S. W. 405.

²¹ *Brown v. Staab*, 103 Kan. 611, 176 Pac. 113.

²² *Carter v. Silber* [1892], 2 Ch. 278 [reversing (1891), 3 Ch. 553].

²³ *Goodnow v. Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798, 18 N. W. 283.

a delay of three years,²⁴ and in extreme cases, where the facts pointed strongly to a ratification, a delay of two months,²⁵ or one,²⁶ has in each case been held to be an unreasonable delay. The fact that the right of action has not accrued to the infant when he comes of age does not enable him to wait until such right of action accrues before electing to affirm or disaffirm.²⁷

§ 1612. Theory of period of limitations. The other rule, which is followed by a number of American states, is that an infant has the time fixed by the Statute of Limitations for bringing an action to recover real property, after reaching majority before his failure to disaffirm will bar his right so to do.¹ So where an infant delayed disaffirming a deed for eighteen years,² or twenty years and seven months,³ he was still allowed to disaffirm, in jurisdictions in which the Statute of Limitations fixed a longer period for bringing ejectment. A delay beyond the period of limitations has been held to bar the infant's right to disaffirm.⁴ If an infant has conveyed

²⁴ *Hogan v. Utter*, 175 N. Car. 332, 95 S. E. 565. (Adopted by analogy as an arbitrary limit.)

²⁵ *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. 923.

²⁶ *Forsyth v. Hastings*, 27 Vt. 646.

²⁷ *Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 560.

¹ *United States. Irvine v. Irvine*, 76 U. S. (9 Wall.) 617, 19 L. ed. 800; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Gilkinson v. Miller*, 74 Fed. 131.

Alabama. *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *McCarthy v. Nierosi*, 72 Ala. 332, 47 Am. Rep. 418; *Hill v. Nelms*, 86 Ala. 442, 5 So. 796.

Arkansas. *Kountz v. Davis*, 34 Ark. 590; *Stull v. Harris*, 51 Ark. 294, 2 L. R. A. 741, 11 S. W. 104.

Kentucky. *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; *Justice v. Justice*, 170 Ky. 423, 186 S. W. 148. (It is also said that the infant must elect to avoid his deed "within a reasonable time after he attains his majority.")

Maine. *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318.

Michigan. *Donovan v. Ward*, 100 Mich. 601, 59 N. W. 254.

Mississippi. *Wallace v. Latham*, 52 Miss. 291; *Allen v. Poole*, 54 Miss. 323; *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616, 32 So. 231, 31 So. 197; *Watson v. Peebles*, 102 Miss. 725, 59 So. 881.

Missouri. *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Thomas v. Pullis*, 56 Mo. 211; *Huth v. Ry.*, 56 Mo. 292; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206.

New Hampshire. *Emmons v. Murray*, 16 N. H. 385.

New York. *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

Ohio. *Drake v. Ramsey*, 5 Ohio 252; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

Virginia. *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

West Virginia. *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; *Blake v. Hollandsworth*, 71 W. Va. 397, 43 L. R. A. (N.S.) 714, 76 S. E. 814.

² *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

³ *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

⁴ *Justice v. Justice*, 170 Ky. 423, 186 S. W. 148.

realty and has not married until after she has come of age, the period of limitations has begun to run upon her coming of age; and her subsequent marriage will not suspend its operation.⁵ A delay during coverture for twenty-four years during which the purchaser has made improvements and the grantor has promised to make a deed has been held to bar the right to disaffirm, although limitations did not run during coverture.⁶

In some jurisdictions the courts have felt that the Statute of Limitations did not apply to an action by an infant to avoid a transaction, but that by analogy the courts would adopt a period corresponding to that fixed by limitations.⁷

A compromise rule has been suggested in some jurisdictions in which it is held that the minor would have a reasonable time to avoid his deed, and that the court would by analogy adopt the time fixed by the Statute of Limitations for one under disability when his cause of action accrued to bring an action after his disability was removed by statute, which in that state was three years.⁸ Where

⁵ *Priddy v. Boice*, 201 Mo. 309, 119 Am. St. Rep. 762, 9 L. R. A. (N.S.) 718, 99 S. W. 1055.

⁶ *Henson v. Culp*, 157 Ky. 442, 163 S. W. 455.

⁷ *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

⁸ *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434.

In North Carolina the three-year period is adopted in analogy to the period in which an infant may bring an action against a disseisor after he has reached the age of majority. *Weeks v. Wilkins*, 134 N. Car. 516, 47 S. E. 24; *Baggett v. Jackson*, 160 N. Car. 26, 76 S. E. 86; *Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 590; *Hogan v. Utter*, 175 N. Car. 332, 95 S. E. 565.

The ten-year period has been adopted in Kentucky, at first by analogy to the Statute of Limitations; and subsequently under the section governing actions for relief not otherwise provided for. *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; *Justice v. Justice*, 170 Ky. 423, 186 S. W. 148.

"Within what time such an action

must be commenced, and whether there is in fact any express statutory limitation on the subject, are questions not hitherto passed on by this court.

"The authorities generally agree that the election to avoid such deed must be made by the infant within a reasonable time after he arrives at full age. But what is a reasonable time can not be determined by any certain or fixed test, and must, therefore, be left for the discretionary determination of the court, which is not in accordance with the modern and wiser policy of our statutes, fixing in every case a definite limit to litigation, and a period at which owners of property may repose in security.

"In *Merriweather v. Herran*, 8 B. Mon. 162, is this language: 'The right of avoidance is still the same, founded in the infancy of the party, taking date from the moment of executing the contract, or, at any rate, from his arrival at full age, and subject to be defeated or lost by any act of confirmation or waiver, or by such con-

this principle applies, the time at which such period begins to run against an infant remainderman is not postponed until the termination of the life estate.⁹

In other jurisdictions this analogy is rejected.¹⁰

Equity will compel an infant on reaching majority to adopt or abandon an agreement for quieting title to realty.¹¹

§ 1613. What constitutes disaffirmance—Executory contracts.

The modern rule is that no set form of disaffirmance is necessary, but that the infant's intention to disaffirm together with any conduct on his part which makes this intention clear constitutes a sufficient disaffirmance.¹ Intent to disaffirm is necessary,² as well as

tinued acquiescence as may afford an implication of either, or by the failure to assert the right for such a length of time as in analogy to the Statute of Limitations, and in view of its purpose of giving repose to society, should operate according to the principles and practice of a court of equity to prevent its future assertion.'

"It seems to us the necessity of resorting to analogy, and much less of depending upon the discretion of the court, as to whether the election has been made within a reasonable time, does not now exist, but that section 9, article 3, chapter 71, General Statutes, was intended and should be applied to a case of this kind. It is as follows: 'An action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued.'

"In our opinion, therefore, while a party may, before the expiration of that period, by act bind himself to a confirmation, he can not, after ten years from his arrival at full age, maintain an action to avoid and set aside a deed made while an infant, and as this action was not commenced within that statutory limit, the court erred in rendering judgment for the plaintiff, and it is reversed, with directions to dismiss the petition." *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447.

⁹ *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

¹⁰ *Ralph v. Ball*, 100 Kan. 460, 164 Pac. 1081.

¹¹ *Overbach v. Heermance*, 1 Hopk. Ch. (N. Y.) 337, 14 Am. Dec. 546.

¹ *Alabama*. *Smoot v. Ryan*, 187 Ala. 396, 65 So. 828.

Arizona. *Arizona Eastern R. Co. v. Carillo*, 17 Ariz. 115, 149 Pac. 313.

Arkansas. *Bagley v. Fletcher*, 44 Ark. 153.

Illinois. *Strain v. Hinds*, 277 Ill. 598, 115 N. E. 563.

Indiana. *Long v. Williams*, 74 Ind. 115; *Shroyer v. Pittinger*, 31 Ind. App. 158, 67 N. E. 475.

Minnesota. *Cogley v. Cushman*, 16 Minn. 397.

Missouri. *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

Montana. *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

New York. *Chapin v. Shafer*, 49 N. Y. 407.

North Dakota. *Casement v. Callaghan*, 35 N. D. 27, 159 N. W. 77.

Oklahoma. *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 853.

Washington. *Plummer v. Northern Pacific Ry. Co.*, 98 Wash. 67, 167 Pac. 73.

² *Strain v. Hinds*, 277 Ill. 598, 115 N. E. 563; *Brown v. Staab*, 103 Kan. 611, 176 Pac. 113.

a positive act by which such intent is evidenced.³ The refusal of an infant to renew a contract after coming of age is not a disaffirmance.⁴ An executory contract may be disaffirmed by notice or its equivalent,⁵ or by interposing infancy as a defense to a suit thereon.⁶ The act of an infant in bringing an action is a disaffirmance of a contract of compromise and settlement which he entered into during minority.⁷ The action of an infant in making a settlement of a cause of action is a disaffirmance of his contract by which he employed an attorney to bring an action to enforce such claim.⁸

An infant should offer to rescind to the adversary party and not to a purchaser from the adversary.⁹

§ 1614. Disaffirmance of conveyance of realty. It was once held that a common-law conveyance, such as feoffment, could be avoided only by an act of equal notoriety;¹ but this rule has no application to modern forms of conveyances.² Undoubtedly, re-entry with intent to hold land adversely will avoid a deed,³ or a grant of an easement, as a right to construct a sewer across his land.⁴ However, the act of an executor in taking possession of realty does not bind a minor heir to avoid the deed.⁵ A conveyance by a guardian of his ward's land is not a disaffirmance of a mortgage which the ward had executed before such conveyance.⁶

³ *Casement v. Callaghan*, 35 N. D. 27, 159 N. W. 77.

⁴ *Brown v. Staab*, 103 Kan. 611, 176 Pac. 113.

⁵ *Mustard v. Wohlford*, 56 Va. (15 Gratt.) 329, 76 Am. Dec. 209. (As where a minor avoided a contract to sell land by selling the property to another after majority.)

⁶ *Alabama*. *Smoot v. Ryan*, 187 Ala. 396, 65 So. 828.

Florida. *Sparr v. Ry.*, 25 Fla. 185, 6 So. 60.

Indiana. *Fetrow v. Wiseman*, 40 Ind. 148.

Kentucky. *Stern v. Freeman*, 45 Ky. (4 Met.) 309.

Massachusetts. *Freeman v. Nichols*, 138 Mass. 313.

⁷ *Arizona*. *Eastern R. Co. v. Carillo*, 17 Ariz. 115, 149 Pac. 313; *Worthy v.*

Jonesville Oil Mill, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634.

⁸ *Plummer v. Northern Pacific Ry. Co.*, 98 Wash. 67, 167 Pac. 73.

⁹ *Downing v. Stone*, 47 Mo. App. 144.

¹ *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

² *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463.

³ *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409 (obiter).

⁴ *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418.

⁵ *Cardwell v. Rogers*, 76 Tex. 37, 12 S. W. 1006. (The deed was made by the donee of an invalid power given by the testator who devised the land to the infant.)

⁶ *Shreeves v. Caldwell*, 135 Mich. 323, 106 Am. St. Rep. 396, 97 N. W. 764.

An executed conveyance of realty may also be avoided by an action of ejectment,⁷ or by a suit to cancel the deed.⁸

An infant may disaffirm a conveyance executed during minority by some means other than by bringing an action.⁹ An infant may disaffirm his conveyance by an answer in an ejectment suit, where the infant or one claiming under him is in possession of the realty;¹⁰ or by a deed executed by the former infant after majority, and inconsistent with the deed executed by him before majority.¹¹ A grantee under a deed executed by a minor can not be heard to claim that a deed executed by such grantor after reaching majority was not a disaffirmance of the earlier deed for the reason that the second deed was obtained by fraud upon such former infant.¹² Whether a quit-claim deed to a third person operates as a disaffirmance of a deed executed during minority and conveying the same realty is a question upon which there is a conflict of authority. In some jurisdictions it has been said that such a deed does not operate as a disaffirmance as it may be consistent with the former warranty deed because it purports to pass only such interest as grantor has.¹³

⁷ Illinois. *Cole v. Pennoyer*, 14 Ill. 158.

Michigan. *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539.

Missouri. *Harris v. Ross*, 86 Mo. 89, 56 Am. Rep. 411; *Craig v. Van Beber*, 100 Mo. 584, 18 Am. St. Rep. 509, 13 S. W. 906.

Ohio. *Drake v. Ramsay*, 5 Ohio 252.

Virginia. *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

⁸ *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852; *Coody v. Coody*, 39 Okla. 719, L. R. A. 1915E, 465, 136 Pac. 754.

⁹ *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580.

¹⁰ *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

¹¹ United States. *Tucker v. Moreland*, 35 U. S. (10 Pet.) 58, 9 L. ed. 345.

Alabama. *Scott v. Brown*, 106 Ala. 604, 17 So. 731.

Arkansas. *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

California. *Hastings v. Dollarhide*, 24 Cal. 195.

Indiana. *Long v. Williams*, 74 Ind. 115; *Losey v. Bond*, 94 Ind. 67.

Kentucky. *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Moore v. Baker*, 92 Ky. 518, 18 S. W. 363; *Estep v. Estep* (Ky.), 73 S. W. 777.

Michigan. *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385.

Minnesota. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

Missouri. *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

New Hampshire. *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38.

New York. *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

Ohio. *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

¹² *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹³ *Shreeves v. Caldwell*, 135 Mich. 323, 106 Am. St. Rep. 396, 97 N. W. 764.

In other jurisdictions it has been said that since the second deed is not intended as an affirmance of the first it must be intended as a disaffirmance, and that accordingly it operates as a disaffirmance of the prior deed, even though that was a warranty deed.¹⁴

An infant can disaffirm a mortgage by giving notice on the day of the foreclosure sale that her interest can not be sold and by conveying her land by warranty deed.¹⁵ A deed to an infant may be disaffirmed by him at majority by a letter demanding back the installment of the purchase price already paid in.¹⁶

§ 1615. Disaffirmance of contract for sale or purchase of personalty. An executed contract for the sale or mortgage of personal property may also be avoided by an act inconsistent with the former act, such as a second conveyance.¹ As a sale of personal property mortgaged by an infant is a disaffirmance of the mortgage, it is not a crime.² A purchase of personalty by an infant may be avoided by notice of disaffirmance,³ or by suit for the purchase price,⁴ or by delivering the chattel bought to the vendor, and acquiescing in a suit by his next friend to recover the money paid for it,⁵ or by tendering to the vendor the chattel which the infant has bought,⁶ even though he refuses to accept it.⁷ A mortgage may be disaffirmed by a plea of infancy in a suit to enforce it. Thus a minor mortgaged a steamboat. At the time the mortgage became due the court appointed a receiver and granted an injunction. Both orders were set aside on motion, it appearing that the mortgagor had not affirmed the mortgage after reaching majority and now disaffirmed it by plea.⁸

§ 1616. Partial disaffirmance impossible. The infant can not, without the consent of the adversary party, affirm that part of the transaction which is advantageous to him and disaffirm the rest;

¹⁴ *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹⁵ *Scott v. Brown*, 106 Ala. 604, 17 So. 731.

¹⁶ *McCarty v. Iron Co.*, 92 Ala. 463, 12 L. R. A. 136, 8 So. 417.

¹ *Chapin v. Shafer*, 49 N. Y. 407.

² *State v. Plaisted*, 43 N. H. 413; *Jones v. State*, 31 Tex. Crim. Rep. 252, 20 S. W. 578.

³ *Stanhope v. Shambow*, 54 Mont. 360,

170 Pac. 752; *Stack v. Cavanaugh*, 67 N. H. 449, 30 Atl. 350.

⁴ *Lemmon v. Beeman*, 45 O. S. 505, 15 N. E. 476.

⁵ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775.

⁶ *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

⁷ *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

⁸ *Sparr v. Ry. Co.*, 25 Fla. 185, 6 So. 60.

but he must treat the entire transaction as a unit.¹ Thus an infant can not avoid a contract made by both herself and her father, by which it is agreed that she shall draw her wages subject to the conditions of the contract, and recover the wages unconditionally.² A minor bought stock from a corporation. Subsequently such corporation transferred its business to another under a contract that upon repayment to such other of the purchase price of such plant it would issue certificates of its own stock. The infant sued such other corporation to recover the price paid for the stock. It was held that he could not recover.³ In another case a contract was made by infants for the purchase of lands, which lands were deeded to them, and paid for in part by cash and the rest by notes given by their guardian in his official capacity. Subsequently suit was brought on the notes and a judgment was obtained, on which the realty was sold. It was held that the infants could not demand that the vendors make title on payment to them of the balance of the purchase price.⁴ So a minor can not adopt the acts of his agent in part and repudiate them in part.⁵ The infant can not claim the benefit of a conditional contract, and refuse to be bound by the condition.⁶ So a minor purchasing goods by conditional sale can

¹ California. *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306, 26 Pac. 119.

Georgia. *Howard v. Cassels*, 105 Ga. 412, 70 Am. St. Rep. 44, 31 S. E. 562.

Illinois. *Biederman v. O'Connor*, 117 Ill. 493, 57 Am. Rep. 876, 4 West. 152, 7 N. E. 463.

Indiana. *Carpenter v. Carpenter*, 45 Ind. 142.

Kansas. *Mead v. Phoenix Ins. Co.*, 68 Kan. 432, 104 Am. St. Rep. 412, 64 L. R. A. 79, 75 Pac. 475.

Maine. *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34.

Massachusetts. *White v. Mount Pleasant, etc., Corp.*, 172 Mass. 462, 52 N. E. 632.

Michigan. *Strong v. Ehle*, 86 Mich. 42, 48 N. W. 868.

New Hampshire. *Ladd v. Wiggin*, 35 N. H. 428.

New York. *Henry v. Root*, 33 N. Y. 526; *Overbach v. Heermance*, 1 Hopk.

Ch. (N. Y.) 337, 14 Am. Dec. 546; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141.

Ohio. *Curtiss v. McDougal*, 28 O. S. 66.

Tennessee. *Tennessee, etc., Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211, 18 S. W. 262; *Western Union Telegraph Co. v. Greer*, 115 Tenn. 368, 1 L. R. A. (N.S.) 525, 89 S. W. 327.

² Tennessee, etc., Co. v. James, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211, 18 S. W. 262.

³ White v. Mount Pleasant, etc., Corp., 172 Mass. 462, 52 N. E. 632.

⁴ Howard v. Cassels, 105 Ga. 412, 70 Am. St. Rep. 44, 31 S. E. 562.

⁵ State v. New Orleans, 105 La. 768, 30 So. 97.

⁶ Biedermann v. O'Connor, 117 Ill. 493, 57 Am. Rep. 876, 7 N. E. 463; *Lowry v. Drake*, 31 Ky. (1 Dana) 46.

not, after condition broken, interpose infancy as a defense.⁷ So an infant can not retain property purchased by him, whether realty,⁸ or personalty,⁹ and avoid a purchase-money mortgage given therefor, or a vendor's lien reserved in the deed,¹⁰ or refuse to pay therefor on the ground of infancy,¹¹ even if the mortgage was given to a third person who advanced the purchase money.¹² An advance to an infant to enable him to purchase land forms an entire transaction with the purchase of such land, and the infant can not prevent the lender from being subrogated to the rights of the vendor and enforcing a vendor's lien, though a mortgage given by the infant to secure such debt in part is not valid,¹³ while an advance to an infant to enable him to erect buildings on land purchased is not an entire transaction with the purchase, and the infant may retain such land and repudiate liability for such advances.¹⁴ An infant who wishes to enforce a contract can not avoid a covenant therein limiting the time within which an action may be brought for breach of such contract.¹⁵ This rule has been applied to such covenants in a contract of insurance,¹⁶ and in a contract by which a telegram is to be transmitted.¹⁷

This view is not, however, entertained in all cases. Thus where A borrowed money from B to enable him to pay X for certain realty, and A gave to B a mortgage on such realty, it was held that A could repudiate the mortgage while retaining the realty.¹⁸ So if an infant repudiates a sale, one claiming under him can not enforce a chattel mortgage given as part of the transaction.¹⁹ But

⁷ Robinson v. Berry, 93 Me. 320, 45 Atl. 34.

⁸ Strong v. Ehle, 86 Mich. 42, 48 N. W. 868; Uecker v. Koehn, 21 Neb. 559, 59 Am. Rep. 849, 32 N. W. 583; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589.

⁹ Heath v. West, 28 N. H. 101; Curtiss v. McDougal, 26 O. S. 66; Knaggs v. Green, 48 Wis. 601, 33 Am. Rep. 838, 4 N. W. 760.

¹⁰ Smith v. Henkel, 81 Va. 524.

¹¹ Thomason v. Phillips, 73 Ga. 140.

¹² Ready v. Pinkham, 181 Mass. 351, 63 N. E. 887. So Thurston v. Building Society [1902], 1 Ch. 1.

¹³ Thurston v. Building Society [1902], 1 Ch. 1.

¹⁴ Thurston v. Building Society [1902], 1 Ch. 1.

¹⁵ Mead v. Phoenix Ins. Co., 68 Kan. 432, 104 Am. St. Rep. 412, 64 L. R. A. 79, 75 Pac. 475; Western Union Telegraph Co. v. Greer, 115 Tenn. 368, 1 L. R. A. (N.S.) 525, 89 S. W. 327.

¹⁶ Mead v. Phoenix Ins. Co., 68 Kan. 432, 104 Am. St. Rep. 412, 64 L. R. A. 79, 75 Pac. 475.

¹⁷ Western Union Telegraph Co. v. Greer, 115 Tenn. 368, 1 L. R. A. (N.S.) 525, 89 S. W. 327.

¹⁸ Citizens', etc., Association v. Arvin, 207 Pa. St. 293, 56 Atl. 870.

¹⁹ Hyde v. Courtwright, 14 Ind. App. 106, 42 N. E. 647.

where A, a minor, sold a horse which he warranted sound, and after majority the note given in part payment therefor was paid and A endorsed, "The note being paid, I discharge property thereby secured," it was held that this did not ratify the warranty.²⁰ In a recent case, however, the infant's representative has been allowed to avoid a contract in part.²¹ The infant had secured a life insurance policy by an application in which he warranted certain facts which were not true. The policy of an adult could have been avoided by the insurance company for such false warranties, but it was held that the beneficiary could avoid such warranties and enforce the rest of the policy. The court based its decision on the rule that an infant was not liable on his warranty collateral to an executed contract of sale.²² This latter rule is correct,²³ but it does not apply to the case at bar. In a warranty collateral to a sale, the infant is merely resisting the enforcement of a contract, executory as to himself. The adversary party might possibly have rescinded the contract for fraud or for breach, but he has elected to affirm it and enforce the executory contract. In *O'Rourke v. Ins. Co.* the infant's representative is seeking to enforce that part of a contract favorable to herself and to avoid the part unfavorable to her.

§ 1617. Restoration of consideration on disaffirmance. It is difficult to state a general rule which will in every case operate fairly between the infant who disaffirms a contract and the adversary party. It is evident, however, that if the infant is in every case bound to return the consideration which he has received, or its equivalent, his disability will amount to little except in executory contracts, and in cases where the infant is so prudent and careful in his management of the property which he receives under the contract, that he really does not need the protection of the law.¹ The earlier cases tend to require an infant to return the consideration received by him, or its equivalent if he has squandered it; but these cases have for the most part been overruled or limited by

²⁰ *Bird v. Swain*, 79 Me. 529, 11 Atl. 421.

²¹ *O'Rourke v. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643, 57 L. R. A. 496, 50 Atl. 834.

²² *O'Rourke v. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643, 57 L. R. A. 496, 50 Atl. 834 [citing on this point, *West*

v. Moore, 14 Vt. 447, 39 Am. Dec. 235].

²³ See §§ 1593 et seq.

¹ *Bickle v. Turner*, 133 Ark. 536, 202 S. W. 703; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Turney v. Mobile & Ohio Ry. Co.*, 127 Tenn. 673, 156 S. W. 1065.

later cases.² After some conflict, it has finally been held by the weight of judicial opinion that an infant is bound to restore so much of the consideration as he still has when he disaffirms the contract, if during minority; or when he comes of age, if he disaffirms when his minority ends.³ If before this time he has wasted or lost the property received by him under the contract, he is not

² *Arkansas*. *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293 [overruling, *Bozeman v. Browning*, 31 Ark. 364].

Massachusetts. *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117 [not following, *Bartlett v. Cowles*, 15 Gray (Mass.) 445].

Missouri. *Highley v. Barron*, 49 Mo. 103; *Craig v. Van Bebbler*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906 [limiting, *Kerr v. Bell*, 44 Mo. 120; *Baker v. Kennett*, 54 Mo. 82, in which it had been said, without making any exception, that an infant must restore the consideration on disaffirmance].

Texas. *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 47 L. R. A. 326, 54 S. W. 661 [limiting the general language used in *Cummings v. Powell*, 8 Tex. 93; *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801; *Graves v. Hickman*, 59 Tex. 383; *Harris v. Musgrove*, 59 Tex. 403; *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451; *Wade v. Love*, 69 Tex. 522, 7 S. W. 225; *Ferguson v. Ry.*, 73 Tex. 344, 11 S. W. 347; *Houston, etc., Ry. v. Ferguson*, 73 Tex. 349, 13 S. W. 57].

Vermont. *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678 [modifying the views expressed in *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228].

³ *United States*. *Tucker v. Moreland*, 35 U. S. (10 Pet.) 58, 9 L. ed. 345; *MacGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326.

Alabama. *American, etc., Co. v.*

Dykes, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292.

Arkansas. *Bickle v. Turner*, 133 Ark. 536, 202 S. W. 703.

Florida. *Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N.S.) 33, 55 So. 844.

Illinois. *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. (N.S.) 128, 89 N. E. 796; *Bennett v. McLaughlin*, 13 Ill. App. 349.

Indiana. *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

Indian Territory. *Sanger v. Hibbard*, 2 Ind. Terr. 547, 53 S. W. 330.

Iowa. *Jenkins v. Jenkins*, 12 Ia. 195.

Kansas. *Burgett v. Barrick*, 25 Kan. 527.

Massachusetts. *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228, 6 L. R. A. 146, 23 N. E. 222; *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577.

Minnesota. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

Mississippi. *Brantley v. Wolf*, 60 Miss. 420; *Harvey v. Briggs*, 68 Miss. 60, 10 L. R. A. 62, 8 So. 274.

Missouri. *Craig v. Van Bebbler*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Betts v. Carroll*, 6 Mo. App. 518.

Nebraska. *Bloomer v. Nolan*, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039.

New Hampshire. *Hamblett v. Hamblett*, 6 N. H. 339.

New Mexico. *Evants v. Taylor*, 18 N. M. 371, 50 L. R. A. (N.S.) 1113, 137 Pac. 583.

New York. *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

bound to return its equivalent,⁴ even if he seeks rescission in equity,⁵ and even if he has been guilty of fraud as to his age.⁶ If, by statute, an infant is required to return the consideration if he is over

North Carolina. *Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 580.

Tennessee. *Lane v. Coal Co.*, 101 Tenn. 581, 48 S. W. 1094; *Grace v. Hale*, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296.

Texas. *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 47 L. R. A. 326, 54 S. W. 661.

Virginia. *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Bedinger v. Wharton*, 68 Va. (27 Gratt.) 857.

West Virginia. *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; *Young v. Ry. Co.*, 42 W. Va. 112, 24 S. E. 615; *Hobbs v. Hinton Foundry, Machine & Plumbing Co.*, 74 W. Va. 443, 82 S. E. 267.

⁴**Arkansas.** *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533.

Florida. *Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N.S.) 33, 55 So. 844.

Georgia. *White v. Sikes*, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228.

Illinois. *Reynolds v. McCurry*, 100 Ill. 356; *Featherstone v. Bettlejewski*, 75 Ill. App. 59.

Indiana. *United States, etc., Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803.

Iowa. *First National Bank v. Casey*, 158 Ia. 349, 138 N. W. 897.

Kentucky. *Gray v. Grimm*, 157 Ky. 603, 163 S. W. 762.

Massachusetts. *Chandler v. Simons*, 97 Mass. 508, 93 Am. Dec. 117; *Walsh v. Young*, 110 Mass. 396; *White v. Cotton-Waste Corporation*, 178 Mass. 20, 59 N. E. 642.

Michigan. *Corey v. Burton*, 32 Mich. 30; *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 897.

Minnesota. *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407, 2 N. W. 942.

Missouri. *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490.

Montana. *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761.

Nebraska. *Bloomer v. Nolan*, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

New York. *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Petrie v. Williams*, 68 Hun (N. Y.) 589; *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141; *Youmans v. Forsythe*, 86 Hun (N. Y.) 370.

North Carolina. *Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 580.

Ohio. *Lemmon v. Beeman*, 45 O. S. 505, 15 N. E. 476.

Oklahoma. *Coody v. Coody*, 39 Okla. 719, L. R. A. 1915E, 465, 136 Pac. 754; *Collins Investment Co. v. Beard*, 46 Okla. 310, 148 Pac. 846.

Tennessee. *Lane v. Dayton, etc., Co.*, 101 Tenn. 581, 48 S. W. 1094.

Texas. *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 47 L. R. A. 326, 54 S. W. 661.

Vermont. *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Wiser v. Lockwood*, 42 Vt. 720.

Wisconsin. *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089; *Lambrecht v. Holsaple*, 164 Wis. 465, 160 N. W. 168.

⁵*Coody v. Coody*, 39 Okla. 719, L. R. A. 1915E, 465, 136 Pac. 754.

⁶*Collins Investment Co. v. Beard*, 46 Okla. 310, 148 Pac. 846.

eighteen, but is not required to return it if under eighteen, an infant who is under eighteen and who has fraudulently represented that he is over eighteen is not estopped to avoid the transaction, although he does not restore the consideration.⁷ If the infant has lost the consideration which he received, the fact that his negligence was one of the causes of such loss does not render him liable for its value.⁸

Even if the property has depreciated in value,⁹ as through the misuse thereof by the infant,¹⁰ or if the infant has consumed the property,¹¹ or sold it,¹² or if the property has been taken from the infant on execution against another person,¹³ he need not account for the loss. An infant who has purchased an automobile may avoid such contract, and if he tenders back the automobile on reaching majority he may recover the money which he paid therefor without regard to the condition in which it is when he returns it.¹⁴

If two infants contract with each other, the one who seeks to disaffirm the contract is not liable for what he has spent before disaffirmance.¹⁵

If the consideration is from its nature something which can not be restored, the infant may avoid his contract without restoring it.¹⁶

If an infant has received stock in a corporation under the contract which he wishes to avoid, the cancellation of the certificate which issued to such infant is sufficient restoration of the consideration received by him.¹⁷

§ 1618. Consideration not enuring to benefit of infant. If the consideration for the contract of the infant was money paid not to him but to some other person,¹ as where it is paid to the infant's

⁷ Lee v. Hibernia Savings & Loan Society, 177 Cal. 656, 171 Pac. 677.

⁸ Lemmon v. Beeman, 45 O. S. 505, 15 N. E. 476.

⁹ Reynolds v. Garber-Buick Co., 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678.

¹⁰ White v. Branch, 51 Ind. 210.

¹¹ Nichol v. Steger, 74 Tenn. (6 Lea) 393 [affirming, 2 Tenn. Ch. 323].

¹² Beickler v. Guenther, 121 Ia. 419, 96 N. W. 895.

¹³ Lemmon v. Beeman, 45 O. S. 505, 15 N. E. 476.

¹⁴ Reynolds v. Garber-Buick Co., 183 Mich. 157, L. R. A. 1915C, 362, 149 N. W. 985.

¹⁵ Drude v. Curtis, 183 Mass. 317, 62 L. R. A. 755, 67 N. E. 317.

¹⁶ White v. Sikes, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228; Nielson v. International Text-Book Co., 106 Me. 104, 75 Atl. 330.

¹⁷ Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N.S.) 128, 89 N. E. 796.

¹ Law v. Long, 41 Ind. 566; Highland v. Tollisen, 75 Or. 578, 147 Pac. 558; Vogelsang v. Null, 67 Tex. 465, 3 S. W.

husband,² or father,³ or agent,⁴ and the infant never in fact receives it, he is not bound to restore an equivalent. So if an infant has not received anything under his contract he is not bound to restore anything.⁵ Neither the infant nor one to whom he has conveyed the realty after he has reached majority is bound to reimburse a grantee to whom the infant had conveyed the realty during minority for commissions which the grantee paid to his own agent to effect such purchase.⁶

§ 1619. Change in form of consideration—Subrogation. Where the infant has sold the property received by him, or changed its form in some other way, it becomes a difficult question to determine how far the fund or property may be traced in order to compel its return by the infant. Where the money received was in part spent on necessities, it has been held that the infant is not bound to repay the value of the necessities thus obtained.¹ If the consideration which the infant has received is an education and it is not regarded as a necessary in that jurisdiction, he may avoid the contract without making restoration.² It seems only fair that if the infant has expended the consideration received by him for necessities which he has consumed or for property which he still has, that he should

451; *Wade v. Love*, 69 Tex. 522, 7 S. W. 225; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

² *Arkansas*. *Stull v. Harris*, 51 Ark. 294, 2 L. R. A. 741, 11 S. W. 104; *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533.

Indiana. *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

Tennessee. *Smith v. Evans*, 24 Tenn. (5 Humph.) 70; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88.

Wisconsin. *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

³ *Arizona* *Eastern Ry. Co. v. Carillo*, 17 Ariz. 115, 149 Pac. 313; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Griffis v. Younger*, 41 N. Car. 520, 51 Am. Dec. 438; *Highland v. Tollisen*, 75 Or. 578, 147 Pac. 558.

⁴ *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451.

⁵ *Shroyer v. Pittinger*, 31 Ind. App. 158, 67 N. E. 475.

⁶ *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹ *Featherstone v. Betlejewski*, 75 Ill. App. 59; *Bedinger v. Wharton*, 68 Va. (27 Gratt.) 857. In *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 47 L. R. A. 328, 54 S. W. 661, the court allowed a writ of error, on the authority of *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; it being stated by the court of civil appeals that part of the consideration was used to buy supplies and clothing, and the court at the outset being under the impression that he should account for the value of such necessities; but this point was not decided, as it was not raised by the record.

² *White v. Sikes*, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228; *Nielson v. International Text-Book Co.*, 106 Me. 104, 75 Atl. 330.

account for the reasonable value of the necessities, or return the property thus acquired by him. In some cases this view has been enforced.³ If an infant has obtained a loan of money by representing that he is of full age, his duty to make restitution where such loan was expended for necessities is exceptionally clear.⁴ If the consideration which the infant received has been invested, he must restore its value.⁵ Where money borrowed was spent in paying off valid liens and making valuable improvements on the infant's realty, the infant was obliged to account therefor.⁶ In some states it has been held that unless the identical money is under the control of the minor he need not return it;⁷ and property for which the consideration has been exchanged need not be returned as a condition of rescission.⁸ Where the purchase money for an infant's realty was paid to her husband, and with it he bought other land in which she had a dower interest, she was not required to repay the purchase money in order to disaffirm;⁹ and a similar view was taken where an infant sold land, and the price was paid to his father, who invested the proceeds in a piano for the infant.¹⁰ Where an infant bought goods on credit, intermingled them with his own goods so as to be indistinguishable, and transferred the entire stock

³If the consideration received consisted in part of necessities the infant must account for such necessities. *Stull v. Harris*, 51 Ark. 294, 2 L. R. A. 741, 11 S. W. 104.

⁴*Ostrander v. Quin*, 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257. (The decision was based on the theory of the estoppel of the infant to deny his capacity to bind himself.)

⁵*Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 580.

⁶*United States Investment Corporation v. Ulrickson*, 84 Minn. 14, 87 Am. St. Rep. 326, 86 N. W. 613. " * * * To say that the consideration paid to Mrs. M. for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property, is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword

to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong." *McGreal v. Taylor*, 167 U. S. 688, 701, 42 L. ed. 326.

⁷*Hawes v. Burlington, etc., Ry. Co.*, 64 Ia. 315, 20 N. W. 717 [citing and following, *Jenkins v. Jenkins*, 12 Ia. 194].

⁸*Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852; *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654.

⁹*Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

¹⁰*Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852. The cases last cited really limit the question to whether the return of the property thus acquired was a condition precedent to disaffirmance.

to his father in fraud, it was held that the entire stock or the proceeds thereof could be subjected to the debt.¹¹

In Indiana the earlier cases denied the duty of the infant to return the purchase price as a condition precedent to disaffirming a sale of realty.¹² A later case has gone farther and taken the position that the infant was not liable to return the purchase money at all, even after rescission.¹³

One who purchases realty from a grantor who had conveyed it to a third person during infancy, acquires only the rights of his grantor if the original deed has been recorded properly;¹⁴ and, accordingly, in order to evict the grantee under the former deed, he must repay to him the consideration which he paid, including various liens upon the land which the original grantee paid as part of the consideration for the conveyance.¹⁵

§ 1620. Special statutory provisions. Local statutes in some states modify the common-law rules. In Iowa a minor must restore "all money or property received by him by virtue of the contract and remaining within his control at any time after he has attained his majority."¹ In California a minor must return the property received by him in consideration of the conveyance "or its equivalent," by force of which statute he must return the equivalent of what he has wasted.² In Indiana an infant may disaffirm a sale of realty without returning the price unless he has falsely represented himself an adult.³ By statute in Indiana a minor married woman

¹¹ *Evans v. Morgan*, 60 Miss. 328, 12 So. 270; and to substantially the same effect is *Sanger v. Hibbard*, 2 Ind. Terr. 547, 53 S. W. 330.

¹² *Towell v. Pence*, 47 Ind. 304; *Miles v. Lingeman*, 24 Ind. 385; *Pitcher v. Laycock*, 7 Ind. 308.

¹³ *Dill v. Bowen*, 54 Ind. 204. "Having disaffirmed the contract, the law imposes on her no legal obligation to repay the purchase money. * * *. If an infant disaffirms a contract after coming of age he must do it in toto; that is to say, if he has property in his hands acquired by the contract the other party may reclaim it. But if the property has passed from his hands or if he has received money, the law imposes no obligation upon him to

account for the property or repay the money upon his disaffirmance of the contract. It is not necessary that the other party should be placed in statu quo." *Dill v. Bowen*, 54 Ind. 204, 208.

¹⁴ *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹⁵ *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹ Statute quoted in *Stout v. Merrill*, 35 Ia. 47; and see *Hawes v. Burlington Ry. Co.*, 64 Ia. 315, 20 N. W. 717; *Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109.

² *Whyte v. Rosencrantz*, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436.

³ *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041.

who has joined with her husband in conveying realty must first restore the consideration before repudiating the sale.⁴ Since a mortgage is a conveyance, an infant feme covert can not disaffirm a mortgage in which her husband, who is of full age, has joined, without returning the consideration.⁵

§ 1621. When restoration of consideration must be made.

Whether restoration of consideration by an infant is on the one hand a condition precedent to disaffirmance or concurrent with it, or, on the other hand, it is not a condition precedent, but on disaffirmance the adversary party has merely a right of action against the infant for so much of the consideration as he is bound to return is a question on which there is a hopeless division of authority. There is a tendency not to insist on restoration as a condition precedent at law, as the infant is either resisting enforcement of the contract, if defendant; or, if plaintiff, has avoided the contract by his own conduct without the aid of the court and is suing to regain possession of what he has parted with or to obtain judgment for its equivalent.¹ There is a tendency in equity to insist on restoration as a condition precedent to the right of disaffirmance or concurrent with it, on the principle that he who seeks equity must do equity.² This tendency is especially clear where the infant has induced the adversary party to enter into the contract by means of fraudulent representations that the infant was of full age and capacity.³ Some courts suggest the distinction that an infant must return the consideration to rescind an executed contract but not to rescind one executory as to him;⁴ but this rule has been said to exist only in

⁴ Blair v. Whitaker (Ind. App.), 69 N. E. 182.

⁵ United States, etc., Co. v. Harris, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.

¹ Shuford v. Alexander, 74 Ga. 293; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565; Worthy v. Jonesville Oil Mill, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634.

² Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; Englebert v. Troxell, 40 Neb. 195, 42 Am. St. Rep. 665, 26 L. R. A. 177, 58 N. W. 852.

See also, Orchard v. Wright-Dalton-Bell-Anchor Store Co., — Mo. —, 197 S. W. 42.

³ International Land Co. v. Marshall, 22 Okla. 693, 19 L. R. A. (N.S.) 1056, 98 Pac. 951.

⁴ Alabama. Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314.

Kentucky. Bailey v. Barnberger, 50 Ky. (11 B. Mon.) 113.

Massachusetts. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105.

Missouri. Craighead v. Wells, 21 Mo. 404.

Virginia. Mustard v. Wohlford, 56 Va. (15 Gratt.) 329, 76 Am. Dec. 209; Bedinger v. Wharton, 68 Va. (27 Gratt.) 857.

equity.⁵ This distinction reconciles many of the cases but by no means all. Thus a return of the consideration has been treated as a condition precedent to allow infancy to be interposed as a defense to a promissory note.⁶ To work out this distinction: if the contract has been executed by the infant and he is suing to recover what he has parted with, restoration is not a condition precedent at law.⁷ At equity, however, restoration is a condition precedent to relief if the infant is asking affirmative relief,⁸ or restoration is decreed in the same action in which the infant seeks relief.⁹ In a suit in equity to recover realty conveyed by the infant, restoration of the consideration seems to be, at least, a concurrent condition.¹⁰ If the contract is executory as to the infant and he is resisting the enforcement of it at law, he need not restore the consideration as a condition precedent.¹¹ If he is defending in equity he need not restore the consideration as a condition precedent to avoiding the contract,¹² especially if the consideration is of a sort which can not from its nature be returned.¹³

In some jurisdictions an attempt has been made to reconcile authorities by holding that an infant need not repay the consideration still held by him as to condition precedent to avoiding a con-

⁵ *Smith v. Evans*, 24 Tenn. (5 Humph.) 70.

⁶ At law. *Philpot v. Mfg. Co.*, 18 Neb. 54, 24 N. W. 428. In equity. *Pemberton, etc., Association v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280.

⁷ *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407, 2 N. W. 942. (His ability to restore was not shown, however.) *Ruchizky v. De Haven*, 97 Pa. St. 202; *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368; *Worthy v. Jonesville Oil Mill*, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634. The court, in speaking of the proposition that restoration is a condition precedent, said: "As a general rule it is unsound." *Ruchizky v. De Haven*, 97 Pa. St. 202.

Contra, *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345.

⁸ *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Utermehle v. McGreal*, 1 D. C. App. 359; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 605, 26 L. R. A. 177, 56 N. W. 852.

See also, *Dudley v. Browning*, 79 W. Va. 331, 90 S. E. 878.

⁹ *Smith v. Evans*, 24 Tenn. (5 Humph.) 70.

¹⁰ *Bozeman v. Browning*, 31 Ark. 364; *Bryant v. Pottinger*, 69 Ky. (6 Bush.) 473.

¹¹ *Craighead v. Wells*, 21 Mo. 404. Contra, *Philpot v. Mfg. Co.*, 18 Neb. 54, 24 N. W. 428.

¹² *White v. Sikes*, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228; *Petty v. Roberts*, 70 Ky. (7 Bush.) 410.

Contra, that the infant can not defend against his note and mortgage without restoring the consideration received by him. *Pemberton, etc., Association v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280. (The infant had, however, made a false representation as to his age.)

¹³ *White v. Sikes*, 129 Ga. 508, 121 Am. St. Rep. 228, 59 S. E. 228.

veyance of realty,¹⁴ but that he must do so to avoid an executed sale by him of personalty.¹⁵ Other courts have held that an infant is obliged to return the purchase price as to condition precedent to avoiding a conveyance of realty.¹⁶ If the infant after coming of age has conveyed to a bona fide purchaser and has thereby rescinded a prior deed made during infancy, the second purchaser may recover the realty from the first without restoring to the latter the consideration paid by him.¹⁷ It has been held that equity will not enjoin an infant from disaffirming a sale of land without returning the purchase money;¹⁸ but in other jurisdictions equity will enjoin an infant from enforcing a judgment in ejectment before he restores the money paid for the land to his guardian and by him to the infant.¹⁹ An infant who wishes to avoid a contract of compromise of personal injuries may do so by bringing an action upon his original cause of action without returning the consideration.²⁰ Even where restoration is a condition concurrent or precedent, it must be shown that the infant actually received the consideration,²¹ and that he has it.²² If he has wasted it, he is not bound to restore it at all.²³ Even where the return of the consideration is said to be a condition precedent, if the infant in his petition to recover realty offers to pay whatever has been expended by grantee in behalf of the infant, alleges that he does not know what the amount is and asks for an accounting, this is sufficient without an actual tender.²⁴ Even if the restoration of the consideration is to be regarded as a condition precedent at law, the adversary party can not prevent the infant from avoiding the contract by refusing to accept the consideration when it is tendered to him by the infant.²⁵

¹⁴ *Carpenter v. Carpenter*, 45 Ind. 142; *Moore v. Baker*, 92 Ky. 518, 18 S. W. 363; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

¹⁵ *Bailey v. Barnberger*, 50 Ky. (11 B. Mon.) 113; *Philpot v. Mfg. Co.*, 18 Neb. 54, 24 N. W. 428; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350.

¹⁶ *Hobbs v. R. R.*, 122 Ala. 602, 82 Am. St. Rep. 103, 26 So. 139; *Stout v. Merrill*, 35 Ia. 47; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801.

¹⁷ *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Moore v. Baker*, 92 Ky. 518, 18 S. W. 363; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

¹⁸ *Brawner v. Franklin*, 4 Gill (Md.)

463; *Mustard v. Wohlford*, 56 Va. (15 Gratt.) 329, 76 Am. Dec. 209.

¹⁹ *Hobbs v. R. R.*, 122 Ala. 602, 82 Am. St. Rep. 103, 26 So. 139.

²⁰ *Worthy v. Jonesville Oil Mill*, 77 S. Car. 69, 11 L. R. A. (N.S.) 690, 57 S. E. 634.

²¹ At law. *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732. In equity. *Monumental, etc., Association v. Herman*, 33 Md. 128.

²² *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407, 2 N. W. 942.

²³ *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233. See § 1617.

²⁴ *Graves v. Hickman*, 59 Tex. 381.

²⁵ *Evanta v. Taylor*, 18 N. M. 371, 50 L. R. A. (N.S.) 1113, 137 Pac. 583.

§ 1622. Results of disaffirmance. On disaffirmance of the contract by the infant, the rights of the parties are to be determined without any reference to the provisions of the contract.¹ If the infant disaffirms the contract, this act on his part is said to render it void from the beginning,² and the rights of the parties are to be adjusted, except for their duty to make restitution, as if the contract had never been made;³ while the right to avoid a contract is personal to the infant any one may take advantage of its invalidity after he has elected to avoid it.⁴ If an infant debtor elects to avoid the contract and to restore the consideration, his surety may take advantage of the invalidity of such contract.⁵ In other cases, however, it seems to be assumed that the transaction is valid until disaffirmance, and that up to that time the rights of the parties are fixed by the contract.⁶

An infant agreeing to work for necessities may repudiate his contract and recover a reasonable compensation.⁷ If he repudiates the contract of employment he can recover the difference between the reasonable value of his services and what has been paid him.⁸ So a minor who works for five months under a contract for two years, and is paid for four months and then avoids his contract

¹ **Alabama.** *Ex parte McFerren*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, 63 So. 159.

Arkansas. *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

Illinois. *Myers v. Rehkopf*, 30 Ill. App. 209.

New Hampshire. *Danville v. Mfg. Co.*, 62 N. H. 133.

North Dakota. *Yancey v. Boyce*, 28 N. D. 187, 148 N. W. 539.

Oklahoma. *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 853.

Washington. *Plummer v. Northern Pacific Ry. Co.*, 98 Wash. 67, 167 Pac. 73.

² *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 853; *Plummer v. Northern Pacific Ry. Co.*, 98 Wash. 67, 167 Pac. 73.

³ *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75;

Grissom v. Beidleman, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 853.

⁴ *Grissom v. Beidleman*, 35 Okla. 343, 44 L. R. A. (N.S.) 411, 129 Pac. 853.

⁵ *Keokuk County State Bank v. Hall*, 106 Ia. 540, 76 N. W. 832; *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752; *Evans v. Taylor*, 18 N. M. 371, 50 L. R. A. (N.S.) 1113, 137 Pac. 583.

⁶ *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

⁷ *Wheatly v. Miscal*, 5 Ind. 142; *Van Pelt v. Corwine*, 6 Ind. 363 [overruling, *Harney v. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662]; *Meredit v. Crawford*, 34 Ind. 399; *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490.

⁸ *The Cubadist*, 252 Fed. 658; *Hagerly v. Lock Co.*, 62 N. H. 576. (If his services at first were worth less than he was paid, this fact must be considered.) *Hoxie v. Lincoln*, 25 Vt. 206.

can not recover more than a fair value for his work less what he has received.⁸ In an action by a minor for his wages it is no defense that he agreed to forfeit wages by leaving without two weeks' notice.⁹ So an infant lessee who avoids the lease at majority is not liable for a breach of conditions.¹¹ So on avoiding a sale by the infant's recovering mortgaged property and vendor's recovering property sold, no liability remains.¹² The better view, therefore, is that on repudiating a contract the infant can not be held for damages caused by the breach of his contract,¹³ though the contrary view has been expressed.¹⁴ Since an infant who repudiates his contract can not be held for damages, directly, the same result can not be accomplished indirectly by allowing a lien to be enforced against his property.¹⁵ If A buys real estate while under age and gives a note therefor upon which B is surety, and A on coming of age elects to disaffirm and tenders to the seller a deed for such land, A and B are discharged from liability on such note, even if the seller refuses to accept such deed.¹⁶

If a conveyance by infants operates as a merger until it is disaffirmed, its subsequent disaffirmance prevents such operation as a merger and leaves the rights of the parties unaffected by the conveyance.¹⁷ If a lessee who under his lease has the right to remove buildings at the expiration thereof, purchases a dower estate and also purchases the fee simple from infant grantors, their disaffirmance prevents the operation of merger and permits the grantee to assert his right under his lease and as a grantee of the widow's dower estate.¹⁸

A minor on rescinding a purchase of realty is chargeable with the rents and profits from the time of taking possession.¹⁹ If a

⁸ Hagerty v. Lock Co., 62 N. H. 576.

⁹ Danville v. Manufacturing Co., 62 N. H. 133; and see Dearden v. Adams, 19 R. I. 217, 36 Atl. 3.

¹¹ Harrison v. Burns, 84 Ia. 446, 51 N. W. 165.

¹² Stotts v. Leonhard, 40 Mo. App. 336.

¹³ Derocher v. Mills, 58 Me. 217, 4 Am. Rep. 286; Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251.

¹⁴ Moses v. Stevens, 19 Mass. (2 Pick.) 332; Lowe v. Sinklear, 27 Mo. 308; Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690.

¹⁵ McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Alvey v. Reed, 115 Ind. 148, 7 Am. St. Rep. 418, 17 N. E. 265; Bloomer v. Nolan, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039.

¹⁶ Evans v. Taylor, 18 N. M. 371, 50 L. R. A. (N.S.) 1113, 137 Pac. 583.

¹⁷ Beauchamp v. Bertig, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹⁸ Beauchamp v. Bertig, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

¹⁹ Scott v. Scott, 29 S. Car. 414, 7 S. E. 811.

minor has agreed to buy realty and has made partial payments under a contract which provides that a default on the part of the purchaser shall operate as a forfeiture of his rights, he may avoid such contract and recover such payments,²⁰ even after default on his part.²¹ He has a lien on the realty to secure the return of the purchase money paid in by him,²² but the infant can not recover money paid in under the contract by another. Thus land was deeded to A, an infant feme covert, under contract with B, A's husband, to build a house thereon. B furnished some money to complete the house. On rescinding, A can not recover the money paid by B.²³ His mere disaffirmance of the sale of realty to him does not revest the legal title in the vendor, but a suit in equity to cancel the conveyance is an appropriate remedy.²⁴ On rescinding a sale of realty, the infant may be held liable for the value of the improvements erected upon the realty by the purchaser,²⁵ though it has been held that his liability is limited to the increased rental value of the property.²⁶

If the grantee is entitled under the occupying claimant's act to the value of the improvements and repairs, which he has made upon the property and to the amount of taxes which he has paid on such property, in case the infant grantor disaffirms on coming of age, the grantor may set off against such claim the rents for such property which were not barred by the period of limitations,²⁷ although such contract or conveyance was not disaffirmed until the minor brought action to recover the property.²⁸ The minor is not entitled, however, to rent prior to the disaffirmance of the contract.²⁹ An infant who has conveyed realty while under age or one to whom he has

²⁰ *Ex parte McFerren*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, 63 So. 159.

²¹ *Ex parte McFerren*, 184 Ala. 223, 47 L. R. A. (N.S.) 543, 63 So. 159.

²² *Scott v. Scott*, 20 S. Car. 414, 7 S. E. 811; *Morris v. Holland*, 10 Tex. Civ. App. 474, 31 S. W. 690.

²³ *Jennings v. Hare*, 47 S. Car. 279, 25 S. E. 198 [distinguishing, *Scott v. Scott*, 20 S. Car. 414, 7 S. E. 811; in which the minor had furnished the money and was allowed to recover it on rescinding].

²⁴ *McCarty v. Iron Co.*, 92 Ala. 463, 12 L. R. A. 136, 8 So. 417.

²⁵ *Runale v. Spencer*, 67 Mich. 189, 34 N. W. 548. So under the local Occupying Claimants Act. *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

²⁶ *Sewell v. Sewell*, 92 Ky. 500, 36 Am. St. Rep. 606, 18 S. W. 162.

²⁷ *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

²⁸ *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

²⁹ *Tobin v. Spann*, 85 Ark. 556, 16 L. R. A. (N.S.) 672, 109 S. W. 534.

conveyed it on coming of age may recover the rents which were due for such realty where the first grantee already had possession under a valid lease.³⁰

While, as we have seen, the adversary party may be subrogated to the rights of the lien holders whom he has paid, the facts which entitle him to subrogation must be alleged by him.³¹ His mere disaffirmance of a conveyance made by him is now held to revest the legal title in him, so as to allow him to sue in ejectment.³² In sales of personalty to the infant, the title is revested in the vendor on disaffirmance and he may recover the specific chattel if in the infant's possession,³³ or its value if he has had it in his possession or under his control after rescinding.³⁴ On avoiding a contract for the purchase of personalty the infant may recover partial payments which he has made under such contract.³⁵ Upon disaffirmance, the rights of the parties become fixed; and neither party can alter such rights without the consent of the other.³⁶ Accordingly, if an infant purchaser of personal property elects to disaffirm, the fact that he sells such property after litigation has begun does not operate as a ratification.³⁷

³⁰ *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

³¹ *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88.

³² See §§ 1594 and 1614.

³³ *Illinois*. *Bennett v. McLaughlin*, 13 Ill. App. 349.

Indiana. *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

Kentucky. *Bailey v. Barnberger*, 50 Ky. (11 B. Mon.) 113.

Massachusetts. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105.

Nebraska. *Curtice Co. v. Kent*, 89 Neb. 496, 52 L. R. A. (N.S.) 723, 131 N. W. 944.

New Hampshire. *Heath v. West*, 28 N. H. 101.

New York. *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Lynde v. Budd*, 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84.

Vermont. *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327.

Contra, *Lamkin v. Le Daux*, 101 Me. 581, 8 L. R. A. (N.S.) 404, 64 Atl. 1048.

³⁴ *Alabama*. *Jefford v. Ringgold*, 6 Ala. 544.

Georgia. *Strain v. Wright*, 7 Ga. 568; *Shuford v. Alexander*, 74 Ga. 293.

Indiana. *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

Massachusetts. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Walker v. Davis*, 67 Mass. (1 Gray) 506.

Vermont. *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228.

Virginia. *Mustard v. Wohlford*, 56 Va. (15 Gratt.) 329, 76 Am. Dec. 209.

³⁵ *Curtice Co. v. Kent*, 89 Neb. 496, 52 L. R. A. (N.S.) 723, 131 N. W. 944.

³⁶ *Lambrecht v. Holsaple*, 164 Wis. 465, 160 N. W. 168.

³⁷ *Lambrecht v. Holsaple*, 164 Wis. 465, 160 N. W. 168.

§ 1623. Theory that contract of infant is voidable only on full restitution. There is another theory of the nature and effect of an infant's voidable contract, which is inconsistent with the operation of the principles already laid down, and often gives, in particular cases, the opposite result from that which they would indicate. This theory is that a contract of an infant, if fair and reasonable, can not be rescinded as far as it is executed unless the adversary party is placed substantially in statu quo.¹ The list of cases cited might be greatly increased by adding cases which involve this general principle, but which have been overruled on the specific point decided. The operation of this principle places an infant's contracts on much the same footing as a contract for necessities, that is, they are to be enforced if fair and reasonable, as far as they are executed, though the reasonable value rather than the contract price controls. In some jurisdictions, however, the principle thus stated is modified by the construction which the courts have placed upon the words "fair and reasonable." These words are sometimes said to be equivalent to "provident and advantageous to the infant."² Under this modification of the rule, an infant may avoid a contract by which he has purchased an automobile for a fair price if such purchase was not provident.³

The principle that an infant can not avoid a fair and reasonable contract without placing the adversary party in statu quo is applied in New Hampshire, by requiring that the adversary party must be put in statu quo,⁴ at least to the full extent of the benefit received

¹ England. *Valentini v. Canall*, L. R. 24 Q. B. D. 106.

Maryland. *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, 8 Atl. 664.

Minnesota. *Johnson v. Insurance Co.*, 56 Minn. 372, 45 Am. St. Rep. 473, 28 L. R. A. 187, 59 N. W. 992, 57 N. W. 934; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Klaus v. Thompson Auto & Buggy Co.*, 131 Minn. 10, 154 N. W. 508; *Berglund v. American Multigraph Sales Co.*, 135 Minn. 67, 160 N. W. 191.

Mississippi. *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

Montana. *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761.

New Hampshire. *Heath v. Stevens*, 48 N. H. 251; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209.

New York. *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703, 47 L. R. A. 303, 55 N. E. 275.

Texas. *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372.

² *Klaus v. Thompson Auto & Buggy Co.*, 131 Minn. 10, 154 N. W. 508; *Berglund v. American Multigraph Sales Co.*, 135 Minn. 67, 160 N. W. 191.

³ *Klaus v. Thompson Auto & Buggy Co.*, 131 Minn. 10, 154 N. W. 508.

⁴ *Heath v. Stevens*, 48 N. H. 251; *Locke v. Smith*, 41 N. H. 346.

by the infant.⁵ In determining the value of the benefits received under the contract, the value of the use of the thing which the infant has purchased must be included if such use was a reasonable thing for the infant, but not otherwise.⁶ The infant is liable for injury to an article which he has purchased, due to his tortious acts,⁷ other than his ignorance or unskillfulness.⁸ An agreement by a minor to apply certain chattels to a debt due to him can be repudiated to the extent that only the value of the chattels need be applied on the debt.⁹ In other jurisdictions it has been applied to special cases rather than broadly and generally. Thus it has been held that an infant lessee who avoids his lease can not recover the rent paid for the time that he used the premises.¹⁰ So beneficial legal services may be enforced against the infant's estate.¹¹ So a minor can not recover premiums paid by him for insurance,¹² at least where not in excess of a fair value of the risk actually incurred by the company; though where an additional sum is added thereto to form an accumulating fund, as is generally done under modern methods of insurance, he may recover this additional sum.¹³ So in order to avoid a minor's assignment of a life insurance policy on his father's life he must repay the premiums paid by the assignee before the assignment was avoided, to keep the policy up.¹⁴

An infant who buys goods, not necessities, must account for the benefit derived therefrom.¹⁵ An infant who has purchased a multi-

⁵ Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Bartlett v. Bailey, 59 N. H. 408; Wooldridge v. Lavoie, — N. H. —, 104 Atl. 346.

⁶ Wooldridge v. Lavoie, — N. H. —, 104 Atl. 346.

⁷ Wooldridge v. Lavoie, — N. H. —, 104 Atl. 346.

⁸ Stack v. Cavanaugh, 67 N. H. 149, 30 Atl. 350; Wooldridge v. Lavoie, — N. H. —, 104 Atl. 346.

⁹ Kimball v. Bruce, 58 N. H. 327.

¹⁰ Valentini v. Canali, L. R. 24 Q. B. D. 166.

¹¹ Epperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434; Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372. In the case last cited it was said that they might be considered as necessities.

¹² Metropolitan Life Ins. Co. v. Bow-

ser, 20 Ind. App. 557, 50 N. E. 86. "We do not assent to the view that as a further consequence of his disability, he may recover back the dues and assessments he may have already paid." Chicago, etc., Association v. Hunt, 127 Ill. 257, 277, 2 L. R. A. 549, 20 N. E. 55.

¹³ Johnson v. Ins. Co., 56 Minn. 372, 45 Am. St. Rep. 473, 28 L. R. A. 187, 59 N. W. 992, 57 N. W. 934. (Note the modification on rehearing, in accordance with the text.)

Contra, under general theory of infancy. Simpson v. Ins. Co., 184 Mass. 348, 68 N. E. 673.

¹⁴ City Savings Bank v. Whittle, 63 N. H. 587, 3 Atl. 645.

¹⁵ Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191; Hall v. Butterfield, 59 N. H. 354, 47

graph for use in business, and who brings an action upon coming of age, to recover the payments which he has made therefor, can recover only the amount of such payments less the amount of benefit which he received from the use of such multigraph.¹⁶ The amount for which the infant is liable is said to be the actual benefit which he has received under the contract and not the reasonable value of the use of personal property which he has received under the contract but which he has surrendered to the vendor.¹⁷ Where an infant bought a bicycle on the installment plan, paid for it in part, used it awhile, and then returned it and sued to rescind, it was held that she must account for a reasonable value for its use, which in this case equalled what she had paid in.¹⁸ While this theory may in some cases be reconciled with the one generally received, it can not be so reconciled in others, and it had better be classed as a divergent holding; nor can it be classed as an obsolete theory. It must be reckoned with at modern law as a principle that still shows evidences of vitality. Even where the theory discussed in this section is in force, an infant may avoid any contract which is not fair and reasonable, without making any compensation beyond returning so much of the consideration received by him as he has left.¹⁹

§ 1624. Infant as bankrupt. Under the United States Bankruptcy Act it has been held that an infant can not be made a bankrupt,¹ even as a member of a firm,² on the ground that he might

Am. Rep. 209; *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703, 47 L. R. A. 303, 55 N. E. 275.

¹⁶ *Berglund v. American Multigraph Sales Co.*, 135 Minn. 67, 160 N. W. 191.

¹⁷ *Berglund v. American Multigraph Sales Co.*, 135 Minn. 67, 160 N. W. 191.

¹⁸ "The plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and fairness, to account for its reasonable use or deterioration in value, otherwise she would be making use of the privilege of infancy as a sword, and not as a shield." *Rice v. Butler*, 160 N. Y. 578, 583, 73 Am. St. Rep. 703, 47 L. R. A. 303, 55 N. E. 275 [criticising, *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775;

McCarthy v. Henderson, 138 Mass. 310].

Contra, as to a sale of a bicycle on the installment plan. *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813.

¹⁹ *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417.

¹ *In re Derby*, Fed. Cas. 3815. (Where this rule was said to apply to voluntary and involuntary proceedings alike.) *In re Duguid*, 100 Fed. 274.

Apparently contra, *In re Book*, 3 McLean, 317.

² *In re Duguid*, 100 Fed. 274. (A case of involuntary bankruptcy.)

The firm may be adjudged bankrupt, though the infant can not be included. *Jennings v. Stannus*, 191 Fed. 347.

avoid his contracts at majority;³ but he may be a bankrupt as to obligations which he can not avoid by reason of his infancy.⁴

The English cases took the same view,⁵ except where the infant had estopped himself, under the equitable principles controlling a court of bankruptcy, by a false representation that he was of age.⁶ Under the present English statute making an infant's contracts void except for necessities, he can not be made a bankrupt for his general debts,⁷ and it has been doubted if he can be forced into involuntary bankruptcy even for necessities.⁸

§ 1625. Infant's torts arising out of contract. While an infant is as a general rule liable for his torts, yet if the tort is so connected with the contract that without the contract no cause of action in tort could exist, the infant can not be held in tort.¹ Thus if an infant makes a fraudulent warranty of goods sold by him,² or makes a fraudulent representation as to its ownership,³ he can not be held liable thereon. So an infant employer can not be held liable for damages caused by the negligence of her servant.⁴ So an infant can not be held liable for his own negligence if it amounts merely to improper performance of a contract. Thus where an infant agreed to thresh certain wheat, and performed the contract in a negligent manner so that the wheat and the barn in which it was stored were burned, no recovery can be had against him for such negligence.⁵ If the infant by word or act repudiates the contract and is then guilty of a tort with reference to the subject-matter he is liable in damages, although the contract afforded him the means of committing the tort. Thus if an infant hires a horse for a specified journey and drives to another place,⁶ or drives beyond the

³In re Eidemiller, 105 Fed. 595.

⁴In re Walrath, 175 Fed. 243.

⁵Belton v. Hodges, 9 Bing. 365; O'Brien v. Currie, 3 Car. & P. 283; Ex parte Layton, 6 Ves. 434; Ex parte Barwis, 6 Ves. 601.

⁶Ex parte Watson, 16 Ves. 265; Ex parte Bates, 2 Mont. D. & D. 337; In re Unity, etc., Association, 3 De Gex & J. 63.

⁷Ex parte Kibble, L. R. 10 Ch. 373; Ex parte Jones, L. R. 18 Ch. Div. 109.

⁸In re Soltykoff [1891], 1 Q. B. 413.

¹Burns v. Smith, 29 Ind. App. 181,

94 Am. St. Rep. 268, 64 N. E. 94;

Lowery v. Cate, 108 Tenn. 54, 91 Am.

St. Rep. 744, 57 L. R. A. 673, 64 S.

W. 1068; West v. Moore, 14 Vt. 447,

39 Am. Dec. 235.

²Morrill v. Aden, 19 Vt. 505.

³Doran v. Smith, 49 Vt. 353.

⁴Burns v. Smith, 29 Ind. App. 181,

94 Am. St. Rep. 268, 64 N. E. 94.

⁵Lowery v. Cate, 108 Tenn. 54, 91

Am. St. Rep. 744, 57 L. R. A. 673, 64

S. W. 1068.

⁶Churchill v. White, 58 Neb. 22, 76

Am. St. Rep. 64, 78 N. W. 369.

place to which he had agreed to go,⁷ he is liable for any damage suffered by such horse, on the theory that he has converted it to his own use. While an infant is not liable for breach of a promise to marry,⁸ he is liable for seduction accomplished by means of such promise.⁹ So an infant caused an old man to become intoxicated and then induced him to sell a cow for the infant's note. It was held that the vendor could recover the cow in the action of trover.¹⁰ If an infant has sold property by means of fraudulent representations, he is liable in assumpsit for the purchase price of such property which he has received.¹¹

⁷Homer v. Thwing, 20 Mass. (3 Pick.) 492; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519.

⁸See § 1582.

⁹Hawk v. Harris, 112 Ia. 543, 84 Am. St. Rep. 352; 84 N. W. 664. Suit by

parent. Fry v. Leslie, 87 Va. 269, 12 S. E. 671. By the woman who was seduced. Becker v. Mason, 93 Mich. 336, 53 N. W. 361.

¹⁰Walker v. Davis, 67 Mass. (1 Gray) 506.

¹¹Patterson v. Kasper, 182 Mich. 281, L. R. A. 1915A, 1221, 148 N. W. 690.

CHAPTER XLVII

CONTRACTS OF INSANE, IMBECILE, ETC.

- § 1626. Nature of insanity in contract law—Perfect sanity not necessary.
- § 1627. Test of capacity.
- § 1628. Weakness of mind not due to insanity.
- § 1629. Time at which capacity must exist.
- § 1630. Validity of contracts of an insane person—Before adjudication.
- § 1631. Void contracts.
- § 1632. Valid contracts.
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- § 1637. Restoration of consideration—Bona fide transaction—Consideration enuring to insane person.
- § 1638. Consideration not enuring to insane person.
- § 1639. Transaction with knowledge of insanity.
- § 1640. Amount of restitution.
- § 1641. Contracts made after adjudication—Statute not providing that contract is void.
- § 1642. Statute making contract void—Guardian acting.
- § 1643. Guardian not acting.
- § 1644. Retroactive effect of adjudication.
- § 1645. Adjudication or finding of restoration to sanity.

§ 1626. Nature of insanity in contract law—Perfect sanity not necessary. In order to affect the power of a person to bind himself by contract, it is now held that there must be such a degree of mental weakness at the time of making the contract as will materially affect his ability to contract. Slight departure from the normal type is insufficient to affect his legal status.¹ A person may

¹ United States. *Mann v. Bank*, 86 Fed. 51.

Alabama. *White v. Farley*, 81 Ala. 563, 8 So. 215.

Florida. *Waterman v. Higgins*, 28 Fla. 660, 10 So. 97.

Georgia. *Richardson v. Adams*, 110 Ga. 425, 35 S. E. 648.

Idaho. *Kelly v. Perrault*, 5 Ida. 221, 48 Pac. 45.

Illinois. *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215, 45 N. E. 1021.

Iowa. *Galer v. Galer*, 108 Ia. 496, 79 N. W. 237; *Merchants' National Bank v. Soesbe*, 138 Ia. 354, 116 N. W. 123.

be absent-minded,² or weak physically,³ or ill, infirm and subject to the influence of others,⁴ without being insane in this sense. It is not necessary that he should be at his best, mentally.⁵ Impairment of mental power is not necessarily incapacity;⁶ and old age and weakness of mind do not necessarily incapacitate.⁷ The fact that a party is so distressed over his financial troubles as to make a foolish bargain,⁸ or that he makes a contract in a period of nervous depression and commits suicide afterwards,⁹ does not establish the fact that he was insane when he entered into the contract. A belief in spiritualism is compatible with capacity to convey realty.¹⁰ On the other hand, a person may be so insane as to affect his capacity

Kentucky. *Hall v. Ins. Co.* (Ky.), 43 S. W. 194; *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422; *Grigsby v. Smith*, 174 Ky. 819, 192 S. W. 856.

Maryland. *Frush v. Green*, 86 Md. 494, 39 Atl. 863.

Massachusetts. *Sutcliffe v. Heatley*, — Mass. —, 122 N. E. 317.

Missouri. *Cutler v. Zollinger*, 117 Mo. 92, 22 S. W. 895.

North Dakota. *Westerland v. First National Bank*, 38 N. D. 24, 164 N. W. 323.

Oklahoma. *Loman v. Paullin*, 51 Okla. 294, 152 Pac. 73.

Oregon. *Swank v. Swank*, 37 Or. 439, 61 Pac. 846.

Rhode Island. *Campbell v. Campbell*, 35 R. I. 211, 85 Atl. 930.

South Carolina. *Cathcart v. Matthews*, 105 S. Car. 329, 89 S. E. 1021.

² *Galer v. Galer*, 108 Ia. 496, 79 N. W. 257.

³ *Merchants' National Bank v. Soesbe*, 138 Ia. 354, 116 N. W. 123; *Nason v. Chicago, R. I. & P. Ry. Co.*, 149 Ia. 608, 128 N. W. 854.

⁴ **Georgia.** *Nance v. Stockburger*, 111 Ga. 821, 36 S. E. 100.

Iowa. *Merchants' National Bank of Greene v. Soesbe*, 138 Ia. 354, 116 N. W. 123.

Kansas. *Seward v. Seward*, 59 Kan. 387, 53 Pac. 63.

New York. *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725.

Utah. *Chadd v. Moser*, 25 Utah 369, 71 Pac. 870.

⁵ *Ralston v. Turpin*, 129 U. S. 663, 32 L. ed. 747.

⁶ *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164; *Harrison v. Otley*, 101 Ia. 652, 70 N. W. 724; *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725; *Loman v. Paullin*, 51 Okla. 294, 152 Pac. 73.

⁷ **Illinois.** *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164.

Iowa. *Wheatley v. Wheatley*, 102 Ia. 737, 70 N. W. 689.

Maine. *Richardson v. Travelers' Ins. Co.*, 109 Me. 117, 82 Atl. 1005.

Minnesota. *Trimbo v. Trimbo*, 47 Minn. 389, 50 N. W. 350.

West Virginia. *Delaplain v. Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 786, 30 S. E. 201.

Wisconsin. *Boardman v. Lorentzen*, 155 Wis. 566, 52 L. R. A. (N.S.) 476, 145 N. W. 750.

⁸ *De Witt v. Mattison*, 26 Neb. 655, 42 N. W. 742.

⁹ *Colonial Trust Co. v. Hoffstot*, 219 Pa. St. 497, 69 Atl. 52.

¹⁰ *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. 306; *Lewis v. Arbuckle*, 85 Ia. 335, 16 L. R. A. 677, 52 N. W. 237.

to make a valid contract without being totally devoid of reason.¹¹ Capacity is presumed to exist.¹²

§ 1627. Test of capacity. The test now adopted by the weight of authority is that in order to affect contractual power, the insanity must be of such a sort that it renders the victim incapable of understanding with reasonable clearness what he is doing—what is the nature and effect of the transaction in which he is engaging.¹ This

¹¹ *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481; *Hay v. Miller*, 48 Neb. 156, 66 N. W. 1115; *Dewey v. Algire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276.

¹² *Westerland v. First National Bank* (N. D.), 164 N. W. 323; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202.

¹ *United States. Allore v. Jewell*, 94 U. S. 506, 24 L. ed. 260; *Griffith v. Godey*, 113 U. S. 89, 28 L. ed. 934; *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141.

Colorado. Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

Georgia. Barlow v. Strange, 120 Ga. 1015, 48 S. E. 344.

Illinois. Lindsey v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489; *Sands v. Potter*, 165 Ill. 397, 56 Am. St. Rep. 253, 46 N. E. 282 [affirming, 59 Ill. App. 206]; *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164; *Greene v. Maxwell*, 251 Ill. 335, 36 L. R. A. (N.S.) 418, 96 N. E. 227; *Weller v. Copeland*, 285 Ill. 150, 120 N. E. 578.

Indiana. Raymond v. Wathen, 142 Ind. 367, 41 N. E. 815; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

Iowa. Elwood v. O'Brien, 105 Ia. 239, 74 N. W. 740; *Mathews v. Nash*, 151 Ia. 125, 130 N. W. 796.

Kentucky. Herzog v. Gipson, 170 Ky. 325, 185 S. W. 1119.

Massachusetts. Sutcliffe v. Heatley, — Mass. —, 122 N. E. 317.

Michigan. Milks v. Milks, 129 Mich. 164, 88 N. W. 402.

Missouri. Boggess v. Boggess, 127 Mo. 305, 29 S. W. 1018; *Jamison v. Culligan*, 151 Mo. 410, 52 S. W. 224; *State v. Grand Lodge*, 78 Mo. App. 546.

New Hampshire. Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592.

New Jersey. Wilkinson v. Shernian, 45 N. J. Eq. 413, 18 Atl. 228; *Kastell v. Hillman*, 53 N. J. Eq. 49, 30 Atl. 535.

New York. Riggs v. Tract Society, 95 N. Y. 503; *Valentine v. Lunt*, 115 N. Y. 496, 22 N. E. 209; *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264.

North Carolina. Whitaker v. Hamilton, 126 N. Car. 465, 35 S. E. 815; *Sprinkle v. Wellborn*, 140 N. Car. 163, 3 L. R. A. (N.S.) 174, 52 S. E. 666.

North Dakota. Westerland v. First National Bank, 38 N. D. 24, 164 N. W. 323.

Oklahoma. Norris v. Dagley, — Okla. —, 166 Pac. 718.

Oregon. Carnagie v. Diven, 31 Or. 366, 49 Pac. 891.

Utah. Hatch v. Hatch, 46 Utah 218, 148 Pac. 433.

Vermont. Allen's Administrators v. Allen's Administrators, 79 Vt. 173, 64 Atl. 1110.

Virginia. Miller v. Rutledge, 82 Va. 863, 1 S. E. 202.

West Virginia. Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383.

Wisconsin. Wright v. Jackson, 59 Wis. 569, 18 N. W. 486.

rule recognizes that a man may have full power to make contracts without being able to manage his own affairs in a reasonable and prudent manner.² The statement of the rule further shows that in order to affect contractual capacity, the mental derangement must be such as not merely can prevent this fair and reasonable understanding on his part of some of his acts, but it must further be such as does in fact prevent his understanding the nature and result of the act under judicial investigation.³ As expressed in a Massachusetts case, an insane delusion must be the "moving cause" of a deed or a contract in order to invalidate it.⁴ One who executes a release while suffering from injuries can not have such release set aside if he had mental capacity at the time and knew and understood the nature of such release.⁵ One may be sane enough to transact simple business and yet too insane for complicated matters.⁶

A contract caused by an insane delusion is voidable,⁷ although an insane delusion which is not connected with the contract in question does not render the contract voidable.⁸

In some jurisdictions it has been said that it requires a higher degree of capacity to make a conveyance or contract than to make a will,⁹ and it has been said that capacity to make a conveyance or

² *Moffitt v. Witherspoon*, 10 Ired. (N. Car. 185.

³ *Georgia*. *Wetter v. Habersham*, 60 Ga. 184; *Barlow v. Strange*, 120 Ga. 1015, 48 S. E. 344.

Illinois. *Emery v. Hoyt*, 46 Ill. 258; *Weller v. Copeland*, 285 Ill. 150, 120 N. E. 578.

Iowa. *Burgess v. Pollock*, 53 Ia. 273, 36 Am. Rep. 218, 5 N. W. 179.

Massachusetts. *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Holyoke v. Haskins*, 22 Mass. (5 Pick.) 20, 16 Am. Dec. 372; *Sutcliffe v. Heatley*, — Mass. —, 122 N. E. 317.

Missouri. *Benoist v. Murrin*, 58 Mo. 307.

Nebraska. *Loder v. Loder*, 34 Neb. 824, 52 N. W. 814.

New Hampshire. *Concord v. Rumney*, 45 N. H. 423.

New Jersey. *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228.

North Carolina. *Sprinkle v. Wellborn*, 140 N. Car. 163, 3 L. R. A. (N.S.) 174, 52 S. E. 666.

Pennsylvania. *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181.

South Carolina. *Cathcart v. Matthews*, 105 S. Car. 329, 89 S. E. 1021.

Tennessee. *Mays v. Prewett*, 98 Tenn. 474, 40 S. W. 483.

⁴ *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75.

⁵ *Turner v. Manufacturers' & Consumers' Coal Co.*, 254 Ill. 187, 98 N. E. 234.

⁶ *Seerley v. Sater*, 68 Ia. 375, 27 N. W. 262.

⁷ *Weller v. Copeland*, 285 Ill. 150, 120 N. E. 578; *Mathews v. Nash*, 151 Ia. 125, 130 N. W. 796.

⁸ *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058; *Weller v. Copeland*, 285 Ill. 150, 120 N. E. 578.

⁹ As an exchange of lands. *Turner v. Haupt*, 53 N. J. Eq. 526, 33 Atl. 28.

a contract involves ability to transact ordinary business and that "mental strength to compete with an antagonist and understanding to protect one's own interests are essential in the transaction of ordinary business."¹⁰ The better view is that capacity to contract and capacity to make a will are so different in many points that they should not be compared. It is true that one may have capacity to make a will but not capacity to make a contract.¹¹ The better view, however, is that capacity to make a contract or a conveyance and capacity to make a will are so different in their nature that it is impossible to say that either requires a greater degree of capacity than the other. It is possible for one to have capacity to make a contract or deed and at the same time to lack capacity to make a will.

The earlier authorities do not always recognize the rules just given. In some cases apparently any degree of insanity was held to destroy contractual capacity;¹² in others, nothing short of a total lack of reason would have that effect.¹³

§ 1628. Weakness of mind not due to insanity. Weakness of mind which is not caused by insanity may be ground for avoiding a contract if the party is not capable of understanding with reasonable clearness the nature and effect of the transaction in which he is engaging.¹ One who is so dazed by the shock of an accident as to be unable to comprehend the nature of the transaction may avoid a contract entered into while in such condition.² A contract or conveyance which is signed by a person who is so nearly unconscious that he is not capable of understanding that he is engaging in any legal transaction, is said not to be void but merely voidable.³ Weakness of mind not caused by technical insanity may avoid a contract. A judgment note given by one dying of meningitis, who is in such physical and mental condition that he does not understand the nature of the act, is invalid.⁴ The representatives of one who

¹⁰ *Greene v. Maxwell*, 251 Ill. 335, 36 L. R. A. (N.S.) 418, 96 N. E. 227.

¹¹ *Jones v. Belshe*, 238 Mo. 524, 141 S. W. 1130.

¹² *Owing's Case*, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311.

¹³ *Stewart v. Lispenhard*, 26 Wend. (N. Y.) 255; *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354.

¹ *St. Louis & San Francisco Ry. Co. v. Nichols*, 39 Okla. 522, 136 Pac. 159.

Such weakness is frequently complicated with unfair advantage of such condition taken by the adversary party. *Southern Ry. Co. v. Brewer* (Ky.), 105 S. W. 160. See §§ 402 et seq.

² *St. Louis & San Francisco Ry. Co. v. Nichols*, 39 Okla. 522, 136 Pac. 159.

³ *Barkey v. Barkey*, 182 Ind. 322, L. R. A. 1915B, 678, 106 N. E. 609.

⁴ *Kedward v. Campbell*, 166 Pa. St. 325, 21 Atl. 111.

executed a written contract when unconscious and incapable of entering into a binding contract are nevertheless bound thereby if such written contract merely embodies the terms of an oral contract which such person had made when competent to contract.⁵ Furthermore, taking advantage of the adversary party's lack of capacity is fraud.⁶ If a person not technically in the class of the insane or imbecile, but below the normal type of mental capacity, is subjected to fraud or duress, and he is thereby misled or coerced, relief is given against contracts into which he is induced to enter by such means. This topic does not involve any technical consideration of capacity and is discussed elsewhere.⁷

§ 1629. Time at which capacity must exist. The mental condition of a party to a contract is to be determined at the very time of making the contract.¹ Accordingly, the contract of one who is ordinarily insane is valid if it is made during a lucid interval.² The fact that a party to a contract was adjudged insane a considerable period of time after he made such contract is not sufficient to show lack of capacity when he made such contract.³ If the contract is made when capacity exists, it is said to be valid though not reduced to writing until after capacity has ceased to exist.⁴

§ 1630. Validity of contracts of an insane person—Before adjudication. At early law it was laid down that a party should not "disable himself" by alleging his insanity. By this view of the law, his contracts generally were absolutely valid, unless a guardian were appointed to represent him, or he had died leaving his heirs and personal representatives to avoid the contract. At modern law

⁵ Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

⁶ See v. Carbon Block Coal Co., 159 Ia. 413, 138 N. W. 825, 141 N. W. 1048.

⁷ See ch. XVII.

¹ Todd v. Ward, — Ala. —, 77 So. 731; Gilmore v. Samuels, 135 Ky. 706, 123 S. W. 271.

² Illinois. Lilly v. Waggoner, 27 Ill. 395; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610.

Kentucky. Jones v. Perkins, 44 Ky. (5 B. Mon.) 222.

Missouri. Richardson v. Smart, 152

Mo. 623, 75 Am. St. Rep. 438, 54 S. W. 542.

Pennsylvania. Gangwere's Estate, 14 Pa. St. 417, 53 Am. Dec. 554.

Tennessee. Wright v. Bank (Tenn. Ch. App.), 60 S. W. 623.

Virginia. Reed v. Reed, 108 Va. 700, 62 S. E. 792.

³ Todd v. Ward, — Ala. —, 77 So. 731. (The interval in this case was three months.)

⁴ Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

¹ Co. Litt. 247b; Beverley's Case, 4 Coke 123b.

this rule has been repeatedly rejected,² and under proper circumstances insanity may be interposed as a defense by the insane person himself.³ In some cases the conveyances and contracts of an insane person have been said to be void as a class;⁴ but in most of the cases cited below, it was not necessary to hold the contract void ab initio, as the record showed that proper steps had been taken to avoid it; and, accordingly, it had become void, whether originally void or voidable. Still, it has been held that the only liability of an insane person is for the consideration, on common counts.⁵ In Louisiana insanity renders a contract voidable only if it is notorious or if the adversary party must have known of such insanity, or if a suit has been filed to interdict the insane person.⁶

At modern law the contracts of an insane person are to be divided into two general classes because of the different legal consequences of each: those entered into before the insane person was adjudicated insane in a proceeding instituted for that purpose, and those entered into after such adjudication.

§ 1631. Void contracts. Of the contracts entered into before adjudication some are still said to be void. A power of attorney is the best example of a void act of a lunatic.¹ While in some of these cases it does not appear whether the power was void originally or whether it has been avoided, in others it clearly appears that the power is void. Thus a third person may raise the question of the

² Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Mitchell v. Kingman, 22 Mass. (5 Pick.) 431; Rice v. Peet, 15 Johns. (N. Y.) 503; Bensell v. Chancellor, 5 Whart. (Pa.) 370.

³ See cases cited in this section.

⁴ United States. German, etc., Society v. De Lashmutt, 67 Fed. 399. (As to a bona fide purchaser from grantor.) Parker v. Marco, 76 Fed. 510.

District of Columbia. Sullivan v. Flynn, 9 Mack. (D. C.) 396.

Iowa. Corbit v. Smith, 7 Ia. 60, 71 Am. Dec. 431; Van Patton v. Beals, 46 Ia. 62.

Kansas. Bethany Hospital Co. v. Philippi, 82 Kan. 64, 30 L. R. A. (N.S.) 194, 107 Pac. 530. (Deed said to be void so as not to operate as a revocation of a prior will.)

Maryland. Owing's Case, 1 Bland. Ch. (Md.) 370, 17 Am. Dec. 311.

Massachusetts. Seaver v. Phelps, 28 Mass. (11 Pick.) 304, 22 Am. Dec. 372.

New York. Brown v. Miles, 61 Hun (N. Y.) 453.

South Carolina. Lee v. Lee, 4 McCord (S. Car.) 183, 17 Am. Dec. 722.

⁵ Milligan v. Pollard, 112 Ala. 465, 20 So. 620.

See also, Clay v. Clay's Committee, 179 Ky. 494, 200 S. W. 934.

⁶ Wolf v. Edwards, 106 La. 477, 31 So. 58; Heard v. Blanks, 128 La. 111, 51 So. 85; Twomey v. Papalia, 142 La. 621, 77 So. 479.

¹ United States. Dexter v. Hall, 89 U. S. (15 Wall.) 9, 21 L. ed. 73; Rigney v. Plaster, 88 Fed. 686; Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25.

validity of the power.² Appointment of agents by means less formal than by power of attorney are generally held to be merely voidable.³ A statute which authorizes a suit to obtain a declaration that a marriage of an insane person was a nullity does not authorize the court to treat such marriage as void after the death of such person if such was not brought during his lifetime.⁴ It is said that a contract of one who is entirely lacking in mind is void.⁵

§ 1632. Valid contracts. The so-called valid contracts of an insane person are those whereby he agrees to do whatever the law would compel him to do. Thus the release of a ground rent inherited from an ancestor, upon the happening of the conditions on which under the terms of the deed accepted by such ancestor, it should be released,¹ is not made voidable by the insanity of the releasor. So a sale by a trustee is not affected by the insanity of the owner of the equity of redemption who bought the land subject to the mortgage.² So where the vendor was sane when contract was made for the sale of realty, but was insane when the deed was delivered, the deed was held valid.³ The renewal by an insane person of an accommodation note given by him when sane is binding when the payee takes the new note bona fide and surrenders the old;⁴ and the insanity of a maker of notes given as a subscription to buy a site for a school library, occurring after expenses were incurred in reliance on the subscription, but before the site was bought, does not revoke the subscription.⁵ If A, when sane, gave a lease to B, which contained a provision for renewal at B's option, A can not avoid a subsequent lease given in pursuance to such provision for

Illinois. McClun v. McClun, 176 Ill. 376, 52 N. E. 928, where it is said to be "wholly void."

North Carolina. Smith v. Smith, 106 N. Car. 496, 11 S. E. 188.

Pennsylvania. In re Misselwitz, 177 Pa. St. 359, 35 Atl. 722, where it is said to be "of no avail."

South-Carolina. Elias v. Loan Association, 46 S. Car. 188, 24 S. E. 102, where it is said to be "null and void."

² Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25.

³ Arthurs v. Gas Co., 171 Pa. St. 532, 33 Atl. 88.

⁴ In re Estate of Gregorson, 160 Cal. 21, L. R. A. 1916C, 697, 116 Pac. 60.

⁵ Duroderigo v. Culwell, 52 Okla. 6, 152 Pac. 905.

¹ Hirst's Estate, 147 Pa. St. 319, 23 Atl. 455.

² Bensieck v. Cook, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642.

³ Brown v. Miles, 61 Hun (N. Y.) 453.

⁴ Bank v. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788, 34 L. R. A. 274, 36 S. W. 716.

⁵ School District v. Stocking (also cited as School District v. Scheidley), 138 Mo. 672, 60 Am. St. Rep. 576, 37 L. R. A. 406, 40 S. W. 656.

renewal, although A was insane when the second lease was executed and delivered.⁶ So an insane person is liable for a breach, committed during insanity, of a contract made while sane.⁷

§ 1633. Necessaries. An insane person like an infant is liable for a reasonable value for such necessities as are furnished to him,¹ or to his wife and family.² This liability is measured, not by the terms of the contract or for the contract price, but by the pre-existing legal liability to pay a reasonable compensation, and it does not need any express promise.³

In the case of necessities, the question of adjudication is immaterial. An insane person, after adjudication, may bind himself by a contract for necessities if his guardian fails to provide them.⁴ By statute in some jurisdictions the estate of an insane person is liable for his support in an asylum.⁵

⁶ *Quinn v. Valiquette*, 80 Vt. 434, 14 L. R. A. (N.S.) 982, 68 Atl. 515.

⁷ *Baldrick v. Garvey*, 66 Ia. 14, 23 N. W. 156; *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743, 26 L. R. A. 153, 38 N. E. 449; *In re Strasburger*, 132 N. Y. 128, 30 N. E. 379.

¹ *England*. *In re Rhodes*, L. R. 44 Ch. D. 94.

Alabama. *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Borum v. Bell*, 132 Ala. 85, 31 So. 454.

Arkansas. *Henry v. Fine*, 23 Ark. 417.

Indiana. *Miller v. Hart*, 135 Ind. 201, 34 N. E. 1003.

Maine. *Sawyer v. Lufkin*, 56 Me. 308.

Massachusetts. *Hallett v. Oakes*, 55 Mass. (1 Cush.) 296; *Kendall v. May*, 92 Mass. (10 All.) 59.

Michigan. *In re Freshour's Estate* (*Lyon v. Minor*), 174 Mich. 114, 45 L. R. A. (N.S.) 67, 140 N. W. 517.

Missouri. *Reando v. Misplay*, 90 Mo. 251, 59 Am. Rep. 13, 2 S. W. 405.

New Hampshire. *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592.

New Jersey. *Van Horn v. Hann*, 39 N. J. L. 207.

North Carolina. *Richardson v.*

Strong, 13 Ired. (N. Car.) 106, 55 Am. Dec. 430.

Pennsylvania. *La Rue v. Gilkyson*, 4 Pa. St. 375, 45 Am. Dec. 700; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *In re Hoffmann*, 256 Pa. St. 343, 101 Atl. 1052.

Vermont. *Stannard v. Burn*, 63 Vt. 244, 22 Atl. 460.

² *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. 84; *Pearl v. McDowell*, 26 Ky. (3 J. J. Mar.) 658, 20 Am. Dec. 199; *Dalton's Committee v. Dalton*, 172 Ky. 585, 189 S. W. 902; *Shaw v. Thompson*, 33 Mass. (16 Pick.) 198, 26 Am. Dec. 655.

³ *Palmer v. Hospital*, 10 Kan. App. 98, 61 Pac. 506; *Dalton's Committee v. Dalton*, 172 Ky. 585, 189 S. W. 902; *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, 201 S. W. 339; *In re Freshour's Estate* (*Lyon v. Minor*), 174 Mich. 114, 45 L. R. A. (N.S.) 67, 140 N. W. 517.

⁴ *Creagh v. Tunstall*, 98 Ala. 249; *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 22 Am. Dec. 372; *Darby v. Cabanne*, 1 Mo. App. 126; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460; *Maughan v. Burns*, 64 Vt. 318, 23 Atl. 583.

⁵ *Board of Chosen Freeholders of Camden County v. Ritson*, 68 N. J. L.

The rules determining what necessities are, are much the same as in the case of infants. In most of the cases already cited, food and clothing were the necessities in question. The services of a physician,⁶ or nurse,⁷ have been held necessities, as have the services of an attorney where rendered in good faith to obtain the removal of a guardian and an adjudication of sanity,⁸ even if such services prove to be unsuccessful,⁹ as long as they were rendered in good faith,¹⁰ and on probable cause.¹¹ Tuition of the child of the insane person may be a necessary.¹² An insane person is liable for reasonable expenses incurred in the preservation of his property,¹³ differing in this respect from an infant.¹⁴ One who lends money to an insane person is subrogated to claims for necessities and the like to the payment of which such money is devoted.¹⁵

Where no personal liability has been held to exist in such cases, as on a contract for attorney's fees and expert witnesses in a hearing on lunacy, it is because under the procedure then in force allowance out of the estate of the insane person should be awarded as costs by the court before which the hearing is had.¹⁶

§ 1634. Voidable contracts. The remaining contracts of an insane person are voidable in the sense that by taking proper steps the insane person or his representatives may disaffirm them.¹ This includes ordinary executory contracts,² and executed conveyances

666, 54 Atl. 839; *Arnold's Estate*, 253 Pa. St. 517, 98 Atl. 701; *Hoffmann*, 258 Pa. St. 343, 101 Atl. 1052.

⁶ *Booth v. Cottingham*, 126 Ind. 481, 26 N. E. 84.

⁷ *Richardson v. Strong*, 13 Ired. L. (N. Car.) 106, 55 Am. Dec. 430.

⁸ *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, 201 S. W. 339; *In re Freshour's Estate* (*Lyon v. Minor*), 174 Mich. 114, 45 L. R. A. (N.S.) 67, 140 N. W. 517; *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 562.

⁹ *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, 201 S. W. 339; *In re Freshour's Estate* (*Lyon v. Minor*), 174 Mich. 114, 45 L. R. A. (N.S.) 67, 140 N. W. 517.

¹⁰ *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, 201 S. W. 339.

¹¹ *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, 201 S. W. 339.

¹² *Harris v. Davis*, 1 Ala. 259.

¹³ *Williams v. Wentworth*, 5 Beav. 325.

¹⁴ See § 1588.

¹⁵ *First National Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495.

¹⁶ *Freeman's Appeal* (Pa.), 13 Atl. 552, 22 W. N. C. 173.

¹ *Weller v. Copeland*, 285 Ill. 150, 120 N. E. 578; *Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542; *Thronson v. Blough*, 38 N. D. 574, 106 N. W. 132.

² *Alabama*. *Luffboro v. Foster*, 92 Ala. 477, 9 So. 281.

Georgia. *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

Indiana. *Schuff v. Ransom*, 79 Ind. 458; *Copenrath v. Kienby*, 83 Ind. 18; *Boyer v. Berryman*, 123 Ind. 451, 24 N.

of property,³ as a bill of sale by an insane person to his father in consideration of his paying debts of the son which were not incurred

E. 249; Louisville, etc., Ry. Co. v. Herr, 135 Ind. 591, 35 N. E. 556; Aetna, etc., Co. v. Sellers, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97.

Iowa. Allen v. Berryhill, 27 Ia. 534.

Kentucky. Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977.

Maine. Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705.

Massachusetts. Allis v. Billings, 47 Mass. (6 Met.) 415, 39 Am. Dec. 744; Arnold v. Iron Works, 67 Mass. (1 Gray) 434; Carrier v. Sears, 86 Mass. (4 All.) 336, 81 Am. Dec. 707.

Michigan. Campbell v. Kuhn, 45 Mich. 513, 40 Am. Rep. 479; 8 N. W. 523.

Mississippi. Bates v. Hyman (Miss.), 28 So. 567.

Missouri. Nicholas, etc., Co. v. Hardman, 62 Mo. App. 153.

New Jersey. Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

New York. Ingraham v. Baldwin, 9 N. Y. 45; Smith v. Ryan, 191 N. Y. 452, 123 Am. St. Rep. 609, 84 N. E. 402.

West Virginia. Hanley v. Loan Co., 44 W. Va. 450, 29 S. E. 1002.

³United States. Luhrs v. Hancock, 181 U. S. 567, 45 L. ed. 1005

Georgia. Woolley v. Gaines, 114 Ga. 122, 88 Am. St. Rep. 22, 39 S. E. 892.

Illinois. Burnham v. Kidwell, 113 Ill. 425; Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211.

Indiana. Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Copenrath v. Kienby, 83 Ind. 18; Meadows v. Thomas (Ind.), 118 N. E. 811.

Iowa. Sedgwick v. Jack, 111 Ia. 745, 82 N. W. 1027; Miller v. Paulson, — Ia. —, 169 N. W. 203.

Kansas. Brown v. Cory, 9 Kan. App. 702, 59 Pac. 1097; Gribben v. Maxwell,

34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584.

Kentucky. Breckenridge v. Ormsby, 24 Ky. (1 J. J. Mar.) 236, 19 Am. Dec. 71; Johnson's Committee v. Mitchell, 146 Ky. 382, 142 S. W. 675; Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247.

Maryland. Riley v. Carter, 76 Md. 581, 35 Am. St. Rep. 443, 19 L. R. A. 489, 25 Atl. 667.

Michigan. Reason v. Jones, 119 Mich. 672, 78 N. W. 899; Cochran Timber Co. v. Fisher, 190 Mich. 478, 157 N. W. 282.

Minnesota. Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1; Wheeler v. McKeon, 137 Minn. 92, 1 A. L. R. 1514, 162 N. W. 1070.

Missouri. McAnaw v. Tiffin, 143 Mo. 667, 45 S. W. 656.

Nebraska. Hay v. Miller, 48 Neb. 156.

New York. Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542; Smith v. Ryan, 191 N. Y. 452, 19 L. R. A. (N.S.) 461, 84 N. E. 402.

North Carolina. Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77; Beeson v. Smith, 149 N. Car. 142, 62 S. E. 888; Hodges v. Wilson, 165 N. Car. 322, 81 S. E. 340.

Oklahoma. Duroderigo v. Culwell, 52 Okla. 6, 152 Pac. 605.

Pennsylvania. Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766.

South Carolina. Wille v. Wille, 57 S. Car. 413, 35 S. E. 804.

Texas. Pearson v. Cox, 71 Tex. 246, 10 Am. St. Rep. 740, 9 S. W. 124.

Washington. Stewart v. Stewart, 83 Wash. 202, 147 Pac. 1157.

Wisconsin. French Lumbering Co. v. Theriault, 107 Wis. 627, 51 L. R. A. 910, 83 N. W. 927.

for necessities,⁴ mortgages,⁵ the forfeiture of a mortgage for non-payment of installments due before the mortgagor was adjudged insane,⁶ a sale of realty after insanity under a power of sale in a mortgage given before insanity,⁷ and the release of a mortgage.⁸ So the lunacy of a partner makes the deed of the firm voidable.⁹ Thus a conveyance by an insane person is "voidable; that is, it may be confirmed or set aside."¹⁰ In some states a conveyance by an insane person is said to be invalid until it is ratified,¹¹ but the better view is that such deed is valid until set aside.¹² "Until disaffirmed the voidable executed contract in respect to the property or benefits conveyed passes the right or title as fully as an unimpeachable contract. By ratification it becomes impervious, by disaffirmance a nullity."¹³ However, in some cases it has been said that such deeds were void.¹⁴ A deed which is made by an insane person without any substantial consideration to one who has knowledge of his insanity, is said to be void in the sense that it does not revoke a prior valid will.¹⁵

⁴ *Wilkins v. Wilkins*, 35 Neb. 212, 52 N. W. 1109.

⁵ *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Creekmore v. Baxter*, 121 N. Car. 31, 27 S. E. 994.

⁶ *Helbreg v. Schumann*, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. 99.

⁷ *Encking v. Simmons*, 28 Wis. 272.

⁸ *Aetna, etc., Co. v. Sellers*, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97.

⁹ *Riley v. Carter*, 76 Md. 581, 35 Am. St. Rep. 443, 19 L. R. A. 489, 25 Atl. 667.

¹⁰ *United States. Luhrs v. Hancock*, 181 U. S. 567, 574, 45 L. ed. 1005.

Indiana. Meadows v. Thomas (Ind.), 118 N. E. 811.

Iowa. Miller v. Paulson, — Ia. —, 169 N. W. 203.

New Jersey. Sands v. Ruddick, 87 N. J. Eq. 620, 101 Atl. 268 [modifying decree, 87 N. J. Eq. 99, 99 Atl. 101].

New York. Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542.

¹¹ *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Valpey v. Rea*, 130 Mass. 384.

¹² *Downham v. Holloway*, 158 Ind. 626, 92 Am. St. Rep. 330, 64 N. E. 82.

¹³ *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 372, 77 Am. St. Rep. 481, 56 N. E. 97.

¹⁴ *United States. Dexter v. Hall*, 82 U. S. (15 Wall.) 9, 21 L. ed. 73.

Alabama. Galloway v. McLain, 131 Ala. 280, 31 So. 603.

Kansas. Bethany Hospital Co. v. Philippi, 82 Kan. 64, 30 L. R. A. (N.S.) 194, 107 Pac. 530.

New York. Van Dusen v. Sweet, 51 N. Y. 376.

Oregon. Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504.

Pennsylvania. In re Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645.

¹⁵ *Bethany Hospital Co. v. Philippi*, 82 Kan. 64, 30 L. R. A. (N.S.) 194, 107 Pac. 530.

The fact that the property has been sold,¹⁶ or mortgaged,¹⁷ to a bona fide purchaser or mortgagee, does not deprive the insane grantor of the right to disaffirm,¹⁸ even where part of the money raised by the mortgage was applied to the support of the insane person.¹⁹ The contrary view is held by a few courts, however.²⁰ Insanity avoids a contract and also a decree of foreclosure taken in pursuance thereof.²¹ So a judgment confessed by an insane person and sales thereunder are voidable.²² Thus if an insane person buys chattels on credit, giving a note for the purchase price secured by a deed of trust on such chattels and on certain land, and containing a provision for the payment of attorney fees, no relief can be given other than a decree for the sale of the chattels.²³ A waiver of rights in a legal proceeding is always voidable.²⁴ But in Louisiana it seems to be held that the contract of an insane person before adjudication of insanity can be avoided only if the adversary party knew or must have known of such insanity.²⁵ It is sometimes said that negotiable instruments, executed by an insane person, are void.²⁶ If the word "void" is not used carelessly for voidable, this holding is then based on the theory that these instruments must be either negotiable in the technical sense, and therefore valid in the hands of bona fide holders, or else void. The true rule is intermediate between these extreme positions. It is that in a negotiable contract of an insane person, "the quality of negotiability does not attach

¹⁶ *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175; *Gray v. Turley*, 110 Ind. 254, 11 N. E. 40; *McKenzie v. Donnell*, 151 Mo. 461, 52 S. W. 222.

Contra, *Keptland Coal & Coke Company v. Keen*, 168 Ky. 836, L. R. A. 1916D, 924, 183 S. W. 247.

¹⁷ *German, etc., Society v. De Lashmutter*, 67 Fed. 399; *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512.

¹⁸ *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Chew v. Bank*, 14 Md. 299; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276.

¹⁹ *German, etc., Society v. De Lashmutter*, 67 Fed. 399.

²⁰ *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *Kentland Coal & Coke Co. v. Keen*, 168 Ky. 836, L. R. A. 1916D, 924, 183 S. W. 247; *Odom v. Riddick*, 104 N. Car. 515, 17 Am. St. Rep. 686, 7 L. R. A. 118, 10 S. E. 609.

²¹ *Lockwood v. Mitchell*, 7 O. S. 387, 70 Am. Dec. 78.

²² *Crawford v. Thomson*, 161 Ill. 161, 43 N. E. 617.

²³ *Bates v. Hyman (Miss.)*, 28 So. 567.

²⁴ *North v. Joslin*, 59 Mich. 624, 26 N. W. 810.

²⁵ *Martinez v. Moll*, 46 Fed. 724; *Wolf v. Edwards*, 106 La. 477, 31 So. 58.

²⁶ *Van Patton v. Beals*, 46 Ia. 62; *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 22 Am. Dec. 372.

to it, though made negotiable in form,"²⁷ and it is therefore voidable, not only in the hands of the payee, but in those even of an indorsee for value, without notice and before maturity.²⁸ This is especially true as to a holder with notice of insanity but not of guardianship.²⁹ By analogy, the indorsement of an insane person should be voidable only, and valid against the maker unless avoided, and it has been so held.³⁰ The decided weight of authority, it must be admitted, however, is the other way.³¹ An indorsement of a note and an assignment of a mortgage by an insane person may be avoided.³² Some authorities have even held that a contract with one known to be insane is absolutely void.³³ In Georgia it has been said to be "a general rule of universal law that the contracts of a lunatic, idiot or other person non compos mentis from age or other infirmity are utterly void."³⁴ The Georgia case is affected by the Georgia statute and by the fact that the insane person had been adjudicated insane in a state where he was domiciled. The cases cited do not bear out the general proposition, which does not seem to be adhered to even in Georgia.³⁵ A grantee who accepts a deed from a grantor whom he knows to be insane is "guilty of meditated fraud,"³⁶ but while such deed is voidable it was, in this case, not necessary to decide if it was not absolutely void.³⁷ Other states

²⁷ *Hosler v. Beard*, 54 O. S. 398, 56 Am. St. Rep. 720, 35 L. R. A. 161, 43 N. E. 1040.

²⁸ *McClain v. Davis*, 77 Ind. 419; *Hosler v. Beard*, 54 O. S. 398, 56 Am. St. Rep. 720, 35 L. R. A. 161, 43 N. E. 1040; *Wireback v. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821; *Moore v. Hershey*, 90 Pa. St. 196. The point was queried in *Milligan v. Pollard*, 112 Ala. 465, 20 So. 620.

²⁹ *Bradbury v. Place* (Me.), 10 Atl. 461.

³⁰ *Carrier v. Sears*, 86 Mass. (4 All.) 336, 81 Am. Dec. 707.

³¹ *Jeneson v. Jeneson*, 66 Ill. 259, *Hannahs v. Sheldon*, 20 Mich. 276; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642.

³² *Thronson v. Blough*, 38 N. D. 574, 166 N. W. 132.

³³ *Fecel v. Guinault*, 32 La. Ann. 91. *Contra*, *Louisville, etc., Ry. v. Herr*, 135 Ind. 591, 35 N. E. 556.

³⁴ *American, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182 [quoting, 1 *Daniel on Negot. Inst.* § 209 (4th ed.), and citing, *Dexter v. Hall*, 92 U. S. (15 Wall.) 9, 21 L. ed. 73; *Anglo-Californian Bank v. Ames*, 27 Fed. 727; *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 22 Am. Dec. 372; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *Gibson v. Soper*, 72 Mass. (6 Gray) 279, 66 Am. Dec. 414].

³⁵ *Bunn v. Postle*, 107 Ga. 490, 33 S. E. 707; *Orr v. Mortgage Co.*, 107 Ga. 499, 33 S. E. 708.

³⁶ *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

³⁷ *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

have held that an executed contract can not be avoided where the contract was fair and the adversary neither knows nor had any reason to know of the insanity.³⁸ Thus it has been held that a partnership contract with a third person who does not know that one of the partners is insane, is valid,³⁹ but otherwise if such person knows of the insanity.⁴⁰ Other states have insisted that good faith, fair dealing and ignorance of the insanity do not prevent the insane person from disaffirming.⁴¹ "The fairness of defendant's conduct can not supply the plaintiff's want of capacity."⁴² The better view at modern law seems to be that the knowledge or ignorance of the insanity possessed by the adversary party does not affect the validity of the contract, but does determine the rule as to the return of the consideration.⁴³ The surrender by an insane person of a policy upon his life for the benefit of another may be avoided because of the insanity of the insured.⁴⁴

It is not necessary to resort to a suit in equity for rescission of a deed executed by an insane person, but such a conveyance may be avoided by the declarations and acts of one who is authorized to avoid it; and an action in ejectment to recover such land may thereupon be brought at law.⁴⁵

³⁸ *Stockmeyer v. Tobin*, 139 U. S. 176, 35 L. ed. 123; *Mathews v. Nash*, 151 Ia. 125, 130 N. W. 796 (obiter, as the contract was unfair and it was performed only in part). *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760. So of a conveyance. *Gingrich v. Rogers*, — Neb. —, 98 N. W. 156.

³⁹ *Jurgens v. Ittman*, 47 La. Ann. 367, 16 So. 952.

⁴⁰ *Schmidt v. Ittman*, 46 La. Ann. 838, 15 So. 310.

⁴¹ *Wooley v. Gaines*, 114 Ga. 122, 88 Am. St. Rep. 22, 39 S. E. 892; *Nutter v. Des Moines Life Ins. Co.*, 156 Ia. 539, 136 N. W. 891; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Sutcliffe v. Heatley*, — Mass. —, 122 N. E. 317.

⁴² *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 306, 22 Am. Dec. 372 [quoted

in *Brigham v. Fayerweather*, 144 Mass. 48, 52, 10 N. E. 735].

⁴³ See § 1639.

⁴⁴ *Hicks v. Northwestern Mutual Life Insurance Company*, 166 Ia. 532, L. R. A. 1915A, 872, 147 N. W. 883; *Sluder v. National Americans*, 101 Kan. 320, L. R. A. 1917F, 631, 166 Pac. 482.

⁴⁵ *Indiana*. *Brown v. Freed*, 43 Ind. 253.

Maine. *Hovey v. Hobson*, 53 Me. 451.

Massachusetts. *Allis v. Billings*, 47 Mass. (6 Met.) 415.

New York. *Van Deusen v. Sweet*, 51 N. Y. 378; *Smith v. Ryan*, 191 N. Y. 452, 123 Am. St. Rep. 600, 84 N. E. 402.

Pennsylvania. *Crawford v. Scovell*, 94 Pa. St. 48.

§ 1635. Disaffirmance. The insane person,¹ or his guardian,² or his heirs,³ or the personal representative of a lunatic may avoid his contracts.⁴ Upon the death of the insured who has attempted to change the beneficiary in an insurance policy while the insured was insane, the beneficiary may avoid such attempted change and enforce the original contract.⁵

But the adversary party can not avoid them,⁶ nor can a third person.⁷ Thus where A, who was insane, telegraphed to B to send money to C, A's attorney, to whom it was due for services, and B sent it, it was held that B could not recover from C.⁸ If A lent money to B to purchase realty when B was insane, and if B purchases realty from C with such money, A can not avoid the transaction between B and C and recover from C the money which A lent to B.⁹

Any conduct which clearly shows an intention to avoid is sufficient. Thus an ejectment suit,¹⁰ or an equity suit to quiet title,¹¹ or to relieve against forfeiture,¹² or a conveyance to another grantee,

¹ *Alabama.* Luffboro v. Foster, 92 Ala. 477, 9 So. 281.

Kentucky. Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977.

Michigan. De Vries v. Crofoot, 148 Mich. 183, 111 N. W. 775.

² *Indiana.* Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270.

Michigan. Reason v. Jones, 119 Mich. 672, 78 N. W. 899.

New Jersey. Sands v. Ruddick, 87 N. J. Eq. 620, 101 Atl. 268 [modifying decree (N. J. Eq.), 99 Atl. 101].

South Dakota. Hatland v. Egan, 36 S. D. 413, 155 N. W. 3.

Washington. Stewart v. Stewart, 85 Wash. 202, 147 Pac. 1157.

³ *Downham v. Holloway*, 158 Ind. 626, 92 Am. St. Rep. 330, 64 N. E. 82. (Conveyance of realty.)

⁴ *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Weber v. Bottger*, 172 Ia. 418, 154 N. W. 579; *Wheeler v. McKeon*, 137 Minn. 92, 1 A. L. R. 1514, 162 N. W. 1070.

⁵ *Hicks v. Northwestern Mutual Life Insurance Company*, 166 Ia. 532, L. R. A. 1915A, 872, 147 N. W. 883; *Sluder*

v. National Americans, 101 Kan. 320, L. R. A. 1917F, 631, 166 Pac. 482; *Grand Lodge, A. O. U. W. v. Frank*, 133 Mich. 232, 94 N. W. 731; *Grand Lodge, A. O. U. W. v. McGrath*, 133 Mich. 626, 95 N. W. 739.

⁶ *Harmon v. Harmon*, 51 Fed. 113; *Murphree v. Clisby*, 168 Ala. 339, 29 L. R. A. (N.S.) 933, 52 So. 907; *Allen v. Berryhill*, 27 Ia. 534, 1 Am. Rep. 309; *Atwell v. Jenkins*, 163 Mass. 362, 47 Am. St. Rep. 463, 28 L. R. A. 694, 40 N. E. 178.

⁷ *Murphree v. Clisby*, 168 Ala. 339, 29 L. R. A. (N.S.) 933, 52 So. 907.

⁸ *Atwell v. Jenkins*, 163 Mass. 362, 47 Am. St. Rep. 463, 28 L. R. A. 694, 40 N. E. 178.

⁹ *Murphree v. Clisby*, 168 Ala. 339, 29 L. R. A. (N.S.) 933, 52 So. 907.

¹⁰ *Jackson v. King*, 4 Cowen (N. Y.) 207, 15 Am. Dec. 354; *Smith v. Ryan*, 191 N. Y. 452, 19 L. R. A. (N.S.) 461, 84 N. E. 402.

¹¹ *Owing's Case*, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311.

¹² *Helbreg v. Schumann*, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. 99.

made after grantor has regained his sanity,¹³ or a demand for the return of the property of the insane person,¹⁴ are sufficient to operate as a disaffirmance.

The fact that at the time of the loss the insured was insane, excuses him from complying with a condition in such policy with reference to furnishing proofs of loss,¹⁵ and if such condition of insanity persists until after the expiration of the period fixed by the contract of insurance within which an action may be brought, the insured may recover on such policy, notwithstanding such delay.¹⁶

If the adversary party knows of the insanity of the promisor or grantor, notice of intent to disaffirm is not a condition precedent to a recovery of the property which the insane person has delivered under such contract.¹⁷

The right of an insane person to avoid a contract must be exercised within a reasonable period from the time at which such insane person recovers his reason or from the time when his representative is authorized to act on his behalf.¹⁸ If the right to avoid the transaction is not exercised within a reasonable time, it ceases to exist and the transaction, though originally voidable, becomes valid.¹⁹

§ 1636. Ratification. Since the contract of an insane person is voidable, it may be ratified.¹ This may be effected by an express promise to perform the contract. Thus a conveyance may be ratified by reacknowledging the deed and having it signed by another attesting witness.² Intent to ratify and conduct by which such intent is manifested are essential to ratification.³ Conduct which shows an intent to ratify may amount to a ratification if unequivocal.⁴ Thus

¹³Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

¹⁴Hatland v. Egan, 36 S. D. 413, 155 N. W. 3.

¹⁵Houseman v. Home Ins. Co., 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048.

¹⁶Houseman v. Home Ins. Co., 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048.

¹⁷Barkey v. Barkey, 182 Ind. 322, L. R. A. 1915B, 678, 106 N. E. 609.

¹⁸Weber v. Bottger, 172 Ia. 418, 154 N. W. 579.

¹⁹Weber v. Bottger, 172 Ia. 418, 154 N. W. 579.

¹Eagle v. Peterson, — Ark. —, 206 S. W. 55; Fahey v. Detroit United Ry., 160 Mich. 629, 125 N. W. 704; Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542.

²Doran v. McConlogue, 150 Pa. St. 98, 24 Atl. 357.

³Ensign v. Faxon, 226 Mass. 218, 115 N. E. 296.

⁴Beasley v. Beasley, 180 Ill. 163, 54 N. E. 187; Newton v. Evers, 215 N. Y. 198, 109 N. E. 118.

knowingly retaining property received under the contract,⁶ especially if it has meanwhile depreciated greatly,⁸ or receiving the benefit of the contract,⁷ or bringing an action against the agent of the former insane person to recover the proceeds of such contract,⁹ may amount to a ratification. However, a guardian's entering every room in the house, or bringing a suit, which abates by the death of the ward and is never revived, is not ratification.⁹ Even when a delay in disaffirming a contract or conveyance is not so great as to preclude the exercise of such right, it may be considered in determining whether the transaction has been affirmed.¹⁰

The insane person on recovering his reason,¹¹ or his personal representatives on his death,¹² may ratify his contract. However, neither the insane person while insane, nor his guardian, nor the county court, nor all of them together, can affirm a conveyance made by him while insane.¹³ The fact that the person who is alleged to be insane appeared to be satisfied with the transaction after regaining his sanity, is, at least, evidence which strongly tends to show that the transaction was entered into when he was of sound mind.¹⁴ A contract entered into through a guardian or committee may be ratified.¹⁵ A ratification precludes subsequent disaffirmance.¹⁶

⁶ *Barry v. Hospital* (Cal.), 48 Pac. 68; *Strodger v. Granite Co.*, 99 Ga. 595, 27 S. E. 174.

⁷ *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

⁸ *Allis v. Billings*, 47 Mass. (6 Met.) 415, 39 Am. Dec. 744; *Gibson v. R. R. Co.*, 164 Pa. St. 142, 44 Am. St. Rep. 586, 30 Atl. 308.

⁹ *Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542.

¹⁰ *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656.

¹¹ *Eagle v. Peterson*, — Ark. —, 206 S. W. 55.

¹² *California*. *Barry v. Hospital* (Cal.), 48 Pac. 68.

Georgia. *Stroder v. Granite Co.*, 99 Ga. 595, 27 S. E. 174.

Illinois. *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187.

Indiana. *Louisville, etc., Ry. v. Herr*, 135 Ind. 591, 35 N. E. 556.

Massachusetts. *Allis v. Billings*, 47 Mass. (6 Met.) 415, 39 Am. Dec. 744.

Michigan. *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N. W. 282.

Minnesota. *Whitcomb v. Hardy*, 73 Minn. 285, 76 N. W. 29.

Pennsylvania. *Gibson v. R. R. Co.*, 164 Pa. St. 142, 44 Am. St. Rep. 586, 30 Atl. 308.

¹² *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707; *Bullard v. Moore*, 158 Mass. 418, 33 N. E. 928.

¹³ *Gingrich v. Rogers*, — Neb. —, 96 N. W. 156.

¹⁴ *Boardman v. Lorentzen*, 155 Wis. 566, 52 L. R. A. (N.S.) 476, 145 N. W. 750.

¹⁵ *Newton v. Evers*, 215 N. Y. 198, 109 N. E. 118.

¹⁶ *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

§ 1637. Restoration of consideration—Bona fide transaction—
Consideration enuring to insane person. The widest divergence between the voidable contracts of an infant and those of an insane person consists in the duty to restore the consideration on disaffirmance. If the contract is a fair and reasonable one and the insane person has received the consideration, and the adversary party did not know of the insanity, the insane person can not disaffirm without putting the adversary party in statu quo by restoring to him the consideration which he has received or its equivalent.¹

It has been said to be a well-established rule that the insanity of a party is not ground for setting a transaction aside if the other party had no notice of such insanity and did not derive any inequi-

¹England. *Molton v. Camroux*, 4 Exch. 17; *Imperial Loan Co. v. Stone* (C. A.) [1892], 1 Q. B. 599.

United States. *Parker v. Marco*, 76 Fed. 510; *Cockrill v. Cockrill*, 79 Fed. 143.

Alabama. *Thomas v. Holden*, 191 Ala. 142, 67 So. 992.

California. *More v. Calkins*, 85 Cal. 177, 24 Pac. 729.

Georgia. *Strodger v. Granite Co.*, 99 Ga. 595, 27 S. E. 174; *Woolley v. Gaines*, 114 Ga. 122, 88 Am. St. Rep. 22, 39 S. E. 892.

Illinois. *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Eldredge v. Palmer*, 185 Ill. 618, 76 Am. St. Rep. 59, 57 N. E. 770; *Peck v. Bartelme*, 220 Ill. 199, 77 N. E. 216.

Indiana. *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543.

Iowa. *Behrens v. McKenzie*, 23 Ia. 333, 92 Am. Dec. 428; *Alexander v. Haskins*, 68 Ia. 73, 25 N. W. 935; *Harrison v. Otley*, 101 Ia. 652, 70 N. W. 724.

Kansas. *Brown v. Cory*, 9 Kan. App. 702, 59 Pac. 1097; *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; *Leavitt v. Files*, 38 Kan. 26, 15 Pac. 891.

Kentucky. *Rath's Committee v. Smith*, 180 Ky. 326, 202 S. W. 501.

Maryland. *Riley v. Carter*, 76 Md. 581, 35 Am. St. Rep. 443, 19 L. R. A. 489, 25 Atl. 667; *Flach v. Gottschalk Co.*, 88 Md. 368, 71 Am. St. Rep. 418, 42 L. R. A. 745, 41 Atl. 908.

Massachusetts. *Gibson v. Soper*, 72 Mass. (6 Gray) 279, 66 Am. Dec. 414.

Minnesota. *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Morris v. Ry. Co.*, 67 Minn. 74, 69 N. W. 628.

Missouri. *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214.

Nebraska. *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276.

New Hampshire. *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592.

New Jersey. *Matthiessen, etc., Co. v. McMahon*, 38 N. J. L. 536.

Oklahoma. *Loman v. Paullin*, 51 Okla. 294, 152 Pac. 73; *Duroderigo v. Culwell*, 52 Okla. 6, 152 Pac. 605.

Pennsylvania. *First National Bank v. Fidelity Title & Trust Co.*, 251 Pa. St. 529, 97 Atl. 75.

Tennessee. *Memphis, etc., Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788, 34 L. R. A. 274, 36 S. W. 716.

Vermont. *Lincoln v. Buckmaster*, 82 Vt. 652; *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 42 L. R. A. (N.S.) 343, 82 Atl. 837.

table advantage therefrom, and he can not be placed in statu quo.² It follows that in such a case if the insane person does not or can not place the adversary party in statu quo the contract is binding upon the insane person; since though it was originally voidable he has not taken the proper steps to avoid it.³ This is said to be the rule "not so much upon the idea that (the transaction) possesses the legal essential of consent, but rather because by means of an apparent contract he has secured an advantage or benefit which can not be restored to the other party, and therefore it would be inequitable to permit him or those in privity with him to repudiate it."⁴ Thus a compromise with an insane person before adjudication of insanity can be avoided only on his placing the adversary in statu quo.⁵ If a loan to an insane person was deposited to his credit at his bank, the lender may recover such money without regard to the ultimate disposition made thereof, by the insane borrower.⁶ It has even been held that a fair deed will not be set aside where the grantee can not be placed in statu quo and had no knowledge of the insanity of the grantor except that he had once been sent to an insane asylum.⁷ The fact that the borrower was insane does not render invalid a loan secured by a mortgage for

² *West v. Seaboard Air Line Ry.*, 151 N. Car. 231, 65 S. E. 979; *Ipock v. Atlantic & North Carolina Ry.*, 156 N. Car. 445, 74 S. E. 352.

³ *Alabama. Thomas v. Holden*, 191 Ala. 142, 67 So. 992.

Illinois. Scanlon v. Cobb, 85 Ill. 296; *Burnham v. Kidwell*, 113 Ill. 425.

Iowa. Alexander v. Haskins, 68 Ia. 73, 25 N. W. 935; *Jewell v. Clay*, 107 Ia. 52, 77 N. W. 511.

Kansas. Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584.

Kentucky. Rath's Committee v. Smith, 180 Ky. 326, 202 S. W. 501.

New Hampshire. Young v. Stevens, 48 N. H. 133, 97 Am. Dec. 592.

New Jersey. Matthiessen v. McMahon, 38 N. J. L. 536; *Goldberg v. West End Homestead Co.*, 78 N. J. L. 70, 73 Atl. 128; *Yauger v. Skinner*, 14 N. J. Eq. 389.

New York. Insurance Co. v. Hunt, 79 N. Y. 641.

North Carolina. Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77.

Oklahoma. Loman v. Paullin, 51 Okla. 294, 152 Pac. 73; *Duroderigo v. Culwell*, 52 Okla. 6, 152 Pac. 605.

Pennsylvania. Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573; *Lancaster Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24; *First National Bank v. Fidelity Title & Trust Co.*, 251 Pa. St. 529, 97 Atl. 75.

South Carolina. Sims v. McLure, 8 Rich. Eq. (S. Car.) 286, 70 Am. Dec. 196.

⁴ *Flach v. Gottschalk Co.*, 88 Md. 368, 375, 71 Am. St. Rep. 418, 42 L. R. A. 745, 41 Atl. 908.

⁵ *Morris v. Ry. Co.*, 67 Minn. 74, 69 N. W. 628.

⁶ *First National Bank v. Fidelity Title & Trust Co.*, 251 Pa. St. 529, 97 Atl. 75.

⁷ *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911.

the purpose of discharging a prior purchase money mortgage on his property, especially if the mortgagee had no notice of the insanity of the mortgagor.⁸ But if the vendor has a mortgage upon the property conveyed by him to the vendee and also on other property, the vendee, if insane, may avoid without offer to return the property sold to him as a condition precedent.⁹

If the insane person has paid the consideration in advance, he may, on repudiating the contract, recover the consideration thus paid.¹⁰ If A has agreed to support B, and B has paid in advance, B may avoid such contract if he was insane when he entered into it, and may recover the amount thus paid.¹¹

In some states the right to rescind seems to be recognized even where the adversary party can not be placed in statu quo.¹²

§ 1638. Consideration not enuring to insane person. But where the prima facie rule of law is that the services rendered or property furnished are rendered gratuitously, as where a daughter renders services for her father,¹ or a husband pays money for the support of his wife and step-daughter,² and the party rendering the services claims that it was done under a contract, no return need be made in such cases for the consideration furnished if the party receiving the services is shown to have been insane. Where the consideration was furnished not to the insane person, but to another, as where money was loaned to a husband secured by a mortgage on his insane wife's property,³ or where an education was furnished to a nephew and niece of an insane grantor,⁴ the insane person is not required to place the adversary party in statu quo.⁵ But where one indorsed a note while sane, and renewed his liability after becoming insane,

⁸ *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 42 L. R. A. (N.S.) 343, 82 Atl. 837.

⁹ *Bates v. Hyman* (Miss.), 28 So. 567. (The vendor's right in the property sold being fully secured by mortgage.)

¹⁰ *Holbrook v. Fyffe*, 164 Ky. 435, 175 S. W. 977.

¹¹ *Holbrook v. Fyffe*, 164 Ky. 435, 175 S. W. 977.

¹² *Orr v. Equitable, etc., Co.*, 107 Ga. 499, 33 S. E. 708; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705.

To the same effect is *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 22 Am. Dec.

372, where a pledge of a note was rescinded without placing the adversary party in statu quo.

See also, *Campbell v. Campbell*, 35 R. I. 211, 85 Atl. 930.

¹ *Kostuba v. Miller*, 137 Mo. 161, 38 S. W. 946.

² *Natcher v. Clark*, 151 Ind. 368, 51 N. E. 468.

³ *North Western, etc., Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185.

⁴ *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

⁵ *Musselman v. Cravens*, 47 Ind. 1; *Van Patton v. Beals*, 46 Ia. 62.

and the time for protesting the original note had passed, he was held bound to pay the note, even though he was originally an accommodation indorser.⁶

§ 1639. Transaction with knowledge of insanity. Where the parties are in personal communication, the fact that the adversary party is ignorant of the insanity implies that the insane person was not clearly and evidently insane. If the parties are not in personal communication the rather peculiar view has been expressed that the adversary party had no reason for thinking that the other was sane, and hence was not misled though he was insane.¹ Conversely, if the adversary party knew of the insanity or had such knowledge and information as would arouse inquiry in the mind of an ordinarily prudent man which would result in his learning of such insanity, the contract may be avoided without replacing such adversary party in statu quo;² and a similar rule obtains where the contract is harsh and oppressive.³ Thus specific performance was refused where the contract was oppressive, and the defendant was given to an excessive use of intoxicating liquors, was predisposed to insanity and was unable to understand the transaction intelligently;⁴ and if false representations were made, it is no defense that the party

⁶ *Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788, 34 L. R. A. 274, 36 S. W. 716.

¹ *Chew v. Bank*, 14 Md. 299, as explained in *Flach v. Gottschalk Co.*, 68 Md. 368, 71 Am. St. Rep. 418, 42 L. R. A. 745, 41 Atl. 908.

² *United States. Allore v. Jewell*, 94 U. S. 506, 24 L. ed. 260; *Harding v. Wheaton*, 2 Mason (U. S.) 278.

Arkansas. Henry v. Fine, 23 Ark. 417.

Illinois. Fecht v. Freeman, 251 Ill. 84, 95 N. E. 1043.

Indiana. Thrash v. Starbuck, 145 Ind. 673, 44 N. E. 543.

Iowa. Hale v. Kobbert, 109 Ia. 128, 80 N. W. 308.

Kentucky. Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977.

Mississippi. Clark v. Lopez, 75 Miss. 932, 23 So. 648 [rehearing denied, 23 So. 957].

New Jersey. Matthiessen, etc., Co. v. McMahon, 38 N. J. L. 536.

North Carolina. Creekmore v. Baxter, 121 N. Car. 31, 27 S. E. 994.

Ohio. Hosler v. Beard, 54 O. S. 398, 56 Am. St. Rep. 720, 35 L. R. A. 161, 43 N. E. 1040.

Pennsylvania. Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766.

³ *Iowa. Hale v. Kobbert*, 109 Ia. 128, 80 N. W. 308.

Missouri. Halley v. Troester, 72 Mo. 73.

Nebraska. Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937.

North Carolina. Garrow v. Brown, Winst. Eq. (N. Car.) 46, 86 Am. Dec. 450; *Sims v. McLure*, 8 Rich. Eq. (S. Car.) 286, 70 Am. Dec. 196.

Pennsylvania. Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766.

⁴ *Mulligan v. Albertz*, 103 Wis. 140, 78 N. W. 1093.

to whom they were made was in such mental condition that he could not understand them.⁵ So if A conveyed realty situated on a river bank, to B, in exchange for other realty, the exchange being greatly in A's favor, and A knowing of B's insanity, B's heirs can rescind, although a change in the bed of the river has washed away the greater part of the land so conveyed to B.⁶ A contract is not, however, unfair merely because there is some advantage in it to the adversary party.⁷

§ 1640. Amount of restitution. If the party who deals with the insane person does not know of his insanity, and the consideration enures to the benefit of the insane person, full restitution must be made in most jurisdictions.¹ What the insane person should return in other cases last given is not clear from the authorities. While it has been said that he need not make restitution,² this probably means that restitution is not a condition precedent.³ It is accordingly not necessary that the insane person should allege in his bill or petition in which he seeks to avoid the transaction, that he has restored the consideration.⁴ The best view seems to be that as in the case of infants, so much of the consideration as remains must be restored,⁵ as where he has squandered the consideration,⁶ though a fair rule not necessarily inconsistent is that one who makes advances on a mortgage given by one whom he knows to be insane can hold him only for benefits actually received by him.⁷ In any case if the benefit received from the rents and profits equals the value of the consideration parted with, no further restitution is necessary.⁸ Where the proceeds of the sale have been used to pay valid debts, and the purchaser has made valuable improvements on

¹ *Kramer v. Williamson*, 135 Ind. 655, 35 N. E. 388.

² *Hale v. Kobbert*, 109 Ia. 123, 80 N. W. 308.

³ *Eldredge v. Palmer*, 185 Ill. 618, 76 Am. St. Rep. 59, 57 N. E. 770, where there was a profit of about \$500 in an exchange of valuable real estate.

⁴ See § 1637.

⁵ *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766.

⁶ *Reaves v. Davidson*, 129 Ark. 88, 195 S. W. 19; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937.

⁴ *Studabaker v. Faylor*, 170 Ind. 498, 127 Am. St. Rep. 397, 83 N. E. 747.

⁵ *Helbreg v. Schumann*, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. 99; *Encking v. Simmons*, 28 Wis. 272.

⁶ *Reaves v. Davidson*, 129 Ark. 88, 195 S. W. 19.

⁷ *Creekmore v. Baxter*, 121 N. Car. 31, 27 S. E. 994.

⁸ *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Alexander v. Haskins*, 68 Ia. 73, 25 N. W. 935.

the realty, he has been held to be subrogated to the rights of the creditors and entitled to retain possession until paid.⁹ So if money lent to an insane person and secured by a mortgage given by him is, under the contract of loan, used in part to pay off a prior mortgage on the same property, the second mortgagee is subrogated to the rights of the first mortgagee.¹⁰

§ 1641. Contracts made after adjudication—Statute not providing that contract is void. In many, if not all, jurisdictions, the statutes provide for a proceeding to determine directly the question of the sanity or insanity of the person against whom such proceeding is instituted, and for appointing a guardian for him in case it is decided that he is insane. While the test of insanity for the appointment of a guardian on adjudication is in some respects different from the test for contractual capacity, such an adjudication binds the world,¹ though the party instituting the proceedings is not bound more than others.²

If the statute does not, by its express terms or by fair implication, provide that the contracts or conveyances of the insane person after such adjudication are void, it is held in some jurisdictions that such transactions are merely voidable,³ at least if they take place

⁹ *Cathcart v. Sugenhimer*, 18 S. Car. 123. (In this case the sale was made by the committee, not by the insane person.) But in *German, etc., Society v. De Lashmutter*, 87 Fed. 399, a grantee was not allowed subrogation as to the amount of the purchase money spent on necessities for the insane person.

¹⁰ *McCracken v. Levi*, 1 Ohio C. C. (N.S.) 566, 14 Ohio C. D. 584.

¹ *American, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182.

² *Hughes v. Jones*, 116 N. Y. 67, 13 Am. St. Rep. 386, 5 L. R. A. 632, 22 N. E. 446; *Gangwere's Estate*, 14 Pa. St. 417, 53 Am. Dec. 554.

³ *Arkansas*. *Eagle v. Peterson*, — Ark. —, 206 S. W. 55. (Guardianship terminated.)

Georgia. *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465. (Result reached with reluctance.)

Kentucky. *Hopson v. Boyd*, 45 Ky.

(6 B. Mon.) 296. (Contract a fair one and restitution not offered.) *Clark v. Trail*, 52 Ky. (1 Met.) 35. (Contract here may have been entered into after finding of restoration to sanity and before a later adjudication of insanity.)

North Carolina. *Armstrong v. Short*, 8 N. Car. (1 Hawks.) 11; *Christmas v. Mitchell*, 38 N. Car. (3 Ired. Eq.) 535; *Rippy v. Gant*, 39 N. Car. (4 Ired. Eq.) 443; *Parker v. Davis*, 53 N. Car. (8 Jones' Law) 460.

Texas. *Elston v. Jasper*, 45 Tex. 409. (Guardianship abandoned: express holding that deed would be void if guardianship were not abandoned.)

Virginia. *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202. (Guardianship abandoned.) It will be noted that most of these cases would be decided the same way in a jurisdiction which held that the adjudication of insanity was conclusive as long as the guardianship continued.

at some time after such adjudication.⁴ It is said that such adjudication is conclusive as to the mental condition of the insane person at the time of the adjudication, but that it does not prevent the admission of evidence to show a subsequent restoration to sanity.⁵ Such adjudication is said not to be conclusive, but requiring the "clearest and most satisfactory proof" of sanity.⁶

This rule is possibly due to a misunderstanding of English law by the earlier American courts. The earlier cases in which this rule is laid down,⁷ assume that the rule is a settled rule of English law. In part, however, they relied on cases in which the adjudication took place after the contract, and in which the court merely held that the adjudication did not retroact with conclusive effect.⁸ In part they relied upon the rule that the insane person may traverse the inquisition, overlooking the fact that such traverse was a direct attack upon such proceeding.⁹

§ 1642. Statute making contract void—Guardian acting. The effect of an adjudication of insanity, where a guardian has been appointed and has taken control of the estate of his ward, is under most statutes to render all contracts and conveyances of the ward during such guardianship void.¹ So after such adjudication a

⁴ *Eagle v. Peterson*, — Ark. —, 206 S. W. 55.

⁵ *Clark's Executor v. Trail's Administrators*, 58 Ky. (1 Met.) 35; *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407.

⁶ *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465.

⁷ *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465; *Armstrong v. Short*, 8 N. Car. (1 Hawks) 11.

⁸ *Faulder v. Silk*, 3 Camp. 126; *Sergeon v. Sealey*, 2 Atk. 412; *Hall v. Warren*, 9 Ves. Jr. 605.

⁹ *Ex parte Roberts*, 3 Atk. 5; *Ex parte Barnsley*, 3 Atk. 184.

¹ *England*. In *re Walker* [1905], 1 Ch. 160.

Georgia. *American, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182.

Illinois. *Burnham v. Kidwell*, 113 Ill. 425.

Indiana. *Redden v. Baker*, 86 Ind. 191.

Kansas. *New England, etc., Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799.

Kentucky. *Pearl v. McDowell*, 26 Ky. (3 J. J. Mar.) 658, 20 Am. Dec. 199.

Maine. *Bradbury v. Place* (Me.), 10 Atl. 461.

Massachusetts. *White v. Palmer*, 4 Mass. 147; *Lynch v. Dodge*, 130 Mass. 458; *Wait v. Maxwell*, 22 Mass. (5 Pick.) 217, 16 Am. Dec. 391; *Leonard v. Leonard*, 31 Mass. (14 Pick.) 280.

Missouri. *Payne v. Burdette*, 84 Mo. App. 332.

Nebraska. *Burgedorff v. Hamer*, 95 Neb. 113, 145 N. W. 250.

New York. *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582; *Wadsworth v. Sherman*, 14 Barb. (N. Y.) 169; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235.

South Carolina. *McCreight v. Aiken*, Rice (S. Car.) 56.

Texas. *Elston v. Jasper*, 45 Tex. 409.

West Virginia. *Hanley v. Loan Co.*, 44 W. Va. 450, 29 S. E. 1002.

check given by the lunatic is void and the bank on which it is drawn is not protected in paying it, even if in ignorance of such adjudication.² The rule that one who has been adjudged to be incompetent can not execute a valid conveyance while such adjudication has not been set aside, even if he is restored to reason, prevents him from executing a deed which is not to take effect until his death, although a similar disposition of such property by will would have been valid.³

The adjudication has been held binding though made in another state, and one in which the person adjudged insane was not domiciled, but in which he had been appointed the administrator of an estate.⁴

The appointment of a conservator of property does not destroy capacity to contract for necessities.⁵

If, however, the guardian of the insane person has contracted with one person for the support of the insane ward, and such support is furnished, a third person who renders services as nurse, not under contract with the guardian, can not recover therefor on the theory that such services were necessities.⁶

§ 1643. Guardian not acting. The reason for the rule is that the adjudication is intended to determine the question of status once and for all; that it is notice to the world; and that the guardian should not be driven to the perpetual litigation that would be necessary if the sanity of the ward could be retried whenever he made a contract or a conveyance. Accordingly, where there has

² *American, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182.

³ *In re Walker* [1905], 1 Ch. 160.

⁴ *American, etc., Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182. (In this case A, after becoming insane, and being adjudged insane by the Florida courts, where he was acting as administrator, drew a check on a Georgia bank, which paid the check without any notice of his condition or of the adjudication. The check was on a fund held by A as administrator, but deposited by him to his personal account with knowledge of the bank. Suit was brought by A's

successor as administrator against the bank, for the amount of the original deposit. He recovered the amount of the check drawn by A while insane, on the theory that the check was void and the bank paid at its peril; but he also recovered checks drawn before insanity, on the theory that the deposit was a trust fund to the knowledge of the bank.)

⁵ *Butler v. Butler*, 225 Mass. 22, 113 N. E. 577.

⁶ Further the services were rendered by a nephew of the insane person, apparently without intent at the time to charge therefor. *Schramek v. Shepeck*, 120 Wis. 643, 98 N. W. 213.

been an adjudication of insanity but no guardian has been appointed,¹ or where the guardianship has been in fact abandoned,² or the guardian has been discharged,³ the contract or conveyance can not be treated as void; and where no guardian was appointed,⁴ or one was appointed but never took charge of the estate,⁵ if the insane person recovers, his subsequent contracts are valid. So where the guardian who was appointed to enable the insane person to draw his pension, refused to take charge of a valuable mill on which repairs were needed, it was held that the insane person might bind himself by a fair contract, at least to the extent of paying a reasonable compensation for the repairs needed, though they were not technical necessities.⁶

§ 1644. Retroactive effect of adjudication. In the suit for an adjudication as to sanity, the court has no power to pass upon the validity of past transfers of property.¹ If the contract or conveyance is made before the adjudication, but within the time during which insanity has been found to exist, it is not rendered void by such adjudication; nor is the adjudication conclusive as to the mental condition of such party.² In such case the effect of the adjudication is "no more than prima facie evidence as to the past condition of the person."³ A note given by a person as surety,

¹ *McCormick v. Littler*, 86 Ill. 62, 28 Am. Rep. 610; *Water, etc., Co. v. Root*, 56 Kan. 187, 42 Pac. 715.

Contra, *Kiehne v. Wessell*, 53 Mo. App. 667.

² *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1; *Elston v. Jasper*, 45 Tex. 409; *Miller v. Rutledge*, 82 Va. 363, 1 S. E. 202.

³ *Eagle v. Patterson*, — Ark. —, 206 W. 55.

⁴ *Water, etc., Co. v. Root*, 56 Kan. 187, 42 Pac. 715.

⁵ *Lower v. Schumacher*, 61 Kan. 625, 60 Pac. 538.

⁶ *Kimball v. Bumgardner*, 16 Ohio C. C. 587, 9 Ohio C. D. 409.

¹ *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386, 5 L. R. A. 632, 22 N. E. 446.

126; *Sergeon v. Sealey*, 2 Atk. 412; *Hall v. Warren*, 9 Ves. Jr. 605.

² *England. Faulder v. Silk*, 3 Camp.

Kentucky. Hopson v. Boyd, 45 Ky. (6 B. Mon.) 296, where the sale was sixteen years before the inquisition.

New Jersey. Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. 837.

New York. Hart v. Deamer, 6 Wend. (N. Y.) 497. (Two months before.)

North Carolina. Rippey v. Gant, 39 N. Car. (4 Ired. Eq.) 443. (Thirteen months before.)

Pennsylvania. Gangwere's Estate, 14 Pa. St. 417, 53 Am. Dec. 554. (About six months before.) *Noel v. Kerper*, 53 Pa. St. 97.

³ *Hopson v. Boyd*, 45 Ky. (6 B. Mon.) 296, 297.

See also, *Sergeson v. Sealy*, 2 Atk. 412; *Titcomb v. Vantyle*, 84 Ill. 317; *Wall v. Hill*, 40 Ky. (1 B. Mon.) 290, 36 Am. Dec. 578.

pending an inquisition of lunacy, is said to be *prima facie* made while insane.⁴

§ 1645. Adjudication or finding of restoration to sanity. Where the guardian was removed by an appellate court as an unsuitable person, the cause remanded to the court of probate powers, and a petition for the appointment of another guardian dismissed, it was held that after this the former adjudication ceased to be conclusive, as it was not intended to fix "permanently the status of the party affected by it."¹ So where an adjudication of insanity was set aside, a sale made thereafter by such alleged insane person was held not to be void, even though the adjudication of insanity was subsequently reinstated.²

Normal status may in some jurisdictions be restored by a discharge from an asylum as cured, without formal adjudication of restoration of sanity,³ or by a discharge from an asylum as "improved."⁴ A physician's discharge from an asylum restores capacity to sue;⁵ and a similar view of the effect of a discharge from an asylum as cured was taken in a divorce suit,⁶ and in a suit on an insurance policy involving the question of the sanity of the insured when he met his death.⁷

⁴ Moore v. Hershey, 90 Pa. St. 196.

¹ Wilwerth v. Leonard, 156 Mass. 277, 31 N. E. 299.

² In this case, however, the decree reinstating the adjudications was held to be erroneous, and further the trial court was held never to have acquired jurisdiction. Mitchell v. Spaulding, 206 Pa. St. 220, 55 Atl. 968.

³ Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352; Topeka,

etc., Co. v. Root, 56 Kan. 187, 42 Pac. 715.

⁴ Reed v. Reed, 108 Va. 790, 62 S. E. 792.

⁵ Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677.

⁶ Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779.

⁷ Mutual, etc., Co. v. Wisvell, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996.

CHAPTER XLVIII

DEAF, DUMB AND BLIND

§ 1646. Deaf, dumb and blind.

§ 1646. Deaf, dumb and blind. When the common law was taking shape, no means existed for giving scientific instruction to the deaf and dumb or to the blind. There was a strong feeling that as a matter of fact those who were deaf and dumb from birth were also idiotic, and this feeling was still stronger in those who were deaf, dumb and blind from birth. Apart from questions of capacity, communication with those who were deaf and dumb was very difficult to all except members of the immediate family; and in the case of those who were deaf, dumb and blind, communication was practically impossible at that time. For these reasons the common law tended strongly to say that a person who was deaf, dumb and blind from birth was an idiot and incapable of making a deed or a contract.¹ In the case of those who were deaf and dumb, but not blind, there was a conflict of authority as to their capacity. Bracton's theory was that a deaf person who could not hear at all, could not convey, but if he could hear imperfectly he could make a conveyance; while a person who could hear but could not speak, could make a gift because he could show his assent by means of signs and nods.² It was apparently said in *Fleta* that one who was deaf or dumb lacked capacity.³ It was suggested that a man "who was deaf and dumb from his birth was non compos; but not if by accident, if deaf, dumb and blind by casualty, is non compos."⁴ It was said that the custody of copyhold land belonged to the lord if the copyholder was deaf and dumb.⁵ On the other hand, it was

¹ Coke on Litt. 42b; 1 Black. Com. 304.

² Bracton Lib. 2f, 12.

³ *Fleta* Lib. 6c, 40.

⁴ *Yong v. Sont*, 1 Dyer 56a, note 13. In the principal case to which the fore-

going statement appears as a note, the question of capacity of one who was deaf and dumb from birth to make a charter of feoffment was raised but not decided. *Yong v. Sont*, 1 Dyer 56a.

⁵ *Eavers v. Skinner*, Cro. Jac. 105.

said that persons who were born deaf and dumb "may be admitted to make contracts for their own good."⁶

With the discovery of means for teaching the deaf and dumb and for teaching the deaf, dumb and blind, it was soon found out that while some of those who were born deaf and dumb, or deaf, dumb and blind, are idiots, others have normal capacity and some have very vigorous and powerful minds. Modern law has accordingly taken notice of the actual facts of the case, and by the great weight of modern authority a person who is born deaf and dumb may make a valid contract if he has sufficient mental capacity apart from these infirmities.⁷ It is said, however, that capacity will not be presumed in such a case and that the person who alleges that one who is born deaf and dumb has sufficient capacity, must establish such fact by evidence.⁸ There is some authority for saying that one who is born deaf, dumb and blind lacks capacity,⁹ but this statement, while possibly correct as a matter of fact in the particular case, can not be regarded as a correct rule of law.

One who is blind has always been regarded as having full capacity if in fact competent mentally.¹⁰

⁶ Martha Elyot's Case, Carter 53.

⁷ Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; Alexier v. Matzke, 151 Mich. 36, 123 Am. St. Rep. 255, 115 N. W. 281; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Christmas v. Mitchell, 38 N. Car. (3 Ired. Eq.) 535.

⁸ Collins v. Trotter, 81 Mo. 275.

⁹ This statement, however, is pure

obiter. Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187.

¹⁰ Jenkins' Eight Centuries of Reports, Fifth Century, Case LXXV. Griffen v. Collins, 122 Ga. 102, 49 S. E. 827. "If a blind man has understanding, he may deliver a deed sealed by him." Jenkins' Eight Centuries of Reports, Fifth Century, Case LXXV.

CHAPTER XLIX

CONTRACTS OF DRUNKARDS

- § 1647. Nature of drunkenness in contract law.
- § 1648. Legal effect of intoxication.
- § 1649. Intoxication as affected by unfair conduct of adversary.
- § 1650. Effect of intoxication in equity.
- § 1651. Contracts for necessities.
- § 1652. Ratification and disaffirmance.
- § 1653. Restoration of consideration.
- § 1654. Effect of adjudication as habitual drunkard.
- § 1655. Effect of drugs.

§ 1647. Nature of drunkenness in contract law. In contract law drunkenness has been treated in almost the same way as insanity.¹ The early common-law theory that drunkenness was not a defense,² left as an after-effect, which persisted long after the theory itself was abandoned,³ the doctrine that a very high degree of intoxication was necessary in order to enable the intoxicated person to avoid a contract.⁴ It has been said that in order to avoid a contract it must have been shown that the person who seeks to avoid it was in a condition of complete intoxication,⁵ that he was utterly deprived of understanding,⁶ or that the intoxication deprived him of understanding so completely that his mental condition resembled idiocy.⁷ Occasionally a rather extreme degree of intoxication seems to be required even in recent cases.⁸ By the great

¹ See §§ 1626 et seq.

² See § 1648.

³ See § 1648.

⁴ *Connecticut.* Caulkins v. Fry, 35 Conn. 170.

Indiana. Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

Maryland. Johns v. Fritchey, 39 Md. 258.

New Jersey. Burroughs v. Richman, 13 N. J. L. (1 Green.) 233, 23 Am. Dec. 717.

Tennessee. Belcher v. Belcher, 16 Tenn. (10 Yerg.) 121.

⁵ *Caulkins v. Fry*, 35 Conn. 170; *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717.

⁶ *Belcher v. Belcher*, 16 Tenn. (10 Yerg.) 121.

⁷ *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

⁸ *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164. "Mere drunkenness is not sufficient to release a party from his contract. To render a transaction voidable on account of the drunkenness of a party to it the

weight of modern authority a less extreme degree of intoxication is sufficient to avoid a contract or conveyance. The use of the word "idiotic" as a standard has been criticized,⁹ and an instruction to the effect that a party who alleges drunkenness must prove that he was "idiotic" is said to place too great a burden upon the party who alleges drunkenness.¹⁰

The rule as laid down by the great weight of modern authority is that before adjudication as an habitual drunkard a party can not escape liability on a contract on the ground that he was intoxicated when he executed such contract, unless at the very moment of execution he was so intoxicated that he was unable to understand the nature and the legal consequences of the transaction in which he was engaging.¹¹

drunkenness must have been such as to have drowned reason, memory and judgment, and to have impaired the mental faculties to such an extent as to render the party non compos mentis for the time being." *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164 [citing, *Bates v. Ball*, 72 Ill. 108; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613].

⁹ *Hauber v. Leibold*, 76 Neb. 706, 107 N. W. 1042.

¹⁰ *Hauber v. Leibold*, 76 Neb. 706, 107 N. W. 1042.

¹¹ *Matthews v. Baxter*, L. R. 6 Ex. 132.

Alabama. *Snead v. Scott*, 182 Ala. 97, 62 So. 36; *Lewis v. Davis* (Ala.), 73 So. 419.

Arkansas. *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695.

Colorado. *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598.

Illinois. *Davidge v. Crandall*, 23 Ill. App. 360; *Bates v. Ball*, 72 Ill. 108; *Schramm v. O'Connor*, 98 Ill. 539; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164.

Indiana. *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

Iowa. *Willcox v. Jackson*, 51 Ia. 208, 1 N. W. 513; *Kuhlman v. Wieben*, 129 Ia. 188, 2 L. R. A. (N.S.) 666, 105 N. W. 445; *Drefahl v. Security Savings Bank*, 132 Ia. 563, 107 N. W. 179; *Snittjer v. Paterni*, 181 Ia. 961, 165 N. W. 176.

Kentucky. *Byrne v. Long* (Ky.), 15 S. W. 778; *Glenn v. Martin*, 179 Ky. 295, 200 S. W. 456.

Louisiana. *Girault v. Feucht*, 120 La. 1070, 46 So. 26.

Michigan. *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156.

Mississippi. *Newell v. Fisher*, 19 Miss. (11 Sm. & M.) 431, 49 Am. Dec. 66.

Missouri. *Rogers v. Warren*, 75 Mo. App. 271.

Nebraska. *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 9 L. R. A. (N.S.) 970, 111 N. W. 602; *Carroll v. Polfus*, 98 Neb. 657, 154 N. W. 213.

New Jersey. *Waldron v. Angleman*, 71 N. J. L. (42 Vroom) 166, 58 Atl. 568.

North Carolina. *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. Car. 365, 107 Am. St. Rep. 532, 50 S. E. 695.

Ohio. *French v. French*, 6 Ohio 214, 31 Am. Dec. 441.

Pennsylvania. *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl.

Where this degree of intoxication exists, the contract is voidable, even if the intoxication is voluntary and not produced by the adversary party.¹² A less degree of intoxication,¹³ even though causing exhilaration and excitement,¹⁴ or preventing him from acting as carefully as if he were sober,¹⁵ does not affect his contractual

86; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959.

Tennessee. *Birdsong v. Birdsong*, 39 Tenn. (2 Head.) 289; *Morris v. Nixon*, 26 Tenn. (7 Humph.) 579; *Belcher v. Belcher*, 16 Tenn. (10 Yerg.) 121.

Texas. *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

Vermont. *Barrett v. Buxton*, 2 Aikens (Vt.) 167, 16 Am. Dec. 691.

Virginia. *Wigglesworth v. Steers*, 11 Va. (1 H. & M.) 70, 3 Am. Dec. 602; *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

¹² **United States.** *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271.

Alabama. *Snead v. Scott* (Ala.), 62 So. 36.

Iowa. *Kuhlman v. Wieben*, 129 Ia. 188, 2 L. R. A. (N.S.) 686, 105 N. W. 445.

Kentucky. *Glenn v. Martin*, 179 Ky. 295, 200 S. W. 456.

Nebraska. *Hauber v. Leibold*, 76 Neb. 706, 107 N. W. 1042; *Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61.

North Carolina. *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. Car. 365, 107 Am. St. Rep. 532, 50 S. E. 695; *Burch v. Scott*, 168 N. Car. 602, 84 S. E. 1035.

Oklahoma. *Coody v. Coody*, 39 Okla. 719, L. R. A. 1915E, 465, 136 Pac. 754.

Pennsylvania. *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 66; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959.

Vermont. *Barrett v. Buxton*, 2 Aikens (Vt.) 167, 16 Am. Dec. 691.

Virginia. *Wigglesworth v. Steers*, 11 Va. (1 H. & M.) 70, 3 Am. Dec. 602.

¹³ **Arkansas.** *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695.

Iowa. *Armstrong v. Breen*, 101 Ia. 9, 69 N. W. 1125; *Kuhlman v. Weiben*, 129 Ia. 188, 2 L. R. A. (N.S.) 686, 105 N. W. 445; *Drefahl v. Security Savings Bank*, 132 Ia. 563, 107 N. W. 179; *Sievertsen v. Paxton-Eckman Chemical Co.*, 160 Ia. 662, 133 N. W. 744, 142 N. W. 424.

Illinois. *Davidge v. Crandall*, 23 Ill. App. 360; *Martin v. Harsh*, 231 Ill. 364, 13 L. R. A. (N.S.) 1000, 83 N. E. 164.

Kentucky. *Glenn v. Martin*, 179 Ky. 295, 200 S. W. 456.

Michigan. *Somers v. Ferris*, 182 Mich. 392, 148 N. W. 782.

Nebraska. *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 9 L. R. A. (N.S.) 970, 111 N. W. 602; *Carroll v. Polfus* (Neb.), 154 N. W. 213.

New York. *McKeon v. Van Slyck*, 223 N. Y. 392, 119 N. E. 851.

North Carolina. *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. Car. 365, 107 Am. St. Rep. 532, 50 S. E. 695.

Tennessee. *Belcher v. Belcher*, 16 Tenn. (10 Yerg.) 121.

Wisconsin. *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176.

¹⁴ *Byrne v. Long* (Ky.), 15 S. W. 778; *Johnson v. Phifer*, 6 Neb. 401; *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 9 L. R. A. (N.S.) 970, 111 N. W. 602.

¹⁵ *Wright v. Waller*, 127 Ala. 557, 54 L. R. A. 440, 29 So. 57; *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94

capacity. A degree of intoxication which leaves the party able to understand the nature of the act does not avoid checks which were given in performance of a prior valid contract.¹⁶ One who is often intoxicated, but who makes a contract while sober, is bound as absolutely as though he were never drunk.¹⁷

§ 1648. Legal effect of intoxication. The tendency of the early common law to regard the outward act and to set up an external standard of liability is illustrated in the rules with reference to drunkenness as well as those with reference to insanity.¹ It was originally held, or at least it was asserted by courts and text writers, that a contract which was entered into by one who was intoxicated at the time, was valid and binding. At early common law it was held, or at least asserted, that a contract entered into by one who was then intoxicated was absolutely binding.² A reaction from this early strictness resulted in holding such contracts void.³ At modern law, however, the weight of authority is clearly to hold such contracts voidable.⁴ The note of one voluntarily intoxicated is not

S. W. 695; *Drefahl v. Security Savings Bank*, 132 Ia. 563, 107 N. W. 179; *McKeon v. Van Slyck*, 223 N. Y. 392, 119 N. E. 851. "One may sufficiently understand a contract and the nature and effect of his entering into it to be fully bound by it although he be capable of a very much less consideration of it than would be bestowed by a man of ordinary prudence." *Wright v. Waller*, 127 Ala. 557, 562, 54 L. R. A. 440, 29 So. 57.

¹⁶ *Drefahl v. Security Savings Bank*, 132 Ia. 563, 107 N. W. 179.

¹⁷ *Ralston v. Turpin*, 129 U. S. 663, 32 L. ed. 747; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Martin v. Harsh*, 231 Ill. 384, 13 L. R. A. (N.S.) 1000, 83 N. E. 164; *Girault v. Feucht*, 120 La. 1070, 46 So. 26; *Coombe v. Carthew*, 59 N. J. Eq. 638, 43 Atl. 1057.

¹ See § 1630.

² *Yates v. Boen*, 2 Stra. 1104. "As for a drunkard, who is voluntarius Daemon, he hath (as hath been said) no privilege thereby; but what hurt or ill soever he doeth, his drunken-

ness doth aggravate it." Co. Litt. 247; a remark which should be limited to certain branches of the law of torts and crimes.

³ *Wade v. Colvert*, 2 Mill (S. Car.) 27, 12 Am. Dec. 652, where a bill of sale was avoided by the assignee for creditors.

⁴ *Alabama*. *Lewis v. Davis*, — Ala. —, 73 So. 419.

California. *Pickett v. Sutter*, 5 Cal. 412.

Illinois. *Bates v. Ball*, 72 Ill. 109.

Indiana. *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377.

Iowa. *Hawley v. Howell*, 60 Ia. 79.

Kansas. *Franks v. Jones*, 39 Kan. 236, 17 Pac. 663.

Michigan. *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; *Wright v. Fisher*, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605.

Minnesota. *Matz v. Martinson*, 127 Minn. 262, L. R. A. 1915B, 1121, 149 N. W. 370.

New York. *Van Wyck v. Brasher*, 81 N. Y. 260.

absolutely void.⁵ It is therefore error to charge so as to eliminate the question whether there had been a rescission or ratification by charging that the former was unnecessary and the latter impossible.⁶ If the party who alleges intoxication admits facts which unequivocally amount to ratification, it is error to submit to the jury the question of the validity of the instrument.⁷

In some jurisdictions it seems to be held that intoxication is of no legal effect unless the adversary party either procured it, or took an unfair advantage of it.⁸

The great weight of authority, however, as has already been stated,⁹ is to the effect that intoxication which prevents the party from understanding the nature and the legal consequences of the act affects his capacity and renders his contract voidable without regard to the cause of such intoxication.¹⁰

Whether it is necessary, in order to make the contract voidable, that the adversary party should know of the intoxication is in some dispute on the authorities. It has been said not to be necessary,¹¹ but in a recent case it was assumed apparently that drunkenness unknown to the adversary party would be ineffectual. In that case a written guaranty was obtained from an illiterate man who was

Ohio. *French v. French*, 8 Ohio 214;
Baird v. Howard, 51 O. S. 57, 22 L. R. A. 846, 36 N. E. 732.

Oklahoma. *Coody v. Coody*, 39 Okla. 719, L. R. A. 1915E, 465, 136 Pac. 754.

Pennsylvania. *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 86; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959.

Tennessee. *Birdsong v. Birdsong*, 39 Tenn. (2 Head.) 289.

Vermont. *Barrett v. Buxton*, 2 Aikens (Vt.) 167, 16 Am. Dec. 691.

Virginia. *Wigglesworth v. Steers*, 11 Va. (1 H. & M.) 70, 3 Am. Dec. 602. But in *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737, a contract of a person is held void if executed when he is so drunk as not to know its true intent or meaning.

⁵ *Wright v. Waller*, 127 Ala. 557, 54 L. R. A. 440, 29 So. 57; *Matz v. Martinson*, 127 Minn. 282, L. R. A. 1915B, 1121, 149 N. W. 370.

⁶ *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156.

⁷ *Matz v. Martinson*, 127 Minn. 282, L. R. A. 1915B, 1121, 149 N. W. 370.

⁸ *Rottenburgh v. Fowl* (N. J. Eq.), 26 Atl. 338; *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717.

⁹ See § 1647.

¹⁰ *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. Car. 365, 107 Am. St. Rep. 532, 50 S. E. 695. "As far as the legal incapacity is concerned it can make no difference from what cause it proceeded, whether from the party's own imprudence or misconduct, or otherwise. It is the state and condition of the mind itself that the law regards and not the causes that produced it." *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. Car. 365, 107 Am. St. Rep. 532, 50 S. E. 695.

¹¹ *Hawkins v. Bone*, 4 F. & F. 311.

drunk, and sent to one who did not know how it was obtained, and who extended credit thereon. The court of appeals decided the case solely on the question of the negligence of the maker.¹²

Drunkenness is ordinarily apparent to those in personal communication with the drunken man, long before it reaches that stage where it affects contractual capacity. Probably for this reason the effect of the knowledge of the adversary has rarely been decided. Analogous to this is the question of the right of the drunken person to avoid where the contract has passed into the hands of a bona fide purchaser for value. If the instrument is negotiable it has been held that in such case the right to avoid the contract is lost.¹³

A provision of the Negotiable Instruments Act to the effect that the title of a person who negotiates an instrument is absolutely void when such instrument was procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care, has been held to authorize a maker who signed when intoxicated, to set up the defense of intoxication as against a bona fide holder for value;¹⁴ and the rule of "ordinary care" has been said not to apply to such a party, since he was incapable of exercising any care.¹⁵ Intoxication may be set up as against an endorsee who is not a bona fide holder.¹⁶

In principle the case of the drunkard is distinguished from the case of the infant or the insane person by the fact that the disqualification of drunkenness is one voluntarily assumed.¹⁷ In Michigan a somewhat different view seems to have been taken, holding that drunkenness must either extend to such total incapacity that no assent at all could be given or else be complicated with fraud in order to amount to a defense against a bona fide holder. But these remarks are in the nature of an obiter as the record did not

¹² *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. Rep. 731, 21 L. R. A. 409, 33 N. E. 311.

¹³ *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246; *McSparran v. Neeley*, 91 Pa. St. 17; *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753.

Contra, *Caulkins v. Fry*, 35 Conn. 170 (obiter).

¹⁴ *Green v. Gunsten*, 154 Wis. 69, 46 L. R. A. (N.S.) 212, 142 N. W. 261.

¹⁵ *Green v. Gunsten*, 154 Wis. 69, 46 L. R. A. (N.S.) 212, 142 N. W. 261.

¹⁶ *Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61.

¹⁷ "If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne by one of two innocent persons it shall be born by him who occasioned it." *State Bank v. McCoy*, 69 Pa. St. 204, 208, 8 Am. Rep. 246.

disclose any such evidence and a judgment in favor of the makers of the note was reversed for want of evidence to support it.¹⁰

§ 1649. Intoxication as affected by unfair conduct of adversary.

A less degree of intoxication than that described may serve as a basis for avoiding contracts if the drunkenness was caused by the adversary party,¹ or if without causing the intoxication he took an unfair advantage of it.² In such cases, it is sufficient ground for avoiding the contract if the intoxication was the means by which the drunken person was deceived or misled to his prejudice. These cases do not involve questions of capacity, but of fraud and undue influence.³

§ 1650. Effect of intoxication in equity. The transactions of an intoxicated person are treated as voidable at law on the ground of his lack of capacity; but in equity his transactions are set aside on the ground of fraud.¹ If an unfair advantage has been taken of the party who is intoxicated, whether by causing his intoxication

¹⁰ *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

¹ *Iowa*. *Snittjer v. Paterni*, 181 Ia. 961, 165 N. W. 175.

Mississippi. *Newell v. Fisher*, 19 Miss. (11 Sm. & M.) 431, 49 Am. Dec. 66.

New Jersey. *Warnock v. Campbell*, 25 N. J. Eq. 485; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717.

Tennessee. *Hotchkiss v. Fortson*, 13 Tenn. (7 Yerg.) 67; *Woodson v. Gordon*, 17 Tenn. (Peck) 196, 14 Am. Dec. 743.

West Virginia. *Miller v. Sterringer*, 66 W. Va. 169, 25 L. R. A. (N.S.) 596, 66 S. E. 228.

Wisconsin. *Dunn v. Amos*, 14 Wis. 106.

² *Alabama*. *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595.

California. *Swan v. Talbot*, 152 Cal. 142, 17 L. R. A. (N.S.) 1066, 94 Pac. 238.

Kentucky. *Matthis v. O'Brien*, 137 Ky. 651, 126 S. W. 156.

Minnesota. *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257.

New Jersey. *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519.

Ohio. *Baird v. Howard*, 51 O. S. 57, 46 Am. St. Rep. 550, 22 L. R. A. 846, 36 N. E. 732.

Virginia. *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792.

West Virginia. *Miller v. Sterringer*, 66 W. Va. 169, 25 L. R. A. (N.S.) 596, 66 S. E. 228. And see cases cited in last note.

³ See ch. XVII.

¹ *Arkansas*. *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 8 Am. & Eng. Ann. Cas. 251, 94 S. W. 695.

California. *Swan v. Talbot*, 152 Cal. 142, 17 L. R. A. (N.S.) 1066, 94 Pac. 238.

Michigan. *Scanlon v. Connor*, 168 Mich. 133, 133 N. W. 931.

North Carolina. *Burch v. Scott*, 168 N. Car. 602, 84 S. E. 1035.

West Virginia. *Miller v. Sterringer*, 66 W. Va. 169, 25 L. R. A. (N.S.) 596, 66 S. E. 228.

or by taking advantage of him when he is in a state of intoxication, equity will give affirmative relief and will set aside his conveyance, or if necessary to protect his rights, it will set aside his contract.² If one who is intoxicated transfers property for a grossly inadequate consideration,³ or without consideration,⁴ equity will set such conveyance aside. On the other hand, it has been said that if no unfair advantage was taken of the party who was intoxicated, equity will not set the contract aside, but it will leave the party to his rights at law on the theory that he can interpose the defense of intoxication, and that accordingly he has a clear, adequate and complete remedy at law.⁵ If specific performance is sought against the party who is induced to enter into the contract while in a condition of intoxication, equity in its discretion may refuse to decree specific performance as against him.⁶ If the contract is fair and reasonable and if the adversary does not know of the fact of intoxication, equity will not refuse to decree specific performance against one who was intoxicated when he entered into the contract.⁷ Still more clearly will specific performance be granted if the contract was fair and reasonable and the intoxication, if it existed at all, was so slight that no one could notice it.⁸ The act of one who has entered into a transaction when intoxicated, in recognizing for several years thereafter the validity of the note which he gave as a part of such transaction and in promising to pay such note, operates as a ratification.⁹

§ 1651. Contracts for necessities. A drunkard even after adjudication is liable for the reasonable value of necessities furnished to himself or his family.¹ The term necessities includes not only

² *United States. Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486.

California. Swan v. Talbot, 152 Cal. 142, 17 L. R. A. (N.S.) 1066, 94 Pac. 238.

Iowa. Willcox v. Jackson, 51 Ia. 208, 1 N. W. 513. (Action at law on note and in equity for foreclosure.)

North Carolina. Burch v. Scott, 168 N. Car. 602, 84 S. E. 1035.

West Virginia. Miller v. Sterringer, 66 W. Va. 169, 25 L. R. A. (N.S.) 596, 66 S. E. 228.

³ *Swan v. Talbot*, 152 Cal. 142, 17 L. R. A. (N.S.) 1066, 94 Pac. 238.

⁴ *Warnock v. Campbell*, 25 N. J. Eq. 485.

⁵ *Campbell v. Ketcham*, 4 Ky. (1 Bibb.) 406; *Rodman v. Zilley*, 1 N. J. Eq. 320.

⁶ *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Moetzel v. Koch*, 122 Ia. 196, 97 N. W. 1079.

⁷ *Rodman v. Zilley*, 1 N. J. Eq. 320.

⁸ *Corrigan v. Ralph*, 265 Ill. 571, 107 N. E. 155.

⁹ *Matz v. Martinson*, 127 Minn. 262, L. R. A. 1915B, 1121, 149 N. W. 370.

¹ *Kandall v. May*, 92 Mass. (10 All.) 59; *Hallett v. Oakes*, 55 Mass. (1 Cush.)

food and clothing,² but also nursing,³ and the services of an attorney in resisting the adjudication.⁴ Where an oral contract is made for the purchase of realty, which can not be proved under the Statute of Frauds, it is held that a subsequent written agreement entered into when one of the parties is drunk may be avoided by him when he becomes sober, and he may recover whatever he has paid thereon while drunk.⁵

§ 1652. Ratification and disaffirmance. Since the contract is voidable it may be ratified by the drunken person on becoming sober.¹ Ratification may be effected either by express agreement or by conduct which necessarily shows an intention consistent only with the validity of the contract. Thus exchanging the property received under the contract,² or selling it,³ or enforcing the mortgage which was given to an intoxicated grantor to secure the purchase price for the land which he conveyed,⁴ operates as a ratification. But where A, who owned property worth one thousand, six hundred dollars, was induced by B, who knew of his intoxication, to transfer it while in such condition for one thousand dollars, it was held that A's acts in keeping the one thousand dollars, treating B's conduct as a wrongful conversion and suing for the difference of six hundred dollars, was not a ratification, but a disaffirmance.⁵ The drunken person may disaffirm the contract if he acts within a reasonable time after he becomes sober.⁶ If he permits a reasonable time to elapse without disaffirming the contract,

296; *McCrillis v. Bartlett*, 8 N. H. 569; *Van Horn v. Hann*, 39 N. J. L. 207; *Parker v. Davis*, 53 N. Car. (8 Jones L.) 460.

² *Parker v. Davis*, 53 N. Car. (8 Jones L.) 460.

³ *Brockway v. Jewell*, 52 O. S. 187, 39 N. E. 470.

⁴ *Hallett v. Oakes*, 55 Mass. (1 Cush.) 296.

⁵ *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469, 6 Atl. 86.

¹ *Alabama. Sellers v. Knight*, 186 Ala. 96, 64 So. 329.

Georgia. Strickland v. Orendorf Co., 118 Ga. 213, 44 S. E. 997.

Kentucky. Taylor v. Patrick, 4 Ky. (1 Bibb.) 168.

Michigan. Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156.

Minnesota. Matz v. Martinson, 127 Minn. 262, L. R. A. 1915B, 1121, 149 N. W. 370.

² *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753.

³ *Oakley v. Shelley*, 129 Ala. 467, 29 So. 385.

⁴ *Sellers v. Knight*, 186 Ala. 96, 64 So. 329.

⁵ *Baird v. Howard*, 51 O. S. 57, 46 Am. St. Rep. 550, 22 L. R. A. 846, 36 N. E. 732.

⁶ *Alabama. Kelly v. Louisville & Nashville R. Co.*, 154 Ala. 573, 45 So. 906.

his right to disaffirm it ends.⁷ What constitutes disaffirmance is not always clear from the authorities. It seems to be held that some act of disaffirmance,⁸ such as a return of the consideration,⁹ is necessary before bringing suit based on such disaffirmance. While this is a proper rule where the return of the consideration is a condition precedent to rescission, yet if the circumstances dispense with such return, no formal rescission before bringing suit would be necessary.¹⁰

§ 1653. Restoration of consideration. In the absence of fraud, the drunken person must restore as a condition precedent to disaffirmance whatever he has received under the contract.¹ If A has entered into a contract with B while A was intoxicated, under which B gave to A a release from the obligations of a former contract, A must surrender such release to B as a condition precedent to rescission.²

This rule, however, must undoubtedly be qualified by providing that the drunken person need not account for whatever he may have lost or wasted during the same period of intoxication in which he made the contract. If fraud co-exists with intoxication, the return of the consideration is not a condition precedent, at least in equity, but provision will be made in the decree for a fair compensation.³ In any event, on disaffirmance the consideration may be recovered in assumpsit from the drunken person.⁴

California. *Swan v. Talbot*, 152 Cal. 142, 17 L. R. A. (N.S.) 1066, 94 Pac. 238.

Indiana. *Cummings v. Henry*, 10 Ind. 109.

Minnesota. *Matz v. Martinson*, 127 Minn. 262, L. R. A. 1915B, 1121, 149 N. W. 370.

Nebraska. *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 9 L. R. A. (N.S.) 970, 111 N. W. 602.

Oklahoma. *Straughan v. Cooper*, 41 Okla. 515, 139 Pac. 265.

Pennsylvania. *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959.

⁷*Kelly v. Louisville & Nashville R. Co.*, 154 Ala. 573, 45 So. 906; *Matz v. Martinson*, 127 Minn. 262, L. R. A. 1915B, 1121, 149 N. W. 370; *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 9 L. R. A. (N.S.) 970, 111 N. W. 602.

⁸*Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156.

⁹*Williams v. Inabnet*, 1 Bailey L. (S. Car.) 343.

¹⁰*Baird v. Howard*, 51 O. S. 57, 46 Am. St. Rep. 530, 22 L. R. A. 846, 36 N. E. 732.

¹*Kelly v. Louisville & Nashville R. Co.*, 154 Ala. 573, 45 So. 906; *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 9 L. R. A. (N.S.) 970, 111 N. W. 602; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959.

²*Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473, 57 Atl. 959.

³*Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486.

⁴*Haneklau v. Felchlin*, 57 Mo. App. 602.

§ 1654. Effect of adjudication as habitual drunkard. Many jurisdictions provide for a proceeding resembling an inquisition in lunacy, by which one who is given over to constant indulgence in alcoholic stimulants whereby intoxication is produced, may be adjudged an habitual drunkard and placed under guardianship.¹ The effect of such adjudication upon contractual capacity depends upon the provisions of the statutes controlling. In general all contracts, conveyances, and the like, made after such adjudication, are void.² If A has been adjudged an habitual drunkard, he can not thereafter bind himself by consenting to the conveyance of property which is held in trust for him and which the trustees are authorized to convey with his consent.³

Under the Alabama statute this adjudication is solely for the preservation of the estate described in the bill filed for the adjudication. Over property not therein described, the drunkard has full power;⁴ over property described, he has no power, even with the consent of his trustee.⁵ But in a case where A was found on inquisition to be an habitual drunkard and subsequently carried on his business in the ordinary manner, and B paid a debt to A, taking A's receipt therefor, such receipt was held to discharge B's debt.⁶ Upon the discharge of the guardian and termination of the guardianship, contractual capacity is restored so that a conveyance the next day is valid, and is not invalidated by a subsequent re-adjudication.⁷

¹ *Menkins v. Lightner*, 18 Ill. 282; *Ure v. Ure*, 223 Ill. 454, 114 Am. St. Rep. 336, 79 N. E. 153; *Brockway v. Jewell*, 52 O. S. 187, 39 N. E. 470.

² *Alabama*. *Pinkston v. Semple*, 92 Ala. 564, 9 So. 329.

Illinois. *Ure v. Ure*, 223 Ill. 454, 114 Am. St. Rep. 336, 79 N. E. 153.

Indiana. *Devin v. Scott*, 34 Ind. 67; *Redden v. Baker*, 86 Ind. 191.

Kentucky. *Pearl v. McDowell*, 26 Ky. (3 J. J. Mar.) 658, 20 Am. Dec. 199.

Maine. *Philadelphia Trust, S. D. & Ins. Co. v. Allison*, 108 Me. 326, 39 L. R. A. (N.S.) 39, 80 Atl. 833.

Massachusetts. *Wait v. Maxwell*, 22 Mass. (5 Pick.) 217, 16 Am. Dec. 391;

Leonard v. Leonard, 31 Mass. (14 Pick.) 283.

New York. *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499. *Pennsylvania*. *Clark v. Caldwell*, 6 Watts. (Pa.) 139.

³ *Philadelphia Trust, S. D. & Ins. Co. v. Allison*, 108 Me. 326, 39 L. R. A. (N.S.) 39, 80 Atl. 833.

⁴ *Jones v. Semple*, 91 Ala. 182, 8 So. 557.

⁵ *Pinkston v. Semple*, 92 Ala. 564, 9 So. 329.

⁶ *Black's Appeal*, 132 Pa. St. 134, 19 Atl. 31.

⁷ *Cockrill v. Cockrill*, 92 Fed. 811, 79 Fed. 143.

§ 1655. Effect of drugs. The same principles apply to the mental effects of morphine,¹ or of anæsthetics,² as to the use of alcohol though such effect is not technically drunkenness. Thus a release given by one who was so under the influence of opiates that he did not know what he was doing is voidable.³ He may thereafter avoid,⁴ or ratify,⁵ such release. Thus one who agreed to release a railroad from liability for accidents for two hundred and forty dollars and his hospital bills has affirmed such contract, even if he was under the influence of opiates when he entered into it, by keeping the money after recovering his senses, and remaining at the hospital for several weeks at the company's expense.⁶ One who accepts a voucher check in full satisfaction of a claim for personal injuries, and who cashes it on the following day, has been held not to be bound by such release, if by reason of his physical suffering and the administration of anæsthetics he was not able to understand the nature of the transaction.⁷ It has been held in some courts that ratification by one who does not know that he has the right in law to avoid is not binding.⁸ But one who understands the nature of the transaction can not avoid a contract though "not in possession of full mental powers."⁹ The fact that A is weakened by personal injuries and has been under the influence of anæsthetics, does not avoid a contract, such as a release, if at the time of executing such release he understands the nature of the transaction into which he is entering.¹⁰ If the adversary party does not know of the condition of the party seeking relief, no rescission can be had unless such adversary party can be placed in statu quo.¹¹

¹ Swank v. Swank, 37 Or. 439, 61 Pac. 846.

² Gibson v. R. R. Co., 164 Pa. St. 142, 44 Am. St. Rep. 586, 30 Atl. 308.

³ United States. Union Pacific Ry. v. Harris, 158 U. S. 328, 39 L. ed. 1003. (Effect of morphine and whisky given for medicinal purposes.)

⁴ Kansas. Chicago, etc., R. R. v. Doyle, 18 Kan. 58.

⁵ Kentucky. Buford v. R. R., 82 Ky. 286.

⁶ Mississippi. Alabama, etc., Ry. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 So. 105.

⁷ Pennsylvania. Gibson v. R. R., 164 Pa. St. 142, 44 Am. St. Rep. 586, 30 Atl. 308. (Effect of chloroform and ether.)

⁸ Birmingham Ry., Light & Power Co. v. Hinton, 158 Ala. 470, 48 So. 546; Alabama, etc., Ry. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 So. 105.

⁹ Gibson v. R. R., 164 Pa. St. 142, 44 Am. St. Rep. 586, 30 Atl. 308.

¹⁰ Gibson v. R. R., 164 Pa. St. 142, 44 Am. St. Rep. 586, 30 Atl. 308.

¹¹ Foster v. University Lumber & Shingle Co., 65 Or. 46, 131 Pac. 736.

¹² Alabama, etc., Ry. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488, 19 So. 105.

¹³ Cooney v. Lincoln, 21 R. I. 246, 79 Am. St. Rep. 799, 42 Atl. 867.

¹⁴ Barrett v. Lewiston, B. & B. St. Ry. Co., 110 Me. 24, 85 Atl. 306.

¹⁵ Cooney v. Lincoln, 21 R. I. 246, 79 Am. St. Rep. 799, 42 Atl. 867.

CHAPTER L

SPENDTHRIFTS

§ 1656. Spendthrifts under guardianship.

§ 1656. **Spendthrifts under guardianship.** At common law no provision was made for placing a spendthrift under guardianship and a spendthrift as such had full capacity to enter into contracts.¹ In order to render his contracts invalid, it was necessary to show that he was insane or intoxicated at the time that he made the contract in question. Under the statutes of a few states, however, provision has been made for placing spendthrifts under guardianship, and under such statutes a spendthrift under guardianship lacks capacity to enter into ordinary contracts.² These statutes are usually so worded that it is not the adjudication that the person is a spendthrift but the appointment of a guardian that deprives him of his capacity to make contracts.³ If the person has been adjudicated a spendthrift but his guardian does not qualify, he retains his capacity to enter into contracts.⁴ While an adjudication that he is no longer a spendthrift, or the removal of the guardian, ordinarily restores his capacity,⁵ his incapacity persists if an appeal has been taken from such adjudication by a party in interest and if under the local practice such an adjudication is suspended while such an appeal is pending.⁶ If a person has been adjudicated a spendthrift and a guardian has been appointed, capacity to enter into contracts or to ratify contracts is destroyed even if an appeal has been taken, provided that such adjudication is affirmed on such appeal.⁷

¹ O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350.

² O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350; Sullivan v. Lloyd, 221 Mass. 108, 108 N. E. 923.

³ O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350.

⁴ O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350.

⁵ Sullivan v. Lloyd, 221 Mass. 108, 108 N. E. 923 (obiter).

⁶ Sullivan v. Lloyd, 221 Mass. 108, 108 N. E. 923.

⁷ Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.

During the continuance of the guardianship the spendthrift has no capacity to bind himself except for necessities.⁸ It has been held that he can not bind himself by a contract to marry, since in case of breach of such contract his estate would be rendered liable for such breach.⁹ If he marries, considerations of public policy have induced the courts to hold such contracts to be valid in the absence of specific statutory provisions which declare it to be invalid.¹⁰ A spendthrift is liable for necessities,¹¹ even if his guardian has supplied him with money for the purchase of necessities which money he has squandered,¹² since his need for food and the like is just as great in cases in which he has been furnished with money by his guardian and has squandered it as in cases in which he has not been furnished money for that purpose.¹³ Food is ordinarily regarded as a necessary.¹⁴ Furniture for the household of the spendthrift may be a necessary,¹⁵ and whether it is a necessary or not in the particular case is a question of fact.¹⁶ Expenses which are incurred by the spendthrift in resisting the adjudication and the appointment of a guardian are regarded as necessities.¹⁷ However, a transaction by which A, the spendthrift, transfers personal property to B to secure B against liability incurred as bail for A, in order to release A from imprisonment under a criminal charge, is not regarded as a necessary and is invalid.¹⁸ The adjudication that the person is a spendthrift renders invalid contracts which the spendthrift has entered into between the time at which proceedings to obtain such adjudication were begun and the date of such adjudication.¹⁹ It does not, however, render invalid a contract into which the spendthrift had entered before such proceedings were begun,²⁰ even if the adversary party did not perform until after the adjudication.²¹

⁸ O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350.

⁹ Sullivan v. Lloyd, 221 Mass. 108, 108 N. E. 923.

¹⁰ Sturgis v. Sturgis, 51 Or. 10, 15 L. R. A. (N.S.) 1034, 131 Am. St. Rep. 724, 93 Pac. 696; In re Chace, 26 R. I. 351.

¹¹ Leonard v. Stott, 108 Mass. 46; McCrillis v. Bartlett, 8 N. H. 569; In re Barker, 83 Or. 702, 164 Pac. 382.

¹² In re Barker, 83 Or. 702, 164 Pac. 382.

¹³ In re Barker, 83 Or. 702, 164 Pac. 382.

¹⁴ In re Barker, 83 Or. 702, 164 Pac. 382.

¹⁵ Leonard v. Stott, 108 Mass. 46.

¹⁶ Leonard v. Stott, 108 Mass. 46.

¹⁷ McCrillis v. Bartlett, 8 N. H. 569.

¹⁸ Mix v. Peck, 13 Conn. 244.

¹⁹ Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.

²⁰ Myer v. Tighe, 151 Mass. 354, 21 N. E. 49.

²¹ Myer v. Tighe, 151 Mass. 354, 21 N. E. 49.

CHAPTER LI

CONVICTS AND FELONS

§ 1657. Convicts and felons.

§ 1657. Convicts and felons. At common law a number of consequences followed attainder of felony which affected property rights and rights to maintain actions but which did not affect capacity to make contracts.¹ It is accordingly held that in the absence of statute one who has been convicted of felony may make a valid contract.² A convicted felon may employ an attorney to attempt to procure for him a parole, or a pardon, or to sue for a writ of habeas corpus.³ A convict who has escaped may make a valid contract for work and labor,⁴ and his marriage which is contracted while he has thus escaped is valid.⁵

Under some statutes it is provided that one who has been convicted shall in certain cases be regarded as civilly dead,⁶ or specific disabilities are imposed upon him.⁷ Under a statute which provides that the civil rights of a convict shall be suspended, a mortgage which is given by a convict is inoperative.⁸ A statute which

¹ *Kynnauld v. Leslie*, L. R. 1 C. P. 389. "An attainted person is not incapable of contracting though he can not pray in aid the King's courts to enforce his contracts. He can contract with those whose consciences bind them to fulfill their engagement * * *. His contracts, too, can be enforced against him." *Kynnauld v. Leslie*, L. R. 1 C. P. 389.

² *Kynnauld v. Leslie*, L. R. 1 C. P. 389; *McCarron v. Dominion Atlantic Ry.*, 134 Fed. 762; *Byers v. Sun Savings Bank*, 41 Okla. 728, 52 L. R. A. (N.S.) 320, 139 Pac. 948.

³ *Byers v. Sun Savings Bank*, 41 Okla. 728, 52 L. R. A. (N.S.) 320, 139 Pac. 948.

⁴ *McCarron v. Dominion Atlantic Ry.*, 134 Fed. 762.

⁵ *Kynnauld v. Leslie*, L. R. 1 C. P. 389.

⁶ Such provision is made in case of one who is imprisoned for life. *Avery v. Everett*, 110 N. Y. 317, 9 Am. St. Rep. 368, 1 L. R. A. 284, 18 N. E. 148.

⁷ *Harmon v. Bower*, 78 Kan. 135, 17 L. R. A. (N.S.) 502, 16 Am. & Eng. Ann. Cas. 121, 96 Pac. 51; *Williams v. Shackelford*, 97 Mo. 322, 11 S. W. 222; *Kenyon v. Saunders*, 18 R. I. 590, 26 L. R. A. 232, 30 Atl. 470.

⁸ *Williams v. Shackelford*, 97 Mo. 322, 11 S. W. 222.

provides that a convict can not make any conveyances of his property, does not render invalid an appeal bond which he has executed.⁹ The suspension of civil rights under a statute which provides that the civil rights of a convict shall be suspended, begins when his imprisonment under such sentence begins; and a conveyance by him of his property which is made after his sentence and before his imprisonment begins while his sentence is suspended by an appeal to the supreme court, is valid.¹⁰

⁹Kenyon v. Saunders, 18 R. I. 590,
26 L. R. A. 232, 30 Atl. 470.

¹⁰Harmon v. Bower, 78 Kan. 135, 18
L. R. A. (N.S.) 502, 16 Am. & Eng.
Ann. Cas. 121, 96 Pac. 51.

CHAPTER LII

CONTRACTS OF MARRIED WOMEN

- § 1658. Contracts of married women at common law.
- § 1659. Exceptions to common-law rule.
- § 1660. Contracts of married women in equity.
- § 1661. Extent of power over separate estate.
- § 1662. Presumptive intent to charge separate estate.
- § 1663. Contracts of married women under modern statutes.
- § 1664. Power to contract for benefit of separate estate.
- § 1665. Power to contract as feme sole with reference to separate estate.
- § 1666. Statutes conferring limited capacity.
- § 1667. Husband required to join in contract.
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- § 1669. Contract required to be in writing.
- § 1670. Power as sole trader.
- § 1671. Capacity under contract with husband.
- § 1672. Power to contract as feme sole generally.
- § 1673. Contracts of suretyship—At common law and under statutes conferring capacity.
- § 1674. Under statutes restricting her power to act as surety.
- § 1675. Mortgage or conveyance of wife's property to secure debt of husband—
Under statutes conferring capacity.
- § 1676. Under statute restricting method of securing husband's debt.
- § 1677. Under statute forbidding mortgage for husband's debt.
- § 1678. Contracts between husband and wife—At common law.
- § 1679. Under modern statutes.
- § 1680. Partnership between husband and wife.
- § 1681. Agent of married woman.
- § 1682. Ratification.
- § 1683. Restitution.
- § 1684. Estoppel.
- § 1685. Right to avoid executed contracts.
- § 1686. Coverture must be pleaded.
- § 1687. Who can use coverture as a defense.

§ 1658. Contracts of married women at common law. English law, like all other systems of law, probably begins with the family as the legal unit. The father and husband is the head of the family with full power over the persons of the members of the family and with full power of controlling and disposing of all family property, and correspondingly subject to complete liability for all obligations

incurred by any of the members of the family. When the common law took a definite shape, the theory of the family was in a period of transition. Serfdom was disappearing and the power of the father over the children was greatly limited; but the power of the husband over the person and property of his wife persisted for a longer period of time than his power over the property of his children. This power of the husband over the person and property of his wife was explained in part upon the theory that in law husband and wife were one person; and in this way a scriptural justification was found for the relics of an ancient and vanishing legal idea. The relic of the liability of the head of the family for the obligations of its members persisted in the law of husband and wife to the extent that he was liable for her torts and for her antenuptial debts. If she had the power of entering into contracts, he would be liable upon them. It followed that if the primitive notion of his liability for her obligations was to persist, there was a rational basis for denying her capacity to incur new contractual obligations after marriage; and accordingly it was well settled at common law that, subject to certain exceptions,¹ a contract entered into by a married woman was void,² even if her husband joined with her in making such contract.³ Even at modern law a contract which is entered into by a married woman is void unless by virtue of the provisions of some statute.⁴ Her conveyances were

¹ See § 1659.

² Bellewe 60.

³ Bellewe 60.

⁴ England. *Johnson v. Gallagher*, 3 De G. F. & J. 515; *Smith v. Plorner*, 15 East. 607.

Alabama. *Threefoot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 So. 513.

Arkansas. *Dobbin v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425.

Connecticut. *Butler v. Buckingham*, 5 Day (Conn.) 492, 5 Am. Dec. 174.

Delaware. *Ross v. Singleton*, 1 Del. Ch. 149, 12 Am. Dec. 86.

Illinois. *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, 14 N. E. 684.

Indiana. *Stevens v. Parish*, 29 Ind. 260, 95 Am. Dec. 636.

Kentucky. *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443;

Graham v. Graham (Ky.), 56 S. W. 708; *Underhill v. Mayer*, 174 Ky. 229, 192 S. W. 14; *Robinson v. Robinson*, 74 Ky. (11 Bush.) 174; *Breckenridge v. Ormsby*, 24 Ky. (1 J. J. Marsh.) 236, 19 Am. Dec. 71.

Maine. See *Haggett v. Hurley*, 91 Me. 542, 41 L. R. A. 362, 40 Atl. 561, for a discussion of the Teutonic theory of the family.

Maryland. *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171.

Massachusetts. *Shaw v. Thompson*, 33 Mass. (16 Pick.) 198, 26 Am. Dec. 655.

Michigan. *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

Mississippi. *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329.

void.⁵ In some jurisdictions, however, a married woman's contract is said to be voidable and not void.⁶

As a rule, the courts insist that such contracts are void. Thus a contract by a married woman to surrender her child is void,⁷ and can not be ratified.⁸ So her assignments,⁹ covenants of warranty,¹⁰ whether covenants of warranty as to her husband's title,¹¹ or her covenants of warranty as to an expectancy which she is attempting to convey,¹² agreements to assume debts,¹³ and notes,¹⁴ even if in the hands of a bona fide holder,¹⁵ and contracts for services and work and labor,¹⁶ are void. So a bond given by her is not payment

Missouri. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629, 29 S. W. 1030.

Nebraska. *Citizens' State Bank v. Smout*, 62 Neb. 223, 86 N. W. 1068.

New Hampshire. *Wadleigh v. Glines*, 6 N. H. 17, 23 Am. Dec. 705.

New York. *Brick v. Campbell*, 122 N. Y. 337, 10 L. R. A. 259, 25 N. E. 493; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

North Carolina. *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

Pennsylvania. *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522.

Tennessee. *First National Bank v. Shaw*, 109 Tenn. 237, 59 L. R. A. 498, 70 S. W. 807; *Taylor v. Swafford*, 122 Tenn. 303, 25 L. R. A. (N.S.) 442, 123 S. W. 350; *Harris v. Taylor*, 35 Tenn. (3 Sneed) 536, 67 Am. Dec. 576.

Texas. *Hollis v. Francois*, 5 Tex. 195, 51 Am. Dec. 760.

Vermont. *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239; *French v. Slack*, 89 Vt. 514, 96 Atl. 6.

Virginia. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624.

West Virginia. *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

Wisconsin. *Weisbrod v. Ry.*, 18 Wis. 35, 86 Am. Dec. 743.

⁵ *Taylor v. Swafford*, 122 Tenn. (14 Cates) 303, 25 L. R. A. (N.S.) 442, 123 S. W. 350.

⁶ *Lindsley v. Patterson*, — Mo. —, L. R. A. 1915F, 680, 177 S. W. 826. The contract of a married woman has been said to be voidable and not void in *Stovall v. Adair*, 9 Okla. 620, 60 Pac. 282.

⁷ *Stapleton v. Poynter* (Ky.), 53 L. R. A. 784, 62 S. W. 730.

⁸ *Austin v. Davis*, 128 Ind. 472, 25 Am. St. Rep. 456, 12 L. R. A. 120, 26 N. E. 890.

⁹ As to notes owned by her. *Brewer v. Hobbs* (Ky.), 30 S. W. 605.

¹⁰ *Threefoot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 So. 513.

¹¹ *French v. Slack*, 89 Vt. 514, 96 Atl. 6.

¹² *Taylor v. Swafford*, 122 Tenn. 303, 25 L. R. A. (N.S.) 442, 123 S. W. 350.

¹³ *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443.

¹⁴ *Boughner v. Laughlin* (Ky.), 64 S. W. 856; *Underhill v. Mayer*, 174 Ky. 229, 192 S. W. 14.

¹⁵ *Culberhouse v. Hawthorne*, 107 Ark. 462, 156 S. W. 421; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575.

¹⁶ *Stephens v. Hicks*, 156 N. Car. 239, 36 L. R. A. (N.S.) 354, 72 S. E. 312.

of a pre-existing debt of her husband's.¹⁷ To such an extreme is this view carried that a note purporting on its face to be executed by a married woman can not be the subject of forgery.¹⁸ A married woman's lack of capacity is not affected by the fact that the adversary party did not know that she was married.¹⁹

A statute which provides that a married woman "shall be authorized to contract" as if she were single, is not retroactive and does not render enforceable contracts which were entered into by a married woman before such statute was enacted.²⁰

Since the actual delivery gives effect to an instrument, without regard to the date which it bears,²¹ an instrument executed and delivered by a woman who is then unmarried is valid, although it bears a date at which she was married.²²

§ 1659. Exceptions to common-law rule. By certain local customs, as in the city of London, a married woman might contract as a sole trader if her business was in fact free from her husband's control.¹ These customs were not generally adopted in this country except possibly to a modified extent in South Carolina.²

The remaining classes of cases were said to arise out of necessity, though it will be seen that there is not absolute uniformity as to when it is necessary to allow a married woman to make contracts as if single. If the husband was an alien and had never been in the jurisdiction of the wife's residence,³ or if whether an alien or not he had left such jurisdiction under such circumstances as would preclude his return, as where he abjured the realm,⁴ or abandoned

¹⁷ *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

¹⁸ *King v. State*, 42 Tex. Cr. App. 108, 96 Am. St. Rep. 792, 57 S. W. 840.

¹⁹ *Collins v. Hall*, 55 S. Car. 336, 33 S. E. 466; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624.

²⁰ *Stephens v. Hicks*, 156 N. Car. 239, 36 L. R. A. (N.S.) 354, 72 S. E. 313.

²¹ See §§ 1183 and 2175.

²² *Becker v. Nogel*, 165 Wis. 73, 160 N. W. 1055.

¹ *Lavie v. Phillips*, 3 Burr. 1776; *Newbiggin v. Pillans*, 2 Bay (S. Car.) 162.

² *Jacobs v. Featherstone*, 6 W. & S. (Pa.) 346.

³ *England. Derry v. Mazarine*, 1 Ld. Raym. 147; *Walford v. Pienne*, 2 Esp. 554; *Gaillon v. L'Aigle*, 1 Bos. & P. 357.

Massachusetts. Gregory v. Paul, 15 Mass. 31; *Gregory v. Pierce*, 45 Mass. (4 Met.) 478.

North Carolina. Troughton v. Hill, 3 N. Car. 406; *Levi v. Marsha*, 122 N. Car. 565, 29 S. E. 832.

Ohio. Wagg v. Gibbons, 5 O. S. 580.
South Carolina. Bean v. Morgan, 4 McCord (S. Car.) 148.

Vermont. Robinson v. Reynolds, 1 Aiken (Vt.) 174, 15 Am. Dec. 673.

⁴ *Carrol v. Blencow*, 4 Esp. 27. "An Abjuration, that is, a Deportation forever into a foreign Land like to a

his wife, left the country and adhered to the public enemy,⁸ or was banished,⁶ she might contract as a feme sole. A similar holding has been made where the husband has left the state as a fugitive from justice.⁷

If the husband abandons his wife, leaves the state in which they were residing and takes up his residence elsewhere permanently, the English authorities hold that the married woman has not the power to make contracts,⁹ even if he is an alien.⁹ American authorities hold that such facts confer capacity to contract.¹⁰ Indeed, if the abandonment is absolute and the husband leaves the state without the intention of returning, it seems immaterial whether he is permanently domiciled in any specific foreign jurisdiction.¹¹ If the husband abandons the wife and is absent and unheard of for so long a time that the presumption of death arises (a length of time often held to be seven years), the wife has power to contract.¹² But where the husband has abandoned the wife, but has neither left the state permanently nor has been absent and unheard of, the weight of authority seems to be that such facts do not remove the disability of the married woman, even though the contract is for necessities.¹³ Still less, of course, does capacity to contract arise

Profession * * * is a Civil Death; and that is the reason that the wife may bring an Action or be impleaded during the natural life of her Husband." Co. Litt. 133a.

⁸ Cornwall v. Hoyt, 7 Conn. 420.

⁹ Co. Litt. 132b, 133a; Ex parte Franks, 7 Bing. 762; Rhea v. Rhenner, 26 U. S. (1 Pet.) 105, 7 L. ed. 72.

⁷ Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686. But in Texas, permanent separation gives the wife the powers of a feme sole.

⁶ Marsh v. Hutchinson, 2 Bos. & P. 226; Williamson v. Dawes, 9 Bing. 292.

⁹ Kay v. De Pienne, 3 Campb. 123.

¹⁰ United States. Rhea v. Rhenner, 26 U. S. (1 Pet.) 105, 7 L. ed. 72.

Alabama. Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Mead v. Hughes, 15 Ala. 141, 50 Am. Dec. 123; Roland v. Logan, 18 Ala. 307; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312.

Connecticut. Cornwall v. Hoyt, 7 Conn. 420.

Illinois. Love v. Mbyehean, 16 Ill. 277, 63 Am. Dec. 306.

Massachusetts. Gregory v. Pierce, 45 Mass. (4 Met.) 478; Abbott v. Bayley, 23 Mass. (6 Pick.) 89.

Missouri. Gallagher v. Delargy, 57 Mo. 29; Rose v. Bates, 12 Mo. 30.

Pennsylvania. Starrett v. Wynn, 17 Serg. & R. (Pa.) 130, 17 Am. Dec. 654.

West Virginia. Buford v. Adair, 43 W. Va. 211, 64 Am. St. Rep. 854, 27 S. E. 260.

¹¹ See cases cited in last note.

¹² Rosenthal v. Mayhugh, 33 O. S. 155.

¹³ Marshall v. Rutton, 8 T. R. 545; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762.

Contra, Rariden v. Mason, 30 Ind. App. 425, 65 N. E. 554.

where the husband is often away for long periods of time, but does not abandon his wife.¹⁴

The insanity of the husband does not confer upon a married woman capacity to bind herself by contracts generally.¹⁵

§ 1660. Contracts of married women in equity. The courts of equity had, by the end of the seventeenth century,¹ established the doctrine that with reference to property held to the separate use of a married woman, free from her husband's control, she had in many ways the power of a feme sole.² Legislation in the nineteenth century created separate estates of married women in property which before such statutes was her general estate, subject to the common-law rights of her husband. Where such statutory estates were created without adding statutory provisions conferring upon the owner the power to contract at law, the rules of equity determined the married woman's power to contract with reference thereto. It is not the province of this work to discuss what property was included in equitable or statutory separate estates, or the rights of a married woman or her husband in such estates except in so far as the contracts of a married woman with reference thereto are concerned. In equity a married woman could not bind herself personally any more than she could at law.³ At the same time a personal judgment against her was erroneous but not void, and it could not be attacked collaterally.⁴

¹⁴ *Rogers v. Phillips*, 8 Ark. 366, 47 Am. Dec. 727.

¹⁵ *McAnally v. Alabama Insane Hospital*, 109 Ala. 109, 55 Am. St. Rep. 923, 34 L. R. A. 223, 19 So. 492; *Shaw v. Thompson*, 33 Mass. (16 Pick.) 198, 26 Am. Dec. 655.

¹ *Drake v. Storr*, 2 Freem. 205.

² *Kloke v. Martin*, 55 Neb. 554, 76 N. W. 168; *Elliott v. Lawhead*, 43 O. S. 171, 1 N. E. 577; *Elliott v. Gower*, 12 R. I. 79, 34 Am. Rep. 600.

³ *England. Johnson v. Gallagher*, 3 De G. F. & J. 494; *Aylett v. Ashton*, 1 Myl. & C. 105.

United States. Canal Bank v. Partee, 99 U. S. 325, 23 L. ed. 390; *Ankeney v. Hannon*, 147 U. S. 118, 37 L. ed. 105.

Florida. Prentiss v. Paisley, 25 Fla. 927, 7 L. R. A. 640, 7 So. 56.

Iowa. Rodemeyer v. Rodman, 5 Ia. 426.

Kentucky. Bell v. Kellar, 52 Ky. (13 B. Mon.) 381.

Nebraska. Kocher v. Cornell, 59 Neb. 315, 80 N. W. 911.

New Jersey. Pierson v. Lum, 25 N. J. Eq. 390.

Ohio. Fallis v. Keys, 35 O. S. 265; *McCurdy v. Baughman*, 43 O. S. 78; *Hart v. Manahan*, 70 O. S. 189, 71 N. E. 696.

Tennessee. Pilcher v. Smith, 39 Tenn. (2 Head.) 208.

⁴ *McCurdy v. Baughman*, 43 O. S. 78; *Hart v. Manahan*, 70 O. S. 189, 71 N. E. 696.

Her promises upon valuable consideration were enforced rather as obligations resembling contracts than as contracts, by compelling performance out of the separate estate owned by her at the time of making the promise.⁵ Property acquired by her afterward could not be held for her contracts to use the customary and convenient but rather inaccurate term,⁶ nor her property which was her general estate when the contract was made, but which was afterwards by statute made her separate estate.⁷ The claim against the separate estate of the married woman is therefore somewhat in the nature of a lien. It is not a specific lien however. Property sold or disposed of by the married woman before judgment is not subject to her debts contracted while she owned it.⁸ So adding to a note "for the payment of which I bind my separate estate," is not a mortgage in equity, giving the holder of such notes priority over the holders of notes enforceable only at law by statute.⁹ Where there is a restraint on anticipation, the income can not be made liable to a judgment rendered before it came due.¹⁰ While the liability of a married woman's estate in equity for her contracts is *sui generis*, it is an instructive analogy to regard her separate estate as a legal entity, liable itself for her contracts. "It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement."¹¹

§ 1661. Extent of power over separate estate. The questions that generally arose in determining the liability of a married woman's separate estate, may be grouped under two general classes:

⁵ *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480.

⁶ *England*. *Sykes's Trusts*, 2 Johns. & H. 415; *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454; *King v. Lucas*, 23 Ch. Div. 712.

United States. *Ankeney v. Hannon*, 147 U. S. 118, 37 L. ed. 105.

Missouri. *Mendenhall v. Leivy*, 45 Mo. App. 20.

Nebraska. *Kocher v. Cornell*, 59 Neb. 315, 80 N. W. 911.

Ohio. *Sticken v. Schmidt*, 64 O. S. 354, 60 N. E. 561.

Tennessee. *Flanagan v. Grocery Co.*, 98 Tenn. 599, 40 S. W. 1079.

Virginia. *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235.

⁷ *Fallis v. Keys*, 35 O. S. 265.

⁸ *D. M. Osborne & Co. v. Graham*, 46 Mo. App. 28; *Flanagan v. Grocery Co.*, 98 Tenn. 599, 40 S. W. 1079.

⁹ *Western, etc., Bank v. Bank*, 91 Md. 613, 46 Atl. 960.

¹⁰ *Hood Barrs v. Cathcart* (C. A.) [1894], 2 Q. B. 559.

¹¹ *Ex parte Jones*, L. R. 12 Ch. Div. 484, 490. To the same effect are *Shattock v. Shattock*, L. R. 2 Eq. 182; *London, etc., Bank v. Lempiere*, L. R. 4 P. C. 572; *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513.

first, to what extent a married woman had the power to bind her separate estate by contract; and second, what contracts within the scope of her power had the effect of binding her separate estate. The weight of authority on the first question is that a married woman is empowered to bind her separate estate by contract except insofar as she is restrained by the instrument creating the estate, or by the statute which made the estate a separate statutory estate.¹ In other jurisdictions, however, a married woman has only such power to charge her separate estate as is specifically conferred on her by the instrument creating it.²

§ 1662. Presumptive intent to charge separate estate. Upon the question of what contracts within the scope of a married woman's power do in fact bind her separate estate there is even less harmony of judicial decision. Undoubtedly the general rule is that the intention of the parties, to be ascertained according to the rules of equity determines whether the contract binds the separate estate. The divergence of decisions arises in applying this

¹ England. *Taylor v. Meads*, 4 De G. J. & S. 597; *Pride v. Bubb*, L. R. 7 Ch. 64; *Cooper v. McDonald*, L. R. 7 Ch. Div. 288.

Alabama. *Bradford v. Greenway*, 17 Ala. 797, 52 Am. Dec. 203; *Steed v. Knowles*, 79 Ala. 446.

Arkansas. *Dobbin v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425.

Connecticut. *Wagner v. Mutual Life Ins. Co.*, 88 Conn. 536, 91 Atl. 1012.

District of Columbia. *Smith v. Thompson*, 2 McArt. (D. C.) 291, 29 Am. Rep. 621; *Zeust v. Staffan*, 14 D. C. App. 200.

Kansas. *Miner v. Pearson*, 16 Kan. 27.

Kentucky. *Cardwell v. Perry*, 82 Ky. 129; *Burch v. Breckenridge*, 55 Ky. (16 B. Mon.) 492, 63 Am. Dec. 553.

Maryland. *Cooke v. Husbands*, 11 Md. 492.

Mississippi. *Musson v. Trigg*, 51 Miss. 172.

Missouri. *Kim v. Weippert*, 46 Mo. 532, 2 Am. Rep. 541; *Ryland v. Banks*, 151 Mo. 1, 51 S. W. 720.

New Hampshire. *Batchelder v. Sargent*, 47 N. H. 262.

New York. *Jasques v. M. E. Church*, 17 Johns. (N. Y.) 549, 8 Am. Dec. 447; *Methodist, etc., Church v. Jacques*, 3 Johns. Ch. (N. Y.) 77.

Ohio. *Machir v. Burroughs*, 14 O. S. 519; *Phillips v. Graves*, 20 O. S. 371; *Edwards v. Edwards*, 24 O. S. 402.

Tennessee. *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513; *Young v. Young*, 47 Tenn. (7 Cold.) 461.

Texas. *Hollis v. Francois*, 5 Tex. 195, 51 Am. Dec. 760.

Virginia. *Finch v. Marks*, 76 Va. 207; *Justis v. English*, 71 Va. (30 Gratt.) 565.

West Virginia. *Hughes v. Hamilton*, 19 W. Va. 366; *Dages v. Lee*, 20 W. Va. 584.

² *Thomas v. Tolwell*, 2 Whart. (Pa.) 11, 30 Am. Dec. 230; *Cochran v. O'Hern*, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60; *Cater v. Eveleigh*, 4 DeSaus Eq. (S. Car.) 19, 6 Am. Dec. 596; *Creighton v. Clifford*, 6 S. Car. 188.

rule to specific states of fact. If the intent to bind the separate estate is expressed, no question of presumptive intent can arise. If the debt is specifically charged upon the separate estate, as by note and mortgage,¹ or if it is made expressly on the credit of the separate estate,² it is, of course, a charge thereon. Indorsing on the contract, "I hereby bind my separate estate," is sufficiently specific.³ On the other hand, the contract may show affirmatively that the married woman did not intend to bind her separate estate, as by her giving a purchase money note specifying on what property it is a lien.⁴ In such cases there is, of course, no charge on her separate realty. It may not appear affirmatively from the contract itself whether it was or was not intended that the contract should be a charge on the married woman's separate estate. In such cases the first question to determine is whether the contract is, on the one hand, intended for the benefit of the married woman or her separate estate; or on the other hand, is not. If the contract is for the benefit of the married woman or her separate estate,⁵ the courts are practically unanimous in holding that such estate is bound. Even under a statute providing that a contract shall charge a separate estate if such intention appear therein, it need not appear if the contract is for the benefit of the separate estate.⁶ The only serious

¹ *Hester v. Barker*, 42 S. Car. 123, 20 S. E. 52.

² *Alabama*. *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366.

Massachusetts. *Rogers v. Wood*, 90 Mass. (8 All.) 387, 85 Am. Dec. 710.

North Carolina. *Jones v. Craigmiles*, 114 N. Car. 613, 19 S. E. 638.

South Carolina. *Martin v. Suber*, 39 S. Car. 525, 18 S. E. 125; *Singluff v. Tindal*, 40 S. Car. 504, 19 S. E. 137.

Tennessee. *National, etc., Bank v. Lumber Co.*, 100 Tenn. 479, 47 S. W. 85.

Vermont. *Priest v. Cone*, 51 Vt. 495, 31 Am. Rep. 695.

³ *National, etc., Bank v. Lumber Co.*, 100 Tenn. 479, 47 S. W. 85.

⁴ *Harvey v. Curry*, 47 W. Va. 800, 35 S. E. 838.

⁵ *Florida*. *Smith v. Poythress*, 2 Fla. 92, 48 Am. Dec. 176; *Halle v. Einstein*, 34 Fla. 589, 16 So. 554.

New Jersey. *Johnson v. Cummins*, 16 N. J. Eq. 97, 84 Am. Dec. 142; *Armstrong v. Ross*, 20 N. J. Eq. 109.

New York. *Noel v. Kinney*, 106 N. Y. 74, 60 Am. Rep. 423, 12 N. E. 351; *Dyett v. Coal Co.*, 20 Wend. (N. Y.) 570, 32 Am. Dec. 598.

Ohio. *Avery v. Vansickle*, 35 O. S. 270; *Patrick v. Littell*, 36 O. S. 79, 38 Am. Rep. 552.

Pennsylvania. *Winternitz v. Porter*, 86 Pa. St. 35.

South Carolina. *Scottish, etc., Co. v. Deas*, 35 S. Car. 42, 28 Am. St. Rep. 832, 14 S. E. 486; *Cater v. Eveleigh*, 4 DeSaus. Eq. (S. Car.) 19, 6 Am. Dec. 596; *James v. Mayrant*, 4 DeSaus. Eq. (S. Car.) 591, 6 Am. Dec. 630.

Vermont. *Dale v. Robinson*, 51 Vt. 20, 31 Am. Rep. 669; *Hubbard v. Bugbee*, 55 Vt. 506, 45 Am. Rep. 637.

⁶ *Gibson v. Hutchins*, 43 S. Car. 287, 21 S. E. 250.

conflict of authority in cases of this class exists where the contract is in writing and it is sought to show by extrinsic evidence that it was intended to charge the separate estate. If the contract is not for the benefit of the married woman or her estate, and no express charge on her separate estate is made, the divergence of authority is complete. Some courts hold that in such case there is no presumption that the married woman intends to charge her separate estate by her contracts, but that such intent must be shown either from the form of the contract or from the surrounding circumstances.⁷ In some states there can be no charge by implication.⁸ The intent to charge must appear on the face of the contract;⁹ and in some states it must refer to the specific property to be charged.¹⁰ Extrinsic evidence is inadmissible to show an intent to charge.¹¹ It has been held that a note does not bind the separate estate if the intent appears only in a trust deed which is void for usury,¹² or in an affidavit as to the sufficiency of her separate estate, which is not a part of the contract.¹³ So a note signed by a married woman does not raise a presumption of a consideration moving to her and hence to charge her separate estate; her intent to do so must be shown specifically.¹⁴ In some states which hold that an affirmative intention to charge must be shown, it has been said that the fact

⁷ **Arkansas.** *Dobbin v. Hubbark*, 17 Ark. 189, 65 Am. Dec. 425.

District of Columbia. *Goldsmith v. Ladson*, 9 Mack (D. C.) 220.

Indiana. *Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587.

Kentucky. *Burch v. Breckenridge*, 55 Ky. (16 B. Mon.) 482, 63 Am. Dec. 553; *Benson v. Simmers* (Ky.), 53 S. W. 1035.

Nebraska. *Westervelt v. Baker*, 56 Neb. 63, 76 N. W. 440 [citing and following, *Grand, etc., Co. v. Wright*, 53 Neb. 574, 74 N. W. 82].

New Jersey. *Oakley v. Pound*, 14 N. J. Eq. 178.

Tennessee. *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511; *Litton v. Baldwin*, 27 Tenn. (8 Humph.) 209; *Cherry v. Clements*, 29 Tenn. (10 Humph.) 552; *Shacklett v. Polk*, 51 Tenn. (4 Heisk.) 104; *Ragsdale v. Gossett*, 70 Tenn. (2 Lea) 729; *Chatterton v.*

Young, 2 Tenn. Ch. 768; *Dismukes v. Shafer* (Tenn. Ch. App.), 54 S. W. 671.

⁸ *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511.

⁹ *Willard v. Eastman*, 81 Mass. (15 Gray) 328, 77 Am. Dec. 366.

¹⁰ *Goldsmith Bros. Smelting & Refining Co. v. Moore*, 108 Ark. 362, 157 S. W. 733.

¹¹ *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511; *Ragsdale v. Gossett*, 70 Tenn. (2 Lea) 729.

¹² *Wallace v. Goodlet*, 93 Tenn. 598, 30 S. W. 27.

¹³ *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. Rep. 141.

¹⁴ *Grand, etc., Co. v. Wright*, 53 Neb. 574, 74 N. W. 82; *Westervelt v. Baker*, 56 Neb. 63, 76 N. W. 440; *Farmers' Bank v. Boyd*, 67 Neb. 497, 93 N. W. 676; *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511.

that payment could be made only out of the separate estate, could be considered in determining the existence of an intent to charge the separate estate.¹⁵ This is, of course, a position not far from that of the courts which presume an intent to charge.

In other jurisdictions the more reasonable rule prevails that if no other source of payment appears to have been contemplated by the contract, the married woman will be presumed to have intended that her contract should have some effect and not be merely a means of defrauding the adversary party; and that effect can only be to bind her separate estate.¹⁶ It is perhaps in contracts of suretyship that the application of these divergent rules is best seen. Where a married woman has no power to bind her estate except that conferred by the instrument creating such estate, she can not ordinarily bind her estate as surety.¹⁷ Where her contract does in fact bind her estate only when it is for her benefit or that of the estate or is expressly charged upon the estate, her signing a note as surety does not bind her separate estate.¹⁸

§ 1663. Contracts of married women under modern statutes.

The rules of equity and common law upon the subject of a married woman's contracts are modified by statute in almost every jurisdiction. Within the scope of the powers conferred upon her by statute her liability is governed by the rules that apply to persons of full capacity.¹ Thus within her statutory powers she may make

¹⁵ *Fowler v. Jacob*, 62 Md. 326.

Contra, *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. 511.

¹⁶ *Kansas*. *Wicks v. Mitchell*, 9 Kan. 80.

Kentucky. *Cardwell v. Perry*, 82 Ky. 129.

Missouri. *Miller v. Brown*, 47 Mo. 504, 4 Am. Rep. 345.

Ohio. *Phillips v. Graves*, 20 O. S. 371, 5 Am. Rep. 675; *Williams v. Urmston*, 35 O. S. 296, 35 Am. Rep. 611 [overruling, *Levi v. Earl*, 30 O. S. 147, and *Rice v. R. R.*, 32 O. S. 380, 30 Am. Rep. 610]; *Hershizer v. Florence*, 39 O. S. 516.

Virginia. *Price v. Bank*, 92 Va. 468, 32 L. R. A. 214, 23 S. E. 887.

¹⁷ *Hartman v. Ogborn*, 54 Pa. St. 120, 93 Am. Dec. 679.

¹⁸ *Yale v. Dederer*, 22 N. Y. 450, 78 Am. Dec. 216; *Willard v. Eastham*, 81 Mass. (15 Gray) 328, 77 Am. Dec. 306; *Wilcox v. Arnold*, 116 N. Car. 708, 21 S. E. 434.

¹ *Idaho*. *Meier & Frank Co. v. Bruce*, 30 Ida. 732, 168 Pac. 5.

Kentucky. *Tarr v. Muir*, 107 Ky. 283, 53 S. W. 663.

Nebraska. *McKell v. Bank*, 62 Neb. 608, 87 N. W. 317.

New Jersey. *Hackettstown National Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920.

Oklahoma. *Farmers' State Bank v. Keen*, — Okla. —, 167 Pac. 207.

Washington. *Conrad v. Mertz*, 45 Wash. 119, 122 Am. St. Rep. 889, 87 Pac. 1118; *Bush & Lane Piano Co. v. Woodard*, 103 Wash. 612, 175 Pac. 329.

a contract which will result in a lien on her separate property in the same way as anyone of full capacity.² Without the scope of statutory power her contracts and conveyances are void, no matter what other powers may have been given to her by statute.³ Her power to bind herself by contract is, in other words, measured by statute.⁴ Since in Pennsylvania the statutes removing disabilities of married women in general do not apply to their capacity with reference to their separate use trusts, they have under such statutes no more power over such trusts than they had before.⁵ So an agreement concerning a note given by a married woman can not change the character of the liability of her separate realty from that shown by the deed executed as required by statute.⁶ The power of a married woman to make contracts at modern law depends therefore upon the phraseology of the statute in the particular jurisdiction whose law is in question, and the construction placed upon it by the courts. No attempt can be made here to give the details of the statutes in the different states or to discuss their effect, state by state. The different statutes can, however, for purposes of convenience be grouped into general classes which can be discussed.

§ 1664. Power to contract for benefit of separate estate. Some statutes create a separate estate and give a married woman power

² *Tarr v. Muir*, 107 Ky. 283, 53 S. W. 663.

³ *Meier & Frank Co. v. Bruce*, 30 Ida. 732, 168 Pac. 5; *Rowley v. Shepardson*, 83 Vt. 167, 138 Am. St. Rep. 1078, 74 Atl. 1002; *First National Bank v. Bertoli*, 87 Vt. 297, Ann. Cas. 1917B, 590, 89 Atl. 359; *Barrows v. Dugan's Estate*, 88 Vt. 441, 92 Atl. 927; *French v. Slack*, 89 Vt. 514, 96 Atl. 6; *Fadden v. Fadden*, — Vt. —, 103 Atl. 1020; *Seaver v. Lang*, — Vt. —, 104 Atl. 877; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

A statute conferring power to act with reference to her separate estate "does not, expressly or by implication, enlarge a wife's capacity to contract generally." *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 578, 74 N. W. 82 [quoted in *Kitchen v. Chapin*, 64 Neb. 144, 146, 57 L. R. A. 914, 89 N. W. 632].

"It must constantly be kept in mind that a married woman can make contracts and bind herself and property at law only so far as the statute authorizes her to do so. Nor should we forget that our holdings are that, when a married woman enters into a contract affecting property not held to her sole and separate use, her responsibility is to be measured by the common law, and not by the statute." *Seaver v. Lang*, — Vt. —, 104 Atl. 877.

⁴ *Meier & Frank Co. v. Bruce*, 30 Ida. 732, 168 Pac. 5; *Fadden v. Fadden*, — Vt. —, 103 Atl. 1020; *Seaver v. Lang*, — Vt. —, 104 Atl. 877.

⁵ *Holliday v. Hively*, 198 Pa. St. 335, 47 Atl. 988.

⁶ *McCollum v. Boughton*, 132 Mo. 601, 35 L. R. A. 480, 30 S. W. 1028, 33 S. W. 476 [denying rehearing, 130 Mo. 617, 35 L. R. A. 487, 34 S. W. 480].

to make contracts for the benefit of such estate,¹ or give to her the same power over her separate estate that a married man has over his property.² Under such statute a married woman is liable on her contracts which fairly tend to benefit her separate estate.³ A married woman is liable for money borrowed by her,⁴ or for debts incurred by her in managing her separate business,⁵ such as farming.⁶ She is liable for the wages of a laborer working on her farm, though originally employed by her husband.⁷ She is bound by a contract that the report of the appraisers as to the amount of loss to her insured property shall be final;⁸ or on a loan made to her;⁹ or for property bought by her,¹⁰ although she had no separate estate;¹¹ or on a promise to pay a commission in case of the sale of her land;¹² or on a debt incurred by her in her business.¹³ Under a statute which provides that a married woman may effect a policy upon her own life for her separate use and that a policy of insurance effected by a married woman upon her own life and expressed to be for the benefit of her husband shall create a trust in his favor,

¹ England. Griffiths v. Fleming [1909], 1 K. B. 805.

Arkansas. Cooper v. Burel, 129 Ark. 261, 195 S. W. 356.

Florida. Nadel v. Weber Bros. Shoe Co., 70 Fla. 218, 70 So. 20.

Idaho. Meier & Frank Co. v. Bruce, 30 Ida. 732, 168 Pac. 5.

Kentucky. Robertson v. Robertson (Ky.), 72 S. W. 813.

Michigan. Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200; Russel v. Bank, 39 Mich. 671, 33 Am. Rep. 444; Mosher v. Kittle, 101 Mich. 345, 59 N. W. 497; Detroit Chamber of Commerce v. Goodman, 110 Mich. 498, 35 L. R. A. 96, 68 N. W. 295; Edison v. Babka, 111 Mich. 235, 69 N. W. 499; Caldwell v. Jones, 115 Mich. 129, 73 N. W. 129; Doane v. Feather, 119 Mich. 691, 78 N. W. 884.

Pennsylvania. Green v. Green, 255 Pa. St. 224, 99 Atl. 801.

Vermont. Seaver v. Lang, — Vt. —, 104 Atl. 877.

² Bank of Commerce v. Baldwin, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504.

³ Nadel v. Weber Bros. Shoe Company, 70 Fla. 218, L. R. A. 1916D, 1230, 70 So. 20.

⁴ McDaniel v. Jonesboro Trust Co., 127 Ark. 61, 191 S. W. 916.

⁵ Hickey v. Thompson, 52 Ark. 234, 12 S. W. 475.

⁶ Hickey v. Thompson, 52 Ark. 234, 12 S. W. 475.

⁷ Mosher v. Kittle, 101 Mich. 345, 59 N. W. 497.

⁸ Montgomery v. Ins. Co., 108 Wis. 146, 84 N. W. 175. (Under the Michigan statute.)

⁹ McDaniel v. Jonesboro Trust Co., 127 Ark. 61, 191 S. W. 916; Fletcher v. Brainerd, 75 Vt. 300, 55 Atl. 608.

¹⁰ People's Trust Co. v. Merrill, — N. H. —, 102 Atl. 827; Seaver v. Lang, — Vt. —, 104 Atl. 877.

¹¹ Seaver v. Lang, — Vt. —, 104 Atl. 877.

¹² Green v. Green, 255 Pa. St. 224, 99 Atl. 801.

¹³ First National Bank v. Hirschko-witz, 46 Fla. 588, 35 So. 22; Nadel v. Weber Bros. Shoe Company, 70 Fla. 218, L. R. A. 1916D, 1230, 70 So. 20.

insurance which is effected by husband and wife under an arrangement by which each is to pay a part of the premium and a certain amount should be payable to the survivor upon the death of whichever should die first, is to be regarded as a valid insurance by the wife upon her own life.¹⁴ Under a statute or constitutional provision which provides that a married woman may incur an obligation for the purchase of property for her separate estate, a married woman who has acquired stock in a national bank as a gift, may be compelled to pay the statutory stockholders liable for debts of such bank.¹⁵

Under these statutes she is not liable on her contracts which are not for the benefit of her separate estate.¹⁶ Thus she is not liable on a covenant of general warranty in a deed conveying her husband's realty which she executes to release her dower;¹⁷ nor on a judgment note not given for the benefit of her separate estate;¹⁸ nor for a note given for realty¹⁹ or personalty²⁰ transferred to herself and her husband together; nor for a contract concerning land leased to her husband, though afterwards sold to her;²¹ nor on a contract between herself and her husband on one side and a third person on the other for repairing property owned by the husband and wife jointly;²² nor for a contract of suretyship,²³ even if for a debt of her tenant;²⁴ nor for a subscription toward the erecting of a chamber of commerce building, though her realty might possibly be advanced in price thereby;²⁵ nor on a mortgage to secure payment

¹⁴ *Griffiths v. Fleming* [1909], 1 K. B. 805.

¹⁵ *Keyser v. Milton*, 228 Fed. 594, 143 C. C. A. 116.

¹⁶ *Burr v. Beckler*, 264 Ill. 230, L. R. A. 1916A, 1049, 106 N. E. 206. (Under Florida law.)

¹⁷ *Pyle v. Gross*, 92 Md. 132, 48 Atl. 713; *Augusta National Bank v. Beard's Executor*, 100 Va. 687, 42 S. E. 694; *French v. Slack*, 89 Vt. 514, 96 Atl. 6.

¹⁸ *Investment Co. v. Roop*, 132 Pa. St. 496 [sub nomine, *Roop v. Investment Co.*, 7 L. R. A. 211; sub nomine, *Appeal of Loop*, 19 Atl. 278].

¹⁹ *Doane v. Feather*, 119 Mich. 691, 78 N. W. 884.

²⁰ *Caldwell v. Jones*, 115 Mich. 129, 73 N. W. 129; *Chamberlain v. Murrin*, 92 Mich. 361, 52 N. W. 640.

²¹ *Edison v. Babka*, 111 Mich. 235, 69 N. W. 499.

²² *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556, 2 L. R. A. 345, 40 N. W. 909.

²³ *Chittim v. Armour*, 125 Ark. 408, 188 S. W. 809; *Bank of Commerce v. Baldwin*, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504; *Burr v. Beckler*, 264 Ill. 230, L. R. A. 1916A, 1049, 106 N. E. 206. (Under Florida law.) *Russel v. Bank*, 39 Mich. 671, 33 Am. Rep. 444.

²⁴ *Chittim v. Armour*, 125 Ark. 408, 188 S. W. 809.

²⁵ *Detroit Chamber of Commerce v. Goodman*, 110 Mich. 498, 35 L. R. A. 96, 68 N. W. 295. (Two judges dissenting.)

of agricultural supplies furnished to other persons joining in the mortgage, to be used in cultivating land which is hers in part;²⁶ nor on a contract to pay her sister's board.²⁷

Under a statute which authorizes a married woman to contract only for necessities and to charge her separate estate, her note given in payment of a note of her deceased husband's is without consideration and unenforceable if she received nothing from his estate.²⁸ Under a statute or constitutional provision which authorizes an obligation for the purchase of property which may be enforced out of her personal estate, she is not personally liable upon a contract which is made by her partner in business on behalf of the partnership.²⁹ If it is sought to charge her upon a contract made on her behalf by an agent, the authority of the agent must be alleged and proved.³⁰ Statutes which confer power to make contracts with reference to a separate estate do not confer power to make contracts which do not concern the separate estate,³¹ and they do not confer a general power to contract at common law.³²

§ 1665. Power to contract as feme sole with reference to separate estate. Other statutes not only create separate statutory estates, but give a married woman power to contract with reference thereto as if she were single.¹ Under most of these statutes a mar-

²⁶ *Simon v. Sabb*, 56 S. Car. 38, 33 S. E. 799.

²⁷ *June v. Labadie*, 132 Mich. 135, 92 N. W. 937.

²⁸ *Gilbert v. Brown*, 123 Ky. 703, 7 L. R. A. (N.S.) 1053, 97 S. W. 40.

²⁹ *Nadel v. Weber Bros. Shoe Company*, 70 Fla. 218, L. R. A. 1916D, 1230, 70 So. 20.

³⁰ *Nadel v. Weber Bros. Shoe Company*, 70 Fla. 218, L. R. A. 1916D, 1230, 70 So. 20.

³¹ *American, etc., Co. v. Owens*, 72 Fed. 219, 18 C. C. A. 513; *Shaffer v. Kugler*, 107 Mo. 58, 17 S. W. 698; *Godfrey v. Megahan*, 38 Neb. 748, 57 N. W. 284; *Stenger, etc., Association v. Stenger*, 54 Neb. 427, 74 N. W. 846; *Hirth v. Hirth*, 98 Va. 121, 34 S. E. 964.

³² *Alabama. McAnally v. Alabama Insane Hospital*, 109 Ala. 109, 55 Am. St. Rep. 923, 34 L. R. A. 223, 19 So. 492.

Kentucky. Gilbert v. Brown, 123 Ky. 703, 7 L. R. A. (N.S.) 1053, 97 S. W. 40.

Michigan. Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200.

North Carolina. Lipinsky v. Revell, 167 N. Car. 508, 83 S. E. 820.

Wisconsin. Conway v. Smith, 13 Wis. 125.

¹ *United States. American, etc., Co. v. Owens*, 72 Fed. 219, 18 C. C. A. 513.

Arizona. Liebes v. Steffy, 4 Ariz. 11, 32 Pac. 261.

Arkansas. Warner v. Hess, 66 Ark. 113, 49 S. W. 489; *Pyles v. Farmers' Bank*, 118 Ark. 601, 176 S. W. 141.

Delaware. Kirkley v. Lacey, 7 Houst. (Del.) 213.

Florida. Nadel v. Weber Bros. Shoe Co., 70 Fla. 218, 70 So. 20.

Kentucky. Tarr v. Muir, 107 Ky. 283, 53 S. W. 663.

Louisiana. First, etc., Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; *Holloman*

ried woman has as much power to contract with reference to her separate property as her husband has with reference to his.² Thus she may be a surety,³ or sole trader,⁴ or may be a member of a partnership of which her husband is not a member;⁵ and it is everywhere held that she may buy property,⁶ or sell it, and this rule applies to lands owned at the passage of the statute as well as those afterwards acquired.⁷ She may authorize an attorney in fact to mortgage her realty.⁸ She may assign her interest in a life insurance policy without the intervention of a trustee,⁹ or may release a cause of action in tort for personal injuries.¹⁰ She may assume a mortgage debt on realty bought by her,¹¹ and may borrow money to pay off a lien and confess judgment therefor,¹² or confess judgment for debt for the improvement of her separate real estate.¹³

v. Alexandria & Pineville Building & Loan Association, 137 La. 970, 69 So. 764.

Missouri. First National Bank v. Kirby (Mo.), 175 S. W. 926.

Nebraska. Farwell v. Cramer, 38 Neb. 61, 56 N. W. 716; **Godfrey v. Megahan**, 38 Neb. 748, 57 N. W. 284; **Melick v. Varney**, 41 Neb. 105, 59 N. W. 521; **Stenger, etc., Association v. Stenger**, 54 Neb. 427, 74 N. W. 846; **Citizens' State Bank v. Smout**, 62 Neb. 223, 86 N. W. 1068.

North Carolina. Bowen v. Daugherty, 168 N. Car. 242, 84 S. E. 265.

Ohio. Society, etc., v. Haines, 47 O. S. 423, 25 N. E. 119.

Pennsylvania. Steffen v. Smith, 159 Pa. St. 207, 28 Atl. 295.

South Carolina. Darwin v. Moore, 58 S. Car. 164, 36 S. E. 539.

Vermont. French v. Slack, 86 Vt. 514, 96 Atl. 6.

Virginia. Hirth v. Hirth, 98 Va. 121, 34 S. E. 964; **Tufts v. Copen**, 37 W. Va. 623, 16 S. E. 793.

² **Bank of Commerce v. Baldwin**, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504; **Farwell v. Cramer**, 38 Neb. 61, 56 N. W. 716.

³ **Westervelt v. Baker**, 56 Neb. 65, 76 N. W. 440 (though in Nebraska such

contract does not prima facie bind her separate estate).

⁴ **Kirkley v. Lacy**, 7 Houst. (Del.) 213.

⁵ **Vail v. Winterstein**, 94 Mich. 230, 34 Am. St. Rep. 334, 18 L. R. A. 515, 53 N. W. 932.

⁶ **Liebes v. Steffy**, 4 Ariz. 11, 32 Pac. 261; **Nadel v. Weber Bros. Shoe Co.**, 70 Fla. 218, 70 So. 20; **Hays v. Jordan**, 85 Ga. 741, 9 L. R. A. 373, 11 S. E. 833; **Melick v. Varney**, 41 Neb. 105, 59 N. W. 521.

⁷ **Jackson v. Everett (Tenn.)**, 58 S. W. 340.

⁸ **Linton v. Ins. Co.**, 104 Fed. 584, 44 C. C. A. 54.

⁹ (Supreme Assembly) **Good Fellows v. Campbell**, 17 R. I. 402, 13 L. R. A. 601, 22 Atl. 307.

¹⁰ **Cooney v. Lincoln**, 20 R. I. 183, 37 Atl. 1031 [citing, Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; **Berger v. Jacobs**, 21 Mich. 215; **Leonard v. Pope**, 27 Mich. 145].

¹¹ **Society, etc., v. Haines**, 47 O. S. 423, 25 N. E. 119; **Brewer v. Maurer**, 38 O. S. 543, 43 Am. Rep. 436.

¹² **Abell v. Chaffee**, 154 Pa. St. 254, 26 Atl. 364.

¹³ **Latrobe, etc., Association v. Fritz**, 152 Pa. St. 224, 25 Atl. 558.

So her note given for money borrowed to buy realty,¹⁴ or for any other loan,¹⁵ is valid. Under a statute which authorizes her to enter into "any engagement respecting property" as if she were unmarried, her note is an engagement respecting property, and is enforceable against her separate estate,¹⁶ although there is no general personal liability.¹⁷ So a married woman who owns separate property from her husband may become a stockholder,¹⁸ as in a building and loan association.¹⁹ If a married woman is one of the chief stockholders in a corporation, her note given for the difference between the value of the property of the corporation and the property for which it is exchanged, is enforceable.²⁰ She may employ an attorney, at least if for her own interests,²¹ as to instituting divorce proceedings,²² even if the suit is afterwards dismissed,²³ or to discharge an attachment levied on her goods as the property of her husband.²⁴

She may by an express contract incur liability for necessities,²⁵ such as the attendance of a doctor,²⁶ even if she is living with her husband. Under a statute which makes the husband primarily liable for necessities, a note given by a married woman in consideration of the services of a physician which were rendered upon the husband's credit, but for which the husband subsequently refused to pay, is not valid.²⁷ She may incur liability for necessities, such as the attendance of a doctor, even if she is living with her husband,²⁸ or for the services of a nurse.²⁹ To hold her estate, it is not

¹⁴ *Steffen v. Smith*, 159 Pa. St. 207, 28 Atl. 295.

¹⁵ *Hollowman v. Alexandria & Pineville Building & Loan Association*, 137 La. 970, 69 So. 764; *Crampton v. Newton's Estate*, 132 Mich. 149, 93 N. W. 250.

¹⁶ *First Savings Bank & Trust Co. v. Flournoy*, 24 N. M. 256, 171 Pac. 793.

¹⁷ *First Savings Bank & Trust Co. v. Flournoy*, 24 N. M. 256, 171 Pac. 793.

¹⁸ *First, etc., Bank v. Moss*, 52 La. Ann. 1524, 28 So. 133. So *Kerr v. Urie*, 86 Md. 72, 63 Am. St. Rep. 493, 37 Atl. 789.

¹⁹ *Holloman v. Alexandria & Pineville Building & Loan Association*, 137 La. 970, 69 So. 764.

²⁰ *Pyles v. Farmers' Bank*, 118 Ark. 601, 176 S. W. 141.

²¹ *Tyler v. Winder*, 89 Neb. 409, 34 L. R. A. (N.S.) 1080, 131 N. W. 592.

²² *Wells v. Gilpin*, 19 Colo. 305, 35 Pac. 545; *Tyler v. Winder*, 89 Neb. 409, 34 L. R. A. (N.S.) 1080, 131 N. W. 592.

²³ *Wolcott v. Patterson*, 100 Mich. 227, 43 Am. St. Rep. 456, 24 L. R. A. 629, 58 N. W. 1006.

²⁴ *Thresher v. Barry*, 69 Conn. 470, 37 Atl. 1064.

²⁵ *Adair v. Arendt*, 126 Ark. 246, 190 S. W. 445.

²⁶ *Goodman v. Shipley*, 105 Mich. 439, 63 N. W. 412.

²⁷ *Underhill v. Mayer*, 174 Ky. 229, 192 S. W. 14.

²⁸ *Goodman v. Shipley*, 105 Mich. 439, 63 N. W. 412 [following, *Meads v. Martin*, 84 Mich. 306, 47 N. W. 583; *Hirshfield v. Waldron*, 83 Mich. 116, 47 N. W. 239].

²⁹ *Bonebrake v. Tauer*, 67 Kan. 827, 72 Pac. 521.

necessary to trace proceeds of a note into her separate estate if her intent to bind it appears from the transaction.³⁰ Under such statutes her after-acquired property is liable for her contracts.³¹

Statutes which confer upon a married woman power to contract with reference to her separate estate, do not confer upon her the general power to bind herself by contract, but confer power upon her to bind herself only by contracts which concern her separate estate.³² Under such a statute she can not bind herself by a contract of suretyship for which she has received no consideration.³³

§ 1666. Statutes conferring limited capacity. The remaining statutes which confer partial capacity may be grouped under this head. By the express provisions of some, a woman who is deserted by her husband may contract as if she were unmarried,¹ at least to the extent of binding herself for such necessities as medical attendance.² Under other statutes the court under certain circumstances may by decree confer upon a married woman the power of acting as a feme sole. Under some of these statutes, desertion or its equivalent is necessary for such decree,³ as where the wife is living apart from her husband and supports herself.⁴ But the mere insolvency of husband is not ground for a decree authorizing the wife to act as a sole trader; nor is evidence that her father-in-law will assist her evidence of a separate estate.⁵ As the decree is notice of her status to the world, a defect in the application of such nature that the court obtains no jurisdictions to make such decree is also notice to the world that the decree is in law a nullity.⁶

³⁰ Spott's Estate, 156 Pa. St. 281, 27 Atl. 132; Darwin v. Moore, 58 S. Car. 164, 36 S. E. 539. (Note given in 1890.)

³¹ In re Ann [1894], 1 Ch. 549; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917.

³² Bank of Commerce v. Baldwin, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504.

³³ Bank of Commerce v. Baldwin, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504.

¹ Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Love v. Moynahan, 16 Ill. 277, 63 Am. Dec. 306; Carstens v. Hanselman, 61 Mich. 426, 1 Am. St.

Rep. 606, 28 N. W. 159; Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; Golden v. Galveston, 20 Tex. Civ. App. 584, 50 S. W. 416.

² Carstens v. Hanselman, 61 Mich. 426, 1 Am. St. Rep. 606, 28 N. W. 159.

³ In re Hughes [1898], 1 Ch. 529, 67 L. J. Ch. N. S. 279; Hill v. Cooper [1893], 2 Q. B. 85; Azbill v. Azbill, 92 Ky. 154, 17 S. W. 284.

⁴ Azbill v. Azbill, 92 Ky. 154, 17 S. W. 284.

⁵ Kohn v. Steinau (Ky.), 29 S. W. 885.

⁶ New England, etc., Co. v. Powell, 94 Ala. 423, 10 So. 324.

§ 1667. Husband required to join in contract. Under some statutes the contract of a married woman is valid if the husband joins in his wife's contract.¹ Under such statutes a separate pledge of property by the wife is invalid,² as is a note signed by the wife, payable to the husband and indorsed by him,³ or a judgment by confession where the husband did not join in the note or sign the order for confession.⁴ A purchase of land at public sale by an agent appointed with the consent of her husband is valid.⁵ Under such statutes the contract or conveyance is valid only if the husband joins therein.⁶ A deed executed by a married woman alone to defraud her creditors and subsequently ratified by a second deed in which her husband joins is invalid as to such creditors.⁷ A deed in which the husband did not join, conveying her interest in land previously her husband's, to her children, in consideration of love, is void;⁸ and a written contract by a married woman to sell land is unenforceable unless her husband joins, or she is living apart from him.⁹ So a mortgage in which the husband does not join is a nullity.¹⁰ So a mortgage may be void as not executed by husband and wife jointly and the note secured thereby may be valid;¹¹ but

¹ *Brinkley v. Ballance*, 126 N. Car. 393, 35 S. E. 631; *J. L. Thompson Co. v. Coats*, 174 N. Car. 193, 93 S. E. 724. (Under former statute.) *Red River National Bank v. Ferguson*, — Tex. —, 206 S. W. 923. An exception was made by a former North Carolina statute where the consideration was her antenuptial debt or her necessary personal expenses. *J. L. Thompson Co. v. Coats*, 174 N. Car. 193, 93 S. E. 724.

² *Taylor v. Jackson (R. I.)*, 25 Atl. 348.

³ *Harvard, etc., Co. v. Benjamin*, 84 Md. 333, 57 Am. St. Rep. 402, 35 Atl. 930.

⁴ *Hoffman v. Shupp*, 80 Md. 611, 31 Atl. 505.

⁵ *Moore v. Taylor*, 81 Md. 644, 32 Atl. 320, 33 Atl. 886.

⁶ *United States. De Roux v. Girard*, 112 Fed. 89, 50 C. C. A. 136. (Decided under the Pennsylvania statute.)

Kentucky. Weber v. Tanner (Ky.), 64 S. W. 741.

Maryland. Harvard, etc., Co. v. Ben-

jamin, 84 Md. 333, 57 Am. St. Rep. 402, 35 Atl. 930.

North Carolina. J. L. Thompson Co. v. Coats, 174 N. Car. 193, 93 S. E. 724.

Ohio. Westlake v. (City of) Youngstown, 62 O. S. 249, 56 N. E. 873.

Pennsylvania. Bingler v. Bowman, 194 Pa. St. 210, 45 Atl. 80.

⁷ *Murphy v. Green*, 128 Ala. 486, 30 So. 643.

⁸ *Ellis v. Pearson*, 104 Tenn. 591, 58 S. W. 318.

⁹ *Bartlett v. Williams*, 27 Ind. App. 637, 60 N. E. 715, and the doctrine of part performance has no application. *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918, under a special statute of a combination type.

¹⁰ *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233.

¹¹ *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910. A mortgage by a feme covert on part of her separate estate with the joinder of her husband is good in equity. *Lynch v. Moser*, 72 Conn. 714, 46 Atl. 153.

if she could incur the debt for which the mortgage was given, it may be held in equity as an appointment of her property for payment.¹² Under such statute it has been held that a note given by a wife to her husband and indorsed by him is invalid as he did not join in the execution.¹³ Such statute is held not to apply where the husband has deserted his wife.¹⁴ Under a statute requiring husband and wife to join in conveying the wife's property, but excepting women whose husbands are non-resident, a woman who is a non-resident may execute a valid deed without her husband's joining, though he is also a non-resident.¹⁵ A resident married woman can not avail herself of a statute conferring power on non-resident married women.¹⁶ If the husband signs the deed but does not join in acknowledging it, the deed is invalid in some jurisdictions,¹⁷ and in others good in equity as a contract.¹⁸ A married woman who bought land is estopped to deny the lien of the vendor thereon, though the notes given therefor were void as not signed by her husband.¹⁹ So under some statutes her trustee must join. Under such statutes a conveyance by husband and wife is void.²⁰ Under a statute authorizing a married woman to act as if she were single in dealing with her separate estate, her power of attorney is valid, though not signed by her husband.²¹

§ 1668. Consent of husband necessary. Some statutes require the consent of the husband, and in some cases his written consent to the wife's contracts.¹ Her husband's consent may be made neces-

¹² *Perrine v. Newell*, 49 N. J. Eq. 57, 23 Atl. 492.

¹³ *Harvard, etc., Co. v. Benjamin*, 84 Md. 333, 57 Am. St. Rep. 402, 35 Atl. 930.

¹⁴ *Beiler v. Dreher*, 129 Ala. 384, 30 So. 22. (By special statutory exception.)

¹⁵ *High v. Whitfield*, 130 Ala. 444, 30 So. 449.

¹⁶ *Swafford v. Herd* (Ky.), 65 S. W. 803. (A statute authorizing a non-resident married woman to appoint an attorney in fact to convey.)

¹⁷ *Weber v. Tanner* (Ky.), 64 S. W. 741; *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 695. So of a mortgage. *Dietrich v. Hutchinson*, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810.

¹⁸ *Rushton v. Davis*, 127 Ala. 279, 28 So. 476.

¹⁹ *Weller v. Monroe* (Ky.), 55 S. W. 1078 [citing, *Faught v. Henry*, 76 Ky. (13 Bush.) 471; *Bybee v. Smith*, 88 Ky. 648, 11 S. W. 722; *McClure v. Bigstaff* (Ky.), 37 S. W. 294; *Adam v. Feeder* (Ky.), 41 S. W. 275].

²⁰ *Johnson v. Sanger*, 49 W. Va. 405, 38 S. E. 645.

²¹ *Farmers', etc., Bank v. Loftus*, 133 Pa. St. 97, 7 L. R. A. 313, 19 Atl. 347.

¹ *Horton v. Hill*, 138 Ala. 625, 36 So. 465; *Bogie v. Nelson*, 151 Ky. 443, 152 S. W. 250; *Coffey v. Shuler*, 112 N. Car. 622, 16 S. E. 911; *Bazemore v. Mountain*, 126 N. Car. 313, 35 S. E. 542.

sary to her acting as a sole trader.² Under such statutes a married woman is not bound by an oral contract for the care of an insane husband, though by statute she could act as sole trader if her husband was insane.³ So as attorney's fees are a matter of negotiation, not merely a liability created and fixed by law, like costs, a married woman, though empowered to sue alone on all her contracts, can not bind herself by contract therefor without her husband's consent.⁴ Some statutes require the written assent of her husband to any conveyance of her property. Under such statute her endorsement and delivery of her note without her husband's consent is a nullity.⁵ A transfer by a married woman of a note assigned to her, without the written consent of her husband is invalid, even in the hands of a bona fide holder.⁶ But the indorsement of the note by the husband, as well as by the wife, has been held to be a sufficient written assent.⁷ A contract of sale of goods without consent of the husband is not void, but voidable, whether treated as a Georgia or as an Alabama contract.⁸ A letter written by a husband as the wife's agent is sufficient to show consent, where it orders the goods to be shipped because of the writer's good standing, and where it states what the wife's property is, it charges it sufficiently.⁹ So is his joining in the execution of the instrument,¹⁰ or signing as a witness.¹¹ This consent must be, however, to the same contract that the wife assents to.¹² An exception to these statutes is generally made in case of necessities, repairs, and the like.¹³

§ 1669. Contract required to be in writing. Some statutes require a married woman's contracts to be in writing except in

² *Cotter v. Gazaway*, 141 Ga. 534, 81 S. E. 879

³ *McAnally v. Insane Hospital*, 109 Ala. 109, 55 Am. St. Rep. 923, 34 L. R. A. 223, 19 So. 492.

⁴ *Cowan v. Motley*, 125 Ala. 369, 28 So. 70.

⁵ *Vann v. Edwards*, 128 N. Car. 425, 39 S. E. 66. (Hence on her death the title thereto vests in her husband, in North Carolina, subject to her debts.)

⁶ *Walton v. Bristol*, 125 N. Car. 419, 34 S. E. 544; *Whelpley v. Stoughton*, 119 Mich. 314, 78 N. W. 137.

⁷ *Coffin v. Smith*, 128 N. Car. 252, 38 S. E. 864.

⁸ *Clewis v. Malon*, 119 Ala. 312, 24 So. 767 [overruling, *Strauss v. Schwab*, 104 Ala. 669, 16 So. 692].

⁹ *Brinkley v. Ballance*, 126 N. Car. 393, 35 S. E. 631.

¹⁰ *Rushton v. Davis*, 127 Ala. 279, 28 So. 476; *Wachovia, etc., Bank v. Ireland*, 122 N. Car. 571, 29 S. E. 835; *In re Freeman*, 116 N. Car. 199, 21 S. E. 110.

¹¹ *Souder v. Bank*, 156 Pa. St. 374, 27 Atl. 293.

¹² *Walton v. Bristol*, 125 N. Car. 419, 34 S. E. 544.

¹³ *McAnally v. Lumber Co.*, 109 Ala. 397, 19 So. 417.

certain cases, as in Alabama, where she is a sole trader under the statute.¹ Contracts of a married woman affecting the body of her estate,² including her interest in a policy of life insurance effected for her benefit on her husband's life,³ come within the provisions of some statutes. Under such statutes an agent can not be appointed orally,⁴ nor can an oral contract for a building be enforced by taking a lien,⁵ nor can it be ratified,⁶ nor can the consent of the husband give it validity.⁷ Indorsement of a promissory note in blank is not written consent within the provision of the statute, so as to enable her husband to pass title thereto.⁸

Part performance of such a contract does not make it enforceable against a married woman, since she has no capacity in these jurisdictions to bind herself except as indicated by statute,⁹ but under some statutes the married woman may enforce an oral contract, though it can not be enforced against her.¹⁰

Contracts for necessities are excepted from the provisions of some of the statutes already referred to. The term necessities has a different meaning in this connection from its meaning in the law of infancy. It includes a mule used to cultivate a farm from which the married woman is supported,¹¹ and goods sold to renters on shares;¹² but not the wages of an overseer, his services not being shown to be necessary;¹³ nor the rent of a hotel.¹⁴ Contracts for necessities are not enforceable without due process of law. Thus a creditor who has sold a married woman merchandise necessary for the support of her family can not take possession of crops raised by her on her

¹ *Clement v. Draper*, 108 Ala. 211, 19 So. 25; *Strauss, etc., Co. v. Glass*, 108 Ala. 546, 18 So. 526 [qualifying, *Strauss v. Schwab*, 104 Ala. 669, 16 So. 692; *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122, 23 L. R. A. 622, 14 So. 667; *Mitchell v. Mitchell*, 101 Ala. 183, 13 So. 147].

² *Sydnor v. Boyd*, 119 N. Car. 481, 37 L. R. A. 734, 26 S. E. 92.

³ *Sydnor v. Boyd*, 119 N. Car. 481, 37 L. R. A. 734, 26 S. E. 92.

⁴ *Scott v. Cotten*, 91 Ala. 623, 8 So. 783.

⁵ *Weathers v. Borders*, 121 N. Car. 387, 28 S. E. 524.

⁶ *Weathers v. Borders*, 121 N. Car. 387, 28 S. E. 524.

⁷ *Strauss, etc., Co. v. Glass*, 108 Ala. 546, 18 So. 526.

⁸ *Case v. Espenschied*, 169 Mo. 215, 69 S. W. 276.

⁹ *Percifield v. Black*, 132 Ind. 384, 31 N. E. 955.

¹⁰ *Lister v. Vowell*, 122 Ala. 264, 23 So. 564.

¹¹ *Allen v. Long (Ky.)*, 41 S. W. 17.

¹² *Bazemore v. Mountain*, 121 N. Car. 59, 28 S. E. 17.

¹³ *Sanderlin v. Sanderlin*, 122 N. Car. 1, 29 S. E. 55. (In this case the contract was invalid, as neither in writing nor for necessities.)

¹⁴ *Crow v. Shacklett (Ky.)*, 38 S. W. 692.

own land, but he must take judgment and issue execution subject to her right to exemptions.¹⁸

§ 1670. Power as sole trader. Under other statutes a married woman is empowered to act as a sole trader, and as such to bind herself by contract.¹ Such statutes are constitutional.² Under such a statute a married woman may carry on business in the name of an agent.³ Unless her note is given in connection with her sole business, such statutes do not make it valid.⁴ A feme covert trading as a sole trader is not subject to the act concerning involuntary insolvency.⁵ Her ownership of a farm which her husband manages is not a separate business.⁶ If by statute a decree of court is necessary to empower a married woman to act as sole trader, she has not such power without such decree, even if she has invested her separate property in her business.⁷

A trade certificate issued to a woman as a feme sole can not be attacked collaterally in any other court as to the propriety of the grounds upon which it was issued.⁸

§ 1671. Capacity under contract with husband. Under some statutes, a special contract between husband and wife, whereby her property is made subject to the provisions of the separate property acts, is necessary to confer upon her the power to make contracts. In the absence of such contract she can not bind herself even as his surety.¹

¹⁸ Rawlings v. Neal, 126 N. Car. 271, 35 S. E. 597.

¹ Arkansas. Hickey v. Thompson, 52 Ark. 234, 12 S. W. 475; Stables v. Samstag, 78 Ark. 517, 94 S. W. 699; Cooper v. Burel, 129 Ark. 261, 195 S. W. 356.

California. Camden v. Mullen, 29 Cal. 564.

District of Columbia. Thompson v. Thompson, 31 D. C. App. 557, 14 Am. & Eng. Ann. Cas. 879.

Indiana. Wallace v. Rowley, 91 Ind. 586.

Kentucky. Eskridge v. Carter (Ky.), 29 S. W. 748.

Maryland. Clark v. Manko, 80 Md. 78, 30 Atl. 621.

² Eskridge v. Carter (Ky.), 29 S. W. 748.

³ Reed v. Newcomb, 64 Vt. 49, 23 Atl. 589.

⁴ First National Bank v. Hirschkowitz, 46 Fla. 568, 35 So. 22.

⁵ Clarke v. Manko, 80 Md. 78, 30 Atl. 621.

⁶ Union, etc., Bank v. Coffman, 101 Ia. 594, 70 N. W. 693.

⁷ McDonald v. Rozan, — Ida. —, 69 Pac. 125.

⁸ Browarsky's Estate, 252 Pa. St. 35, 97 Atl. 91.

¹ Barlow Brothers Co. v. Parsons, 73 Conn. 696, 49 Atl. 205.

§ 1672. Power to contract as feme sole generally. Other statutes confer upon a married woman the power of contracting as if she were unmarried,¹ subject in some cases to limitations which will be hereafter discussed. Under some statutes her power to contract is said to be the same as that of her husband.² Unless the case falls within one of the exceptions her power to contract is the same as if she were unmarried.³

Under such statutes a married woman is liable personally on her contracts.⁴ She may purchase her husband's realty which has been sold in foreclosure proceedings.⁵ She is liable for money lent

¹ *United States. Western Springs v. Collins*, 98 Fed. 933, 40 C. C. A. 33.

Alabama. Stacy v. Walter, 125 Ala. 291, 28 So. 89.

Arkansas. Holland v. Bond, 125 Ark. 526, 189 S. W. 165.

Colorado. Rose v. Otis, 18 Colo. 59, 31 Pac. 493.

Georgia. Goodrich v. Association, 96 Ga. 803, 22 S. E. 585.

Idaho. Meier & Frank Co. v. Bruce, 30 Ida. 732, 168 Pac. 5. (Discussion of Oregon statute.)

Illinois. Snell v. Snell, 123 Ill. 403, 5 Am. St. Rep. 526, 14 N. E. 684; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Pease v. Furniture Co.*, 176 Ill. 220, 52 N. E. 932 [affirming, 70 Ill. App. 138].

Indiana. Young v. McFadden, 125 Ind. 254, 25 N. E. 284; *Koh-i-noor Laundry Co. v. Lockwood*, 141 Ind. 140, 40 N. E. 677.

Kansas. Harrington v. Lowe, 73 Kan. 1, 4 L. R. A. (N.S.) 547, 84 Pac. 570.

Minnesota. Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699.

Mississippi. Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317.

Montana. Marcellus v. Wright, 51 Mont. 559, 154 Pac. 714.

Ohio. Hackman v. Cedar, 13 Ohio C. C. 618, 5 Ohio C. D. 293; *McHenry v. Batavia, etc., Co.*, 17 Ohio C. C. 206, 9 Ohio C. D. 531.

Oklahoma. Farmers' State Bank v. Keen, — Okla. —, 167 Pac. 207.

Pennsylvania. Yeany v. Shannon, 256 Pa. St. 135, 100 Atl. 527; *Bartholomew v. Allentown National Bank*, 260 Pa. St. 509, 103 Atl. 954. (Subject to certain statutory exceptions.)

Rhode Island. Cooney v. Lincoln, 20 R. I. 183, 37 Atl. 1031.

South Carolina. Ex parte Nurnberger, 40 S. Car. 334 [sub nomine, *Nurnberger v. Ludekins*, 18 S. E. 935].

Washington. Brookman v. Insurance Co., 18 Wash. 308, 51 Pac. 395; *Bush & Lane Piano Co. v. Woodard*, 103 Wash. 612, 175 Pac. 329.

² *Farmers' State Bank v. Keen*, — Okla. —, 167 Pac. 207; *First, etc., Bank v. Leonard*, 36 Or. 390, 59 Pac. 873.

³ *Holland v. Bond*, 125 Ark. 526, 189 S. W. 165; *Hackettstown, etc., Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920; *Bartholomew v. Allentown National Bank*, 260 Pa. St. 509, 103 Atl. 954; *Seaver v. Lang*, —Vt. —, 104 Atl. 877.

⁴ *Arkansas. Holland v. Bond*, 125 Ark. 526, 189 S. W. 165.

Kansas. Harrington v. Lowe, 73 Kan. 1, 4 L. R. A. (N.S.) 547, 84 Pac. 570.

New Hampshire. Orr & Rolfe Co. v. Merrill, — N. H. —, 98 Atl. 303.

Ohio. McHenry v. Batavia, etc., Co., 17 Ohio C. C. 206, 9 Ohio C. D. 531.

Oregon. First, etc., Bank v. Leonard, 36 Or. 390, 59 Pac. 873.

Washington. Churchill v. Miller, 90 Wash. 694, 156 Pac. 851.

⁵ *Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714.

to her,⁶ and upon her notes, if given for a valuable consideration,⁷ and she is liable upon her note which she has given for her husband's debt,⁸ in the absence of specific statutes restricting her power to incur such liability.⁹ She may sell her personalty as if she were unmarried.¹⁰ She may bind herself personally upon a debt for community property;¹¹ and she is liable upon a joint and several note which she signs with her husband for a community debt.¹² She can not, however, make a contract without the consent of her husband which concerns any right which belongs to the community,¹³ such as a right to bring an action for her personal injuries.¹⁴ She is liable personally upon her contract for necessities and for household supplies.¹⁵ So she may be estopped by a covenant of warranty from denying that the deed was given on valuable consideration.¹⁶ Under such statutes a married woman may convey her legal title to land acquired after the statute was passed, without her husband's joining in the deed;¹⁷ and she may convey her equitable interest.¹⁸ She is personally liable on her covenants of warranty.¹⁹ But in Iowa her joining in a covenant in a deed conveying her husband's realty does not bind her unless she expressly so states.²⁰ Her liability is not to be extended beyond her contract however. Thus she is not liable on the covenants of her husband's deed in which she joins to release dower or homestead rights,²¹ nor does such deed convey an undivided interest in the property therein

⁶ *Yeany v. Shannon*, 256 Pa. St. 135, 100 Atl. 527.

⁷ *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910; *Harvey v. Squire*, 217 Mass. 411, 105 N. E. 355.

⁸ *Holland v. Bond*, 125 Ark. 526, 189 S. W. 165.

⁹ See § 1674.

¹⁰ *Deese v. Deese*, — N. Car. —, 97 S. E. 475.

¹¹ *Conrad v. Mertz*, 45 Wash. 119, 122 Am. St. Rep. 889, 87 Pac. 1118; *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328.

¹² *Churchill v. Miller*, 90 Wash. 694, 156 Pac. 851.

¹³ *Hammond v. Jackson*, 89 Wash. 610, 154 Pac. 1106.

¹⁴ *Hammond v. Jackson*, 89 Wash. 610, 154 Pac. 1106.

¹⁵ *Adair v. Arendt*, 126 Ark. 246, 190 S. W. 445.

¹⁶ *Stacey v. Walter*, 125 Ala. 291, 82 Am. St. Rep. 235, 28 So. 89.

¹⁷ *Farmers' Exchange Bank v. Hagelken*, 165 Mo. 443, 65 S. W. 728; *Farmers' State Bank v. Keen*, — Okla. —, 167 Pac. 207.

¹⁸ *Cadematori v. Gauger*, 160 Mo. 352, 61 S. W. 195.

¹⁹ *Security Bank v. Holmes*, 68 Minn. 538, 71 N. W. 699.

²⁰ *Moore v. Graves*, 97 Ia. 4, 65 N. W. 1008. This is by force of a special statute that a spouse joining in a covenant of warranty in a deed conveying the realty of the others is not bound personally unless the deed so states expressly.

²¹ *Western Springs v. Collins*, 98 Fed. 933, 40 C. C. A. 33.

described, owned by her.²² As the progress of legislation is toward statutes of this class, a detailed discussion of the other classes of statutes is of less importance.

§ 1673. Contract of suretyship—At common law and under statutes conferring capacity. At common law a contract of suretyship by a married woman was void, like her other contracts.¹ Where she has a separate estate, either at equity or by statute her contracts of suretyship are valid except in jurisdictions in which her power over her separate estate is limited to that expressly conferred upon her or necessarily implied from the nature of her estate.²

So where the statute authorizing her to contract with reference to her separate estate is construed to apply only to contracts beneficial to her estate, she can not act as surety,³ either for her husband,⁴ or for a stranger.⁵ Under such view of the statute a contract of suretyship for her husband is void, though given for property which will make his estate more valuable and thereby increase her share in his estate if she survives him. The consideration moving

See also on this point, *Warner v. Flack*, 278 Ill. 303, 116 N. E. 197; *White v. Grand Rapids & I. Ry. Co.*, 190 Mich. 1, 155 N. W. 719; *H. T. & C. Co. v. Whitehouse*, 47 Utah 323, 154 Pac. 950; *French v. Slack*, 89 Vt. 514, 96 Atl. 6.

²² *Penny v. Mortgage Co.*, 132 Ala. 357, 31 So. 96.

¹ *Goldsmith Bros. Smelting & Refining Co. v. Moore*, 108 Ark. 362, 157 S. W. 733; *Woodrough v. Perkins*, 4 Ky. (1 Bibb.) 288. See §§ 1658 et seq.

² *Swing v. Woodruff*, 41 N. J. L. 469; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503.

Maryland. *Fredericktown Savings Institution v. Michael*, 81 Md. 487, 33 L. R. A. 628, 32 Atl. 189, 340.

Massachusetts. *Major v. Holmes*, 124 Mass. 108; *Binney v. Bank*, 150 Mass. 574, 6 L. R. A. 379, 23 N. E. 380.

Missouri. *Lincoln v. Rowe*, 51 Mo. 571; *Metropolitan Bank v. Taylor*, 62 Mo. 338.

Washington. *Kittitas County v. Travers*, 16 Wash. 528, 48 Pac. 340.

³ **Arkansas.** *Chittim v. Armour*, 125 Ark. 408, 188 S. W. 809.

Delaware. *Kohn v. Collison*, 1 Marv. (Del.) 109, 27 Atl. 834; *Wright v. Parvis, etc., Co.*, 1 Marv. (Del.) 325, 40 Atl. 1123.

Idaho. *Jaeckel v. Pease*, 6 Ida. 131, 53 Pac. 399; *Bank of Commerce v. Baldwin*, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504.

Indiana. *Guy v. Liberenz*, 160 Ind. 524, 65 N. E. 186.

Kentucky. *Magoffin v. Bank* (Ky.), 69 S. W. 702.

Michigan. *De Vries v. Conklin*, 22 Mich. 255.

New Hampshire. *Ott v. Hentall*, 70 N. H. 231, 51 L. R. A. 226, 47 Atl. 80.

Wisconsin. *Mueller v. Wiese*, 95 Wis. 381, 70 N. W. 485.

⁴ *Strode v. Miller*, 7 Ida. 16, 59 Pac. 893; *Holt v. Gridley*, 7 Ida. 416, 63 Pac. 188.

⁵ *Bank of Commerce v. Baldwin*, 14 Ida. 75, 17 L. R. A. (N.S.) 676, 93 Pac. 504; *Nourse v. Henshaw*, 123 Mass. 96.

to her is too remote.⁶ As with other contracts, in some jurisdictions her contract of suretyship *prima facie* binds her separate estate,⁷ in others it binds her separate estate if specifically charged thereon,⁸ but otherwise not.⁹

Under statutes conferring general power to contract,¹⁰ or under statutes giving to a married woman power to contract with reference to her separate estate as if she were unmarried,¹¹ her contract of suretyship is valid. Thus a statute authorizing a married woman to give a bond with or without a warrant of attorney, as if she were a feme sole, includes a bond to secure the debt of her husband or another.¹² Under a decree allowing a married woman to contract

⁶ *Bishop v. Bourgeois*, 58 N. J. Eq. 417, 43 Atl. 655.

⁷ *Kimm v. Weippert*, 46 Mo. 532; *Miller v. Brown*, 47 Mo. 504; *Moeckel v. Heim*, 46 Mo. App. 340; *Williams v. Urmston*, 35 O. S. 296, 35 Am. Rep. 611; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

⁸ *Smith v. Spalding*, 40 Neb. 339, 58 N. W. 952; *Briggs v. Bank*, 41 Neb. 17, 59 N. W. 351; *Spatz v. Martin*, 46 Neb. 917, 65 N. W. 1063; *First National Bank v. Stoll*, 57 Neb. 758, 78 N. W. 254; *Kershaw v. Barrett* (Neb.), 90 N. W. 764; *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488.

⁹ *Union, etc., Bank v. Coffman*, 101 Ia. 594, 70 N. W. 693; *Smith v. Bond*, 56 Neb. 529, 76 N. W. 1062; *Eckman v. Scott*, 34 Neb. 817, 52 N. W. 822.

¹⁰ *Massachusetts. Binney v. Bank*, 150 Mass. 574, 6 L. R. A. 379, 23 N. E. 380; *Middleborough National Bank v. Cole*, 191 Mass. 168, 77 N. E. 781; *Willard v. Greenwood* (Mass.), 117 N. E. 823. (General power to make contracts except with her husband.)

Michigan. State Bank v. Maxson, 123 Mich. 250, 81 Am. St. Rep. 196, 82 N. W. 31. (Under Kansas statute.)

Minnesota. King v. Hansing, 88 Minn. 401, 93 N. W. 307.

Missouri. Grandy v. Campbell, 78 Mo. App. 502.

New Mexico. First Savings Bank & Trust Co. v. Flournoy, 24 N. M. 256, 171 Pac. 793.

North Dakota. Colonial, etc., Co. v. Stevens, 3 N. D. 265, 55 N. W. 578.

Oklahoma. Cooper v. Bank, 4 Okla. 632, 46 Pac. 475; *Bennett v. Odneal*, 44 Okla. 534, 147 Pac. 1013.

Oregon. First, etc., Bank v. Leonard, 36 Or. 390, 59 Pac. 873 [distinguishing; *Knoll v. Kiessling*, 23 Or. 8, 35 Pac. 248, and *Campbell v. Snyder*, 27 Or. 249, 41 Pac. 650, as cases where the wife could, under the law then in force, bind only her separate estate and not herself personally].

South Dakota. Colonial, etc., Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108; *Miller v. Purchase*, 5 S. D. 232, 58 N. W. 556; *O. W. Schultz Lumber Co. v. Robinson*, — S. D. —, 169 N. W. 526; *McKinney v. Peters*, — S. D. —, 170 N. W. 132.

Washington. Knickerbocker Co. v. Hawkins, 102 Wash. 582, 173 Pac. 628.

Wisconsin. Ritter v. Brusa, 116 Wis. 55, 92 N. W. 361.

¹¹ *Hackfeld v. Medcalf*, 20 Hawaii 47, Ann. Cas. 1912D, 105; *Hart v. Grigsby*, 77 Ky. (14 Bush.) 542; *Commonwealth v. Abbott*, 168 Mass. 471, 47 N. E. 112.

¹² *Warder, etc., Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88.

as a feme sole she can act as surety,¹³ but apparently not under a decree of less extensive scope.¹⁴

§ 1674. Under statutes restricting her power to act as surety. In some jurisdictions the specific provisions of the local statute forbid a married woman to act as surety for any person, and in other jurisdictions they forbid her to act as surety for her husband. Her contract of suretyship in violation of such statute is invalid,¹ and it is really because of these statutes that contracts of suretyship must be considered apart from other contracts.² Where she can not be surety for her husband, she is not liable on a note of a firm

¹³ *Sypert v. Harrison*, 88 Ky. 461, 11 S. W. 435; *Skinner v. Carr* (Ky.), 51 S. W. 799. But this rule is possibly modified by the act of 1894, under which she can only secure the debt of another by setting aside specific property for such debt, not incurring any personal liability therein. *Skinner v. Lynn* (Ky.), 51 S. W. 167. The statement in *Lane v. Bank* (Ky.), 43 S. W. 442, that she can not be a surety under such a decree is an obiter. In *Mundo v. Anderson*, 109 Ky. 147, 58 S. W. 520, it is held that after such decree she may be surety even under the act of 1894.

¹⁴ *Bidwell v. Robinson*, 79 Ky. 29.

¹ **United States.** *Grosman v. Union Trust Co.*, 228 Fed. 610, 143 C. C. A. 132.

Alabama. *Schenig v. Cofer*, 97 Ala. 726, 12 So. 414; *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39; *Trotter Bros. v. Downs*, — Ala. —, 75 So. 906; *Corinth Bank & Trust Co. v. Pride*, — Ala. —, 79 So. 255.

Georgia. *Finch v. Barclay*, 87 Ga. 393, 13 S. E. 566; *Smith v. Hardman*, 99 Ga. 381, 27 S. E. 731; *Strickland v. Vance*, 99 Ga. 531, 59 Am. St. Rep. 241, 27 S. E. 152; *Munroe v. Haas*, 105 Ga. 468, 30 S. E. 654; *Coffee v. Ramey*, 111 Ga. 817, 35 S. E. 641; *National Bank v. Smith*, 142 Ga. 663, L. R. A. 1915B, 1116, 83 S. E. 526.

Indiana. *International, etc., Association v. Watson*, 158 Ind. 508, 64 N. E. 23; *Cook v. Buhrlage*, 159 Ind. 102, 64 N. E. 603; *Andrysiak v. Satkoeki*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286; *Union National Bank v. Finney*, 180 Ind. 470, 103 N. E. 110.

Kentucky. *Baker v. Owensboro Savings Bank & Trust Co.*, 140 Ky. 121, 130 S. W. 969; *Brady v. Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082.

Maryland. *Union Trust Co. v. Knabe*, 122 Md. 584, 89 Atl. 1106. (Under New Jersey statute.)

New Jersey. *Colonial Building & Loan Association v. Griffin*, 85 N. J. Eq. 455, 96 Atl. 901; *Seigman v. Streeter*, 64 N. J. L. 169, 44 Atl. 888; *Vliet v. Eastburn*, 64 N. J. L. 627, 46 Atl. 735, 1061.

Pennsylvania. *Yeany v. Shannon*, 256 Pa. St. 135, 100 Atl. 527.

South Carolina. *Pittman v. Raysor*, 49 S. Car. 469, 27 S. E. 475.

Texas. *Red River National Bank v. Ferguson*, — Tex. —, 206 S. W. 923. The courts are unwilling to allow this rule when once enacted by the legislature, to be abrogated except by the very clearest language. *Red River National Bank v. Ferguson*, — Tex. —, 206 S. W. 923.

² Her capacity to pledge her property for her husband's debt presents a different question. See §§ 1675 et seq.

of which her husband is a member.³ She may become liable on her note given to secure a loan to a corporation of which her husband is an officer.⁴

If she makes a contract jointly with her husband, it will not be presumed that she is surety;⁵ and if she claims that she was surety she must establish such relationship as a fact.⁶

Under such statutes the test of suretyship seems to be whether the married woman received anything of value for incurring the obligation.⁷ Her obligation is valid if she receives anything of value,⁸ as where it is for her own debt as a separate trader,⁹ or for money advanced to a business in which she has an interest,¹⁰ or for her ante-nuptial debt,¹¹ or for the discharge of liens on her property,¹² even where the debt was primarily her husband's, as where without any intent of evading the statute the husband borrowed money, giving as security a mortgage on certain real estate which he afterwards transferred to his wife,¹³ or which he transfers to a third person, who transfers to the wife in consideration of her

³ *Brady v. Equitable Trust Co.* 178 Ky. 639, 199 S. W. 1082; *Storrs, etc., Co. v. Wingate*, 67 N. H. 190, 29 Atl. 413.

⁴ *City Bank & Trust Co. v. Atwood*, 197 Mich. 116, 163 N. W. 941. (Under Alabama law.)

⁵ *Birmingham Trust & Savings Co. v. Howell*, — Ala. —, 79 So. 377.

⁶ *Birmingham Trust & Savings Co. v. Howell*, — Ala. —, 79 So. 377.

⁷ *Alabama. Staples v. City Bank & Trust Co.*, 104 Ala. 687, 70 So. 115.

Georgia. National Bank v. Smith, 142 Ga. 663, L. R. A. 1915B, 1116, 83 S. E. 526.

Indiana. Goff v. Hankins, 11 Ind. App. 456, 39 N. E. 294; *Bowles v. Trapp*, 139 Ind. 55, 38 N. E. 406; *Field v. Noblett*, 154 Ind. 357, 56 N. E. 841; *Cook v. Buhrlage*, 159 Ind. 162, 64 N. E. 603.

Kentucky. Third National Bank v. Tierney, 128 Ky. 836, 18 L. R. A. (N.S.) 81, 110 S. W. 293.

Mississippi. Read v. Brewer (Miss.), 16 So. 350.

South Carolina. Griffin v. Earle, 34 S. Car. 246, 13 S. E. 473; *Simon v. Sabb*, 56 S. Car. 38, 33 S. E. 799.

Texas. Red River National Bank v. Ferguson, — Tex. —, 206 S. W. 923.

⁸ *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529; *Morningstar v. Hardwick*, 3 Ind. App. 431, 29 N. E. 929; *Longnecker v. Bondurant*, 173 Ky. 427, 191 S. W. 286; *Schmidt v. Spencer*, 87 Mich. 121, 49 N. W. 479; *Shaw v. Fortine*, 98 Mich. 254, 57 N. W. 128.

⁹ *Witkowski v. Maxwell*, 69 Miss. 56, 10 So. 453.

¹⁰ *Longnecker v. Bondurant*, 173 Ky. 427, 191 S. W. 286.

¹¹ *Harrisburg, etc., Bank v. Bradshaw*, 178 Pa. St. 180, 34 L. R. A. 597, 33 Atl. 629, even if she was originally liable only as accommodation indorser, and she was released by failure to protest in time.

¹² *Jones v. Rice*, 92 Ga. 236, 18 S. E. 348; *Waldrop v. Beal*, 89 Ga. 306, 15 S. E. 310.

¹³ *Taylor v. Mortgage Co.*, 106 Ga. 238, 32 S. E. 153; *Daniel v. Royce*, 96 Ga. 566, 23 S. E. 493.

assuming her husband's debts.¹⁴ So a covenant not to engage in a certain business in a certain city, in which a married woman joins with her husband on their selling their business and good will, is valid,¹⁵ as is her note given to take up her husband's note and prevent payee from attacking a transfer of property to her as in fraud of her husband's creditors;¹⁶ or her note given to settle an action brought against her husband and herself, though the debt on which the action was brought was her husband's;¹⁷ or on a promise as principal jointly with her husband to reimburse a third person for paying her husband's debt;¹⁸ or a note given by a married woman as premium on an insurance policy taken out by her on her husband's life in his absence;¹⁹ or a note given by herself and her husband for money advanced by a third person to pay premiums on a policy on her husband's life in her favor;²⁰ or as surety on a note for money lent to a corporation in which she was a stockholder.²¹ So she is liable on a promise to pay a debt incurred by him as her agent for her separate estate,²² or to pay his debt in consideration of a transfer of realty to her.²³ It is even held that her promise to pay his debt secured by a mortgage is valid by reason of the benefit to her dower in the mortgaged lands.²⁴ Her possible interest in her husband's personalty is too remote to constitute a benefit to her under this rule. Hence, her promissory note given to pay his debt incurred in buying personalty is invalid.²⁵ A note given by a married woman to secure a debt which is partly hers and partly her husband's is valid as to her own debt, though invalid as to her husband's.²⁶ If under the contract she receives a thing of value she is liable though she incurs a liability greatly in excess thereof.²⁷ The form of the contract is therefore immaterial. If the

¹⁴ *Seaver v. Lang*, — Vt. —, 104 Atl. 877.

¹⁵ *Koh-i-noor Laundry Co. v. Lockwood*, 141 Ind. 140, 40 N. E. 877.

¹⁶ *Whelpley v. Stoughton*, 112 Mich. 594, 70 N. W. 1098.

¹⁷ *Thornton v. Lemon*, 114 Ga. 155, 39 S. E. 943.

¹⁸ *Hill v. Cooley*, 112 Ga. 115, 37 S. E. 109.

¹⁹ *Mitchell v. Richmond*, 164 Pa. St. 566, 30 Atl. 486.

²⁰ *Crenshaw v. Collier*, 70 Ark. 5, 65 S. W. 709.

²¹ *Alphin v. Wade*, 89 Ark. 354, 118 S. W. 667.

²² *Christensen v. Wells*, 52 S. Car. 497, 30 S. E. 611.

²³ *Strickland v. Gray*, 98 Ga. 667, 27 S. E. 155.

²⁴ *Beberdick v. Crevier*, 60 N. J. L. 389, 37 Atl. 959.

²⁵ *Bishop v. Bourgeois*, 58 N. J. Eq. 417, 43 Atl. 655.

²⁶ *Lanier v. Olliff*, 117 Ga. 397, 43 S. E. 711.

²⁷ *Vliet v. Eastburn*, 64 N. J. L. 627 [sub nomine, *Eastburn v. Vliet*, 46 Atl. 735, 1061]. She was held liable on a note of \$2,080 because she received a note of \$80. So *Woolverton v. Van Syckel*, 57 N. J. L. 393, 31 Atl. 603.

debt is the married woman's she is liable even if she appears on the contract as a surety.²⁸ If the contract is made directly with the married woman and she acquires a thing of value thereby, she can not evade liability on the ground that she was really acquiring such property in order that her husband might have the use thereof, even if such purpose was known to the adversary party.²⁹ If a loan is actually made to the wife she is liable even though she intends to and does apply the money to her husband's debts, or allows him to use it.³⁰ So she is liable on a note to obtain a loan made to her, though with the knowledge of the lender she means to use the loan in paying a debt of her husband's.³¹ A married woman is liable for money which she has borrowed personally from one who is cashier of the bank which was her husband's creditor and to which she paid the money thus borrowed to apply upon her husband's debt as long as the transaction was a genuine one.³² So a sale of her separate estate is valid, though the purchaser knows that she means to use the proceeds to pay her husband's debt, he not being a creditor of the husband.³³ A married woman is liable on a contract of guaranty made as part of a contract of sale of a note owned by her, irrespective of the disposition of the proceeds.³⁴

The many devices to which creditors of a husband or some other person for whom a married woman is willing to become surety resort to evade the provisions of the statute which forbids a married woman to act as surety are detected by the courts wherever possible, and

²⁸ *Maddox v. Wilson*, 91 Ga. 39, 16 S. E. 213; *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102.

²⁹ *McDonald v. Bluthenthal*, 117 Ga. 120, 43 S. E. 422; *Yeany v. Shannon*, 256 Pa. St. 135, 100 Atl. 527; *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108.

³⁰ *Alabama*. *Hamil v. Mortgage Co.*, 127 Ala. 90, 28 So. 558; *Adams v. Davidson*, 192 Ala. 200, 68 So. 267; *Warren v. Crow*, 195 Ala. 568, 73 So. 989.

Georgia. *McCrory v. Grandy*, 92 Ga. 319, 18 S. W. 65.

Indiana. *State, ex rel. Morris v. Frazier*, 134 Ind. 648, 34 N. E. 636; *McCoy v. Barns*, 136 Ind. 378, 36 N. E. 134.

New Hampshire. *Iona, etc., Bank v. Boynton*, 69 N. H. 77, 39 Atl. 522.

New Jersey. *Todd v. Bailey*, 58 N. J. L. 10, 32 Atl. 696.

Pennsylvania. *Yeany v. Shannon*, 256 Pa. St. 135, 100 Atl. 527.

³¹ *Alabama*. *Adams v. Davidson*, 192 Ala. 200, 68 So. 267.

Georgia. *Chastain v. Peak*, 111 Ga. 889, 36 S. E. 967; *Bank v. Johnson*, 146 Ga. 791, 92 S. E. 631.

New Hampshire. *First, etc., Bank v. Hunton*, 69 N. H. 509, 45 Atl. 351.

Pennsylvania. *Yeany v. Shannon*, 256 Pa. St. 135, 100 Atl. 527.

³² *Adams v. Davidson*, 192 Ala. 200, 68 So. 267.

³³ *Nelms v. Keller*, 103 Ga. 745, 30 S. E. 572.

³⁴ *Kitchen v. Chapin*, 64 Neb. 144, 97 Am. St. Rep. 637, 57 L. R. A. 914, 89 N. W. 632.

such transactions are held to impose no liability upon her.³⁵ A wife who gives her note for money borrowed to pay her husband's debt is not liable where part of the agreement of the contract of lending was such use;³⁶ nor is she liable upon her note given to her husband's creditor for her husband's debt;³⁷ nor is she liable on a charge upon her separate estate for his debt.³⁸ A married woman is not liable upon a transaction by which she borrows money from her husband's creditor and pays it back to him to satisfy her husband's debt or permits him to apply it to such debt.³⁹ If a married woman has given her note to her husband's creditor and part of the proceeds have been applied to the payment of her husband's debt, she is liable for the face of the note less the amount thus applied upon his debt.⁴⁰ If a married woman makes a note payable to her son without any consideration, intending that he may use it as collateral, she is in legal effect a surety for a debt, and such note can not be enforced against her by a creditor who knows such facts.⁴¹ A married woman who gives an accommodation note to be used as collateral security to protect her husband's surety is in legal effect a surety for her husband and such note can not be enforced against her by such surety if he takes it with knowledge of the facts.⁴² A married woman is not liable on a guaranty of a note assigned to her by her husband and redelivered by her to him, where the lender knows that the husband is to use the money, in part, to pay a loan due the same lender.⁴³ If a married woman has pledged her notes for her husband's debt her release of such notes upon his failure to pay his debt is void and such release may be

³⁵ *Staples v. City Bank & Trust Co.*, 194 Ala. 687, 70 So. 115; *Vinegar Bend Lumber Co. v. Leftwich*, 197 Ala. 352, 72 So. 536; *National Bank v. Smith*, 142 Ga. 663, L. R. A. 1915B, 1116, 83 S. E. 526; *Ginsberg v. People's Bank*, 145 Ga. 815, 89 S. E. 1086; *Milton v. Setze*, 146 Ga. 26, 90 S. E. 469; *Third National Bank v. Tierney*, 128 Ky. 836, 18 L. R. A. (N.S.) 81, 110 S. W. 293; *Oswald v. Jones*, 254 Pa. St. 32, 98 Atl. 784.

³⁶ *Bank v. Johnson*, 146 Ga. 791, 92 S. E. 631; *First, etc., Bank v. Hunton*, 69 N. H. 509, 45 Atl. 351; *Oswald v. Jones*, 254 Pa. St. 32, 98 Atl. 784.

³⁷ *Vinegar Bend Lumber Co. v. Leftwich*, 197 Ala. 352, 72 So. 536.

³⁸ *Ginsberg v. People's Bank*, 145 Ga. 815, 89 S. E. 1086.

³⁹ *Staples v. City Bank & Trust Co.*, 194 Ala. 687, 70 So. 115; *Third National Bank v. Tierney*, 128 Ky. 836, 18 L. R. A. (N.S.) 81, 110 S. W. 293.

⁴⁰ *Staples v. City Bank & Trust Co.*, 194 Ala. 687, 70 So. 115.

⁴¹ *Milton v. Setze*, 146 Ga. 26, 90 S. E. 469.

⁴² *National Bank v. Smith*, 142 Ga. 663, L. R. A. 1915B, 1116, 83 S. E. 526.

⁴³ *First, etc., Bank of Hanscom*, 104 Mich. 67, 62 N. W. 167.

canceled.⁴⁴ A note given by a married woman to take up a prior note of her husband's is void.⁴⁵ So one lending money to a husband on his wife's note, knowing that the husband is going to use the money to pay his debt, can not recover.⁴⁶ On the same principle business by a husband and wife jointly, as a means of making her liable as surety for his debts is not her separate business under the statute authorizing her to contract for her separate business.⁴⁷ So if the money is paid to the husband and there is nothing to show what disposition was made of it, the wife is not liable,⁴⁸ while if the husband takes it as her agent she is liable.⁴⁹ The wife's liability as surety is not increased by her signing as an indorser.⁵⁰ It has been held that where the loan is made to the husband, the wife is not liable as surety, even if he applies the money to the use of his wife's separate estate,⁵¹ or to necessities for the family.⁵² The fact that the holder does not know that the surety is the wife of the maker does not render her liable thereon.⁵³ Where on the face of the instrument the married woman does not appear as surety, some authorities hold that she can not set up her suretyship against a bona fide holder for value;⁵⁴ others hold that she can.⁵⁵ It seems to be held that she estops herself from denying the validity of her note by representing that the proceeds thereof are for her separate estate,⁵⁶ as where the check given for the note is payable to her,⁵⁷ or where she acquiesces in her husband's statement that the money is to be used in paying off a mortgage on the wife's property.⁵⁸ A note by

⁴⁴ *Adams v. Davidson*, 192 Ala. 200, 68 So. 267.

⁴⁵ *Bank v. Johnson*, 146 Ga. 791, 92 S. E. 631.

⁴⁶ *Fisk v. Mills*, 104 Mich. 433, 62 N. W. 559.

⁴⁷ *Emerson, etc., Co. v. Knapp*, 90 Wis. 34, 62 N. W. 945.

⁴⁸ *Merchants', etc., Association v. Jarvis*, 92 Ky. 566, 18 S. W. 454; *Magill v. Trust Co.*, 81 Ky. 129; *Hirshman v. Brashears*, 79 Ky. 258.

⁴⁹ *Hounshell v. Ins. Co.*, 81 Ky. 304.

⁵⁰ *Continental, etc., Bank v. Clark*, 117 Ala. 292, 22 So. 988; *National, etc., Bank v. Whicher*, 173 Mass. 517, 73 Am. St. Rep. 317, 53 N. E. 1004.

⁵¹ *Richardson v. Stephens*, 114 Ala. 238, 21 So. 949; *Wiltbank v. Tobler*, 181 Pa. St. 103, 37 Atl. 188.

⁵² *Elston v. Corner*, 106 Ala. 76, 19 So. 324.

⁵³ *Corinth Bank & Trust Co. v. Pride*, — Ala. —, 79 So. 255.

⁵⁴ *Scott v. Taul*, 115 Ala. 529, 22 So. 447; *Venable v. Lippold*, 102 Ga. 208, 29 S. E. 181 (where she was a joint maker).

⁵⁵ *Leschen v. Guy*, 149 Ind. 17, 48 N. E. 344; *Voreis v. Nussbaum*, 131 Ind. 267, 16 L. R. A. 45, 31 N. E. 70.

⁵⁶ *McVey v. Cantrell*, 70 N. Y. 295, 26 Am. Rep. 605; *Bratton v. Lowry*, 39 S. Car. 383, 17 S. E. 832.

⁵⁷ *Hackettstown, etc., Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920.

⁵⁸ *Vosburg v. Brown*, 119 Mich. 697, 78 N. W. 886.

a husband and wife who are partners is valid as to her,⁵⁰ or a note given to raise money for a corporation in which she is a stockholder,⁵¹ or medical services for her,⁵¹ or to cultivate a farm owned by her.⁵² A clause in a mortgage to the effect that the mortgagors will pay the note with interest does not bind a married woman who signs as mortgagor only.⁵³ Such a statute does not affect a payment by a wife of her husband's debts,⁵⁴ or her contract to pay which is substituted for his.⁵⁵

§ 1675. Mortgage or conveyance of wife's property to secure debt of husband—Under statutes conferring capacity. A married woman has power to mortgage her property to secure her husband's debt if she is authorized by statute to contract as a feme sole, or if she has power by statute or in equity to deal with her separate estate.¹ If by statute she may convey her separate estate by a deed

⁵⁰ *Compton v. Smith*, 120 Ala. 233, 25 So. 300.

⁵¹ *Williams v. Bank (Ky.)*, 49 S. W. 183.

Contra, *Allen v. Beebe*, 63 N. J. L. 377, 11 Am. & Eng. Corp. Cas. N. S. 20, 43 Atl. 681.

⁵² *Harper v. O'Neil*, 194 Pa. St. 141, 44 Atl. 1065.

⁵³ *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39.

⁵⁴ *Exchange, etc., Bank v. Wolverton*, 11 Wash. 108, 39 Pac. 248.

⁵⁵ *Bushard v. McCay*, — Ala. —, 77 So. 699.

Bushard v. McCay, — Ala. —, 77 So. 699; *Booker v. Small*, 147 Ga. 566, 94 S. E. 999.

¹ *Florida*. *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12; *Ocklawaha River Farms Co. v. Young*, — Fla. —, 74 So. 644.

Kentucky. *Drady v. Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082.

Michigan. *Marx v. Bellel*, 114 Mich. 631, 72 N. W. 620.

Missouri. *Schneider v. Staihr*, 20 Mo. 269; *Wilcox v. Todd*, 64 Mo. 390; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73; *Rines v. Mansfield*, 96 Mo. 394,

9 S. W. 798; *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512, 19 S. W. 727.

Nebraska. *Wilson v. New*, 1 Neb. (Unoff.) 42, 95 N. W. 502; *Watts v. Gantt*, 42 Neb. 869, 61 N. W. 104; *Holmes v. Hull*, 50 Neb. 656, 70 N. W. 241; *Linton v. Cooper*, 53 Neb. 400, 73 N. W. 731.

New Jersey. *Lawshe v. Trenton Banking Co.*, 87 N. J. Eq. 56, 99 Atl. 617.

North Carolina. *Meares v. Butler*, 123 N. Car. 206, 31 S. E. 477; *Foster v. Davis*, 175 N. Car. 541, 95 S. E. 917.

Oklahoma. *Bennett v. Odneal*, 44 Okla. 354, 147 Pac. 1013; *Harn v. Missouri State Life Insurance Co.*, — Okla. —, 173 Pac. 214.

Oregon. *Knoll v. Kiessling*, 23 Or. 8, 35 Pac. 248; *Campbell v. Snyder*, 27 Or. 249, 41 Pac. 659.

Pennsylvania. *Citizens', etc., Association v. Heiser*, 150 Pa. St. 514, 24 Atl. 733; *Bartholomew v. Allentown National Bank*, 260 Pa. St. 509, 103 Atl. 954.

Tennessee. *Young v. Brown*, 136 Tenn. 184, 188 S. W. 1149.

in which her husband joins, she may mortgage it by such a conveyance to secure his debt.²

A married woman who joins with her husband in a mortgage is not a surety, since she incurs no personal liability,³ and the general rule prior to the Negotiable Instruments Act to the effect that extension of time discharged a surety who did not assent to such extension, did not apply to such a mortgage.⁴ Even under statutes which do not allow a married woman to be surety or guarantor for her husband, it is held that such statutes refer to personal liability, and that her power to mortgage or pledge her property for her husband's debt is not thereby limited.⁵ Such statute does not prevent her from assigning a life insurance policy of which she is the beneficial owner as security for the debt of her husband.⁶

§ 1676. Under statute restricting method of securing husband's debt. Under the Kentucky statute a married woman can secure her husband's debt only by setting aside some part of her property by deed, mortgage, and the like.¹ Under such a statute coverture is not a defense to a married woman's pledge of her general estate with her husband's consent as collateral for the debt of another.²

Texas. Red River National Bank v. Ferguson, — Tex. —, 206 S. W. 923.

Wisconsin. Krause v. Reichel, 167 Wis. 360, 167 N. W. 817.

² Red River National Bank v. Ferguson, — Tex. —, 206 S. W. 923.

³ Bennett v. Odneal, 44 Okla. 354, 147 Pac. 1013.

⁴ Bennett v. Odneal, 44 Okla. 354, 147 Pac. 1013.

⁵ Florida. Ocklawaha River Farms Co. v. Young, — Fla. —, 74 So. 644.

Kentucky. Forcht v. National Surety Co., 177 Ky. 139, 197 S. W. 545; Brady v. Equitable Trust Co., 178 Ky. 693, 199 S. W. 1082.

Missouri. So with suretyship in general. Meads v. Hutchinson, 111 Mo. 620, 19 S. W. 1111.

New Jersey. Colonial Building & Loan Association v. Griffin, 85 N. J. Eq. 455, 96 Atl. 901.

North Carolina. Gore v. Townsend, 105 N. Car. 228, 8 L. R. A. 443, 11 S. E. 160; Meares v. Butler, 123 N. Car. 206, 31 S. E. 477.

Pennsylvania. Siebert v. Bank, 186 Pa. St. 233, 40 Atl. 472; Kuhn v. Ogilvie, 178 Pa. St. 303, 35 Atl. 957.

Texas. Red River National Bank v. Ferguson, — Tex. —, 206 S. W. 923.

⁶ Dusenberry v. Ins. Co., 188 Pa. St. 454, 41 Atl. 736.

¹ New, etc., Bank v. Blythe (Ky.), 53 S. W. 409; Third National Bank v. Tierney, 128 Ky. 836, 18 L. R. A. (N.S.) 81, 110 S. W. 293; Daviess County Bank & Trust Co. v. Wright, 129 Ky. 21, 17 L. R. A. (N.S.) 1122, 110 S. W. 361; Underhill v. Mayer, 174 Ky. 229, 192 S. W. 14; Forcht v. National Surety Co., 177 Ky. 139, 197 S. W. 545; Brady v. Equitable Trust Co., 178 Ky. 693, 199 S. W. 1082; Staib v. German Insurance Bank, 179 Ky. 118, 200 S. W. 322.

² Daviess County Bank & Trust Co. v. Wright, 129 Ky. 21, 17 L. R. A. (N.S.) 1122, 110 S. W. 361; Brady v. Equitable Trust Co., 178 Ky. 693, 199 S. W. 1082.

The instrument by which her property is set aside need not show on its face that it is for her husband's debt.³ A pledge of an insurance policy to secure the joint note of husband and wife,⁴ or a written assignment of a life insurance policy,⁵ or an indorsement in blank of a stock certificate,⁶ complies with this statute; but a note given by her to take up her husband's note,⁷ or in consideration of his pre-existing debt,⁸ is invalid. Under a similar statute once in force in North Carolina, she could be held only in case of a specific charge on her estate or in case the consideration for her promise enured peculiarly to her benefit.⁹ A mortgage or pledge to secure the husband's debt is discharged by facts which would discharge the personal liability of a surety,¹⁰ as by taking new notes to which the wife is not a party extending the time of payment.¹¹ Under a constitutional provision to the effect that the separate property of a married woman shall not be liable for debts of her husband without her consent given by some instrument in writing, she may give such consent by executing a mortgage,¹² even if such mortgage is in the form of an absolute deed.¹³

§ 1677. Under statute forbidding mortgage for husband's debt. Under statutes specifically forbidding a married woman to mortgage her property for her husband's debts, and even in some cases under statutes which forbid her to act as surety, she can not give a valid mortgage for his debt.¹ Such a statute includes a

³ *Staib v. German Insurance Bank*, 179 Ky. 118, 200 S. W. 322.

⁴ *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937.

⁵ *New York, etc., Co. v. Miller (Ky.)*, 56 S. W. 975.

⁶ *Staib v. German Insurance Bank*, 179 Ky. 118, 200 S. W. 322.

⁷ *Russell v. Rice (Ky.)*, 44 S. W. 110; *Crumbaugh v. Postell (Ky.)*, 49 S. W. 334; *Milburn v. Jackson (Ky.)*, 52 S. W. 949; *Bank v. Stitt*, 107 Ky. 49, 52 S. W. 950; *Third National Bank v. Tierney*, 128 Ky. 836, 18 L. R. A. (N.S.) 81, 110 S. W. 293.

⁸ *Underhill v. Mayer*, 174 Ky. 229, 192 S. W. 14.

⁹ *Thompson Co. v. Coats*, 174 N. Car. 193, 93 S. E. 724.

¹⁰ *Foster v. Davis*, 175 N. Car. 541, 95 S. E. 917.

¹¹ *Foster v. Davis*, 175 N. Car. 541, 95 S. E. 917.

Contra, if interest is not paid in advance. *Staib v. German Insurance Bank*, 179 Ky. 118, 200 S. W. 322.

¹² *Ocklawaha River Farms Co. v. Young*, — Fla. —, L. R. A. 1917F, 337, 74 So. 644.

¹³ *Ocklawaha River Farms Co. v. Young*, — Fla. —, L. R. A. 1917F, 337, 74 So. 644.

¹ *United States. American, etc., Co. v. Owens*, 64 Fed. 249; *American, etc., Co. v. Owens*, 72 Fed. 219, 18 C. C. A. 513.

Alabama. McNeil v. Davis, 105 Ala. 657, 17 So. 101; *Elston v. Comer*, 108 Ala. 76, 19 So. 324; *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. Rep. 117, 21 So. 320; *Gravlee v. Cannon*, 195 Ala. 549, 70 So. 719; *Vinegar Bend Lumber*

pledge as well as a mortgage.² An assignment of a life insurance policy as security for her husband is void.³ So a pledge of a note owned by a married woman to secure a debt which is due in part from herself and in part from her husband is valid as to her debt but not as to her husband's.⁴ If realty is conveyed to husband and wife by entirety, and the husband gives his personal note therefor, a mortgage executed by husband and wife upon the land thus conveyed to secure such purchase money note is valid, even as to the wife's interest;⁵ but such mortgage can not be enforced as against another tract of land which is the wife's separate property.⁶ So a mortgage on land owned by husband and wife in common,⁷ or by the entirety,⁸ is invalid at least as to the wife's interest. A transaction by which a married woman conveys her separate property to her husband and then joins him in a mortgage thereon in order to secure his debt, is invalid as against a mortgagee who knows the facts.⁹ If a married woman has mortgaged her property to secure her husband's debt and subsequently given a later mortgage upon such property, the proceeds of which are to be used in discharging the first mortgage, she may have the latter mortgage canceled on the ground that it was in legal effect given for the purpose of securing her husband's debt.¹⁰ A mortgage which purports to secure the indebtedness of the husband and wife imports a joint obligation;¹¹ and if the married woman claims that the debt was the husband's and that she was a surety, the burden is upon her to prove that the obligation was of such character.¹²

Co. v. Leftwich, 197 Ala. 352, 72 So. 538; Bank v. Austin, — Ala. —, 75 So. 301; Trotter Bros. v. Downs, — Ala. —, 75 So. 906; Shannon v. Ogletree, — Ala. —, 76 So. 865; Corinth Bank & Trust Co. v. Pride, — Ala. —, 79 So. 255.

Georgia. First, etc., Bank v. Bayless, 96 Ga. 684, 23 S. E. 851.

Indiana. Merchants', etc., Association v. Scanlan, 144 Ind. 11, 42 N. E. 1008; Kelley v. York, 183 Ind. 628, 109 N. E. 772.

South Carolina. Carrigan v. Drake, 36 S. Car. 354, 15 S. E. 339.

² Corinth Bank & Trust Co. v. Pride, — Ala. —, 79 So. 255.

³ Union; etc., Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 353, 39 N. E. 205.

⁴ Johnston v. Gullledge, 115 Ga. 981, 42 S. E. 354.

⁵ Kelley v. York, 183 Ind. 628, 109 N. E. 772.

⁶ Kelley v. York, 183 Ind. 628, 109 N. E. 772.

⁷ Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 117, 21 So. 320; Shannon v. Ogletree, — Ala. —, 76 So. 865.

⁸ Wilson v. Logue, 131 Ind. 191, 31 Am. St. Rep. 426, 30 N. E. 1079.

⁹ Vinegar Bend Lumber Co. v. Leftwich, 197 Ala. 352, 72 So. 538.

¹⁰ Bank v. Aust' — Ala. —, 75 So. 301.

¹¹ Cox v. Brown, — Ala. —, 73 So. 964.

¹² Cox v. Brown, — Ala. —, 73 So. 964; Taylor v. Maxwell, — Ala. —, 75 So. 959.

The mortgage is not valid even if the wife gives it by way of compromise, believing that her husband's debt is enforceable out of her estate.¹³ A mortgage given to a surety or co-surety of her husband's to indemnify him, has been held invalid.¹⁴ Her mortgage to obtain money with which to pay her husband's debt is invalid.¹⁵ If it is given in part for her debt and in part for his, it is valid as far as her portion of the debt is concerned.¹⁶ It is valid if given to raise money to reimburse a trust fund of which her husband is trustee for payments made out of such fund with her consent to discharge a mortgage on her realty.¹⁷ Under this statute such a mortgage is void at law and equity, even as to a bona fide purchaser. No decree in equity is needed to interpose such defense in an action of ejectment at law.¹⁸

Attempts to evade this statute are common, but the courts are alert to detect such evasions.¹⁹ A mortgage was held invalid where the creditor suggested that the married woman deed the property to her son, and that the son then give a mortgage for his debt;²⁰ and so where a husband and wife, tenants by the entirety, joined in conveying the realty to a third person, who reconveyed to the husband—the latter then mortgaged the land to secure his individual debt, this way of evading the statute being taken with the knowledge of the agent of the mortgagee.²¹ A different rule applies where

¹³ First, etc., *Bank v. Bayless*, 96 Ga. 684, 23 S. E. 851.

¹⁴ *McNeil v. Davis*, 105 Ala. 657, 17 So. 101.

Contra, where a trust deed given to indemnify several makers of a note against liability thereon was held valid though the principal debtor was her husband and the others his sureties. *McCollum v. Boughton*, 132 Mo. 601, 35 L. R. A. 480, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480.

¹⁵ *Trotter Bros. v. Downs*, — Ala. —, 75 So. 906.

¹⁶ *Trotter Bros. v. Downs*, — Ala. —, 75 So. 906.

¹⁷ *Gray v. Huffaker*, 176 Cal. 516, 169 Pac. 1038.

¹⁸ *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39 [distinguishing, *Williams, etc., Co. v. Bass*, 57 Ala. 487, as under a statute by which appropria-

tion of property by a wife for her husband's debt would be declared void on her application, and which required a precedent decree so declaring it void; and qualifying, *Richardson v. Stephens*, 114 Ala. 238, 21 So. 949]. To the same effect see, *Taylor v. Allen*, 112 Ga. 330, 37 S. E. 408.

¹⁹ *Bank v. Austin*, — Ala. —, 75 So. 301.

²⁰ *National Bank v. Carlton*, 96 Ga. 469, 23 S. E. 388.

²¹ *Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. 715; *Machine Co. v. Scovell*, 111 Ind. 551, 13 N. E. 58; *Long v. Crosson*, 119 Ind. 3, 4 L. R. A. 783, 21 N. E. 450; *Wilson v. Logue*, 131 Ind. 191, 31 Am. St. Rep. 426, 30 N. E. 1079; *Sohn v. Gantner*, 134 Ind. 31, 33 N. E. 787; *Klein v. Gantner*, 135 Ind. 699, 35 N. E. 2;

the husband held the legal title as trustee for his wife and with her consent deeded the property to their son by a deed reciting a money consideration, in order to enable the son to raise money for his father by mortgage.²² If a married woman borrows money secured by mortgage on her property to discharge a prior mortgage given by her to secure her husband's debt, such subsequent loan and mortgage are both valid.²³ If a married woman and her husband borrow money from a person other than the husband's creditor and secure such loan by a mortgage upon the homestead, the transaction is valid although the money thus raised was used to pay a debt of the husband's, the mortgagee not knowing of the purpose for which such money was borrowed.²⁴ If land is bought by husband and wife by the entirety and their joint note is given therefor which is subsequently renewed by a note executed by the husband alone, such note does not amount in legal effect to a payment of the first note; and, accordingly, a subsequent mortgage executed by husband and wife to secure the second note is valid, since the married woman is securing her own debt and is not merely becoming surety for her husband's debt.²⁵ Under a statute forbidding a married woman to act as surety, she may, if within the general powers conferred on her by equity or by statute, pay the debt of her husband or of a third person,²⁶ even though she can not act as surety,²⁷ and her executory contracts of suretyship are void,²⁸ such as a contract to convey her realty to pay for the sale to her husband of a printing establishment.²⁹ Thus she may convey realty to pay

Gezesak v. Hibberd, 149 Ind. 354, 48 N. E. 361; *Government, etc., Institution v. Denny*, 154 Ind. 261, 55 N. E. 757; *Abicht v. Searls*, 154 Ind. 594, 57 N. E. 246.

²² *Smyth v. Fitzsimmons*, 97 Ala. 451, 12 So. 48.

²³ *Field v. Campbell*, — Ind. App. —, 67 N. E. 1040 [rehearing denied, 68 N. E. 911].

²⁴ *Warren v. Crow*, — Ala. —, 73 So. 989.

²⁵ *Kelley v. York*, 183 Ind. 628, 109 N. E. 772.

²⁶ *Alabama*. *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17; *Hollingsworth v. Hill*, 116 Ala. 184, 22 So. 460; *Farrow v. Cotney*, 153 Ala. 550, 45 So. 69.

New Hampshire. *Babbitt v. Morrison*, 58 N. H. 419; *Thompson v. Ela*, 58 N. H. 490.

New Jersey. *Shipman v. Lord*, 60 N. J. Eq. 484, 46 Atl. 1101 [affirming, 58 N. J. Eq. 380, 44 Atl. 215].

Ohio. *Meiley v. Butler*, 26 O. S. 535. *Pennsylvania*. *Yeany v. Shannon*, 256 Pa. St. 135, 100 Atl. 527.

²⁷ *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17; *Edwards v. Jefferson Standard Life Insurance Co.*, — N. Car. —, 92 S. E. 695.

²⁸ *Warwick v. Lawrence*, 43 N. J. Eq. 179, 3 Am. St. Rep. 299, 10 Atl. 376.

²⁹ *Thomas v. Weaver*, 52 N. J. Eq. 580, 29 Atl. 353.

such debt,³⁰ even where she can not give a mortgage to secure his debt.³¹ Thus if she joins her husband in conveying property owned by them in entirety, in trust for her husband's debts, this amounts to a payment of her husband's debts after a sale of such property under such trust deed, and she can not maintain ejectment against the purchaser.³² In Georgia a married woman, while she can not be surety may pay the debt of a third person,³³ but can not pay her husband's debt even by way of compromise of an alleged claim against her therefor,³⁴ or if she was surety for such debt.³⁵

If the deed of the married woman is really intended as security and not as an absolute conveyance, it is void.³⁶

If the wife delivers property to pay her husband's debt,³⁷ or money,³⁸ she may recover it. A married woman's note which is given to take up a note of her husband's is invalid.³⁹ So where a married woman borrowed money and gave her note for the amount of the loan plus a debt of her husband's, and paid part of her note, she could recover the excess so paid over the amount of the loan to her.⁴⁰ A statute forbidding a conveyance for the debt of the husband is held to include a mortgage.⁴¹ A married woman may buy up her husband's debts and give a mortgage on her lands to secure the purchase price thereof.⁴²

§ 1678. Contracts between husband and wife—At common law.

At common law a valid contract between husband and wife was impossible, since the wife had no power to contract generally, and

³⁰ Pratt, etc., Co. v. McClain, 135 Ala. 452, 33 So. 185; Farrow v. Cotney, 153 Ala. 550, 45 So. 69; Ocklawaha River Farms Co. v. Young, — Fla. —, 74 So. 644; Rogers v. Shewmaker, 27 Ind. App. 631, 87 Am. St. Rep. 274, 60 N. E. 462.

³¹ Farrow v. Cotney, 153 Ala. 550, 45 So. 69.

³² Rogers v. Shewmaker, 27 Ind. App. 631, 87 Am. St. Rep. 274, 60 N. E. 462.

³³ Villa Rica, etc., Co. v. Paratain, 92 Ga. 370, 17 S. E. 340; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Freeman v. Coleman, 86 Ga. 590, 12 S. E. 1064.

³⁴ Mickleberry v. O'Neal, 98 Ga. 42, 25 S. E. 933.

³⁵ Riviere v. Ray, 100 Ga. 626, 28 S. E. 391.

³⁶ Henderson v. Brunson, 141 Ala. 674, 37 So. 549; Gravlee v. Cannon, 195 Ala. 549, 70 So. 719.

³⁷ Grant v. Miller, 107 Ga. 804, 33 S. E. 671. (Where the husband delivered the property with the wife's consent.)

³⁸ Maddox v. Oxford, 70 Ga. 179; Chappel v. Boyd, 61 Ga. 662.

³⁹ Bank v. Johnson, 146 Ga. 791, 92 S. E. 631.

⁴⁰ Lewis v. Howell, 98 Ga. 428, 25 S. E. 504.

⁴¹ Parsons v. Rolfe, 66 N. H. 620, 27 Atl. 172.

⁴² Ellis v. Cribb, 55 S. Car. 328, 33 S. E. 484.

further, the common-law theory of the legal unity of husband and wife made a promise between husband and wife, one which in law had but one party.¹ It was therefore unenforceable by either even after divorce,² or after the death of the other.³ Thus a contract for the division of property between husband and wife, each agreeing to make no claim to the estate of the other, does not bar the right of either.⁴ Under this rule a note by a wife to a partnership of which her husband is a member is invalid.⁵ A bond which is executed by a husband and his surety to the wife is void as against the husband,⁶ but it is valid as against the surety.⁷

This rule applied at common law even to executed contracts and to executed transactions,⁸ including direct conveyances of land by one to the other.⁹

¹ *United States. Wallingsford v. Allen*, 35 U. S. (10 Pet.) 583, 9 L. ed. 542.

Arkansas. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753.

Delaware. Williams v. Betts (Del.), 98 Atl. 371.

Illinois. Erringdale v. Riggs, 148 Ill. 403, 36 N. E. 93.

Kentucky. Scarborough v. Watkins, 48 Ky. (9 B. Mon.) 540, 50 Am. Dec. 528.

Massachusetts. Roby v. Phelan, 118 Mass. 541; *Clark v. Patterson*, 158 Mass. 388, 33 N. E. 589; *National Granite Bank v. Whicher*, 173 Mass. 517, 53 N. E. 1004; *Atkins v. Atkins*, 195 Mass. 124, 122 Am. St. Rep. 221, 11 L. R. A. (N.S.) 273, 80 N. E. 806; *MacKeown v. Lacey*, 200 Mass. 437, 86 N. E. 799.

Michigan. Loomis v. Brush, 36 Mich. 40.

New Hampshire. Kimball v. Kimball, 75 N. H. 291, 73 Atl. 408.

New Jersey. Turner v. Davenport, 61 N. J. Eq. 18, 49 Atl. 463; *Lister v. Lister*, 86 N. J. Eq. 30, 97 Atl. 170; *Woodruff v. Appgar*, 42 N. J. L. 198; *Homan v. Headley*, 58 N. J. L. 485, 34 Atl. 941.

New York. Winter v. Winter, 191 N. Y. 462, 84 N. E. 382.

Ohio. Fowler v. Trebein, 16 O. S. 493, 91 Am. Dec. 95.

Pennsylvania. Johnston v. Johnston, 31 Pa. St. 450.

Tennessee. Bailey v. Apperson, 134 Tenn. 716, 185 S. W. 710.

West Virginia. Bolyard v. Bolyard, 79 W. Va. 554, L. R. A. 1917D, 440, 91 S. E. 529.

Wisconsin. Putnam v. Bicknell, 18 Wis. 333. The court calls it "the rule of the Common Law which has been declared and recognized by the legislature and by this court that contracts between husband and wife are void." *National Granite Bank v. Tyndale*, 176 Mass. 547, 550, 51 L. R. A. 447, 57 N. E. 1022.

As to conveyances in Louisiana, see *Marks v. Loewenberg*, 143 La. 196, 78 So. 444.

² *Pittman v. Pittman*, 4 Or. 298.

³ *Clark v. Royal Arcanum*, 176 Mass. 468, 57 N. E. 787.

⁴ *Jewell v. McQuesten*, 68 N. H. 233, 34 Atl. 742.

⁵ *Clark v. Patterson*, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589.

⁶ *Bolyard v. Bolyard*, 79 W. Va. 554, L. R. A. 1917D, 440, 91 S. E. 529.

⁷ *Bolyard v. Bolyard*, 79 W. Va. 554, L. R. A. 1917D, 440, 91 S. E. 529.

⁸ *Woodruff v. Appgar*, 42 N. J. L. 198; *Homan v. Headley*, 58 N. J. L. 485, 34 Atl. 941; *Elder v. Elder*, 256 Pa. St. 139, 100 Atl. 581.

⁹ *England. Beard v. Beard*, 3 Atk. 72.

These rules apply only to a contract with a lawful wife, a contract with a wife by a bigamous marriage not being invalid for that reason.¹⁰

Such contracts were invalid in equity while executory,¹¹ but if executed and fair and reasonable, equity would enforce them.¹² If the legal title descended to the wife on the husband's death, the legal and equitable title merged in the wife.¹³ Upon the death of the wife, the legal estate of the husband ended and both legal and equitable estates passed to her heirs.¹⁴ As such conveyance does not pass the legal title, it is not available in an action in ejectment.¹⁵ A valuable consideration will be presumed to exist if it is recited in the deed.¹⁶

§ 1679. Under modern statutes. The effect of modern statutes upon the power of a married woman to make contracts with her husband is a question on which there is a lack of harmony arising

Arkansas. *Maupin v. Gains*, 125 Ark. 181, 188 S. W. 552.

Delaware. *Williams v. Betts* (Del.), 98 Atl. 371.

Illinois. *Newman v. Willets*, 48 Ill. 534.

Indiana. *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679.

Missouri. *Carson v. Berthold & Jennings Lumber Co.*, 270 Mo. 238, 192 S. W. 1018.

Ohio. *Fowler v. Trebein*, 16 O. S. 493, 91 Am. Dec. 95.

Pennsylvania. *Elder v. Elder*, 256 Pa. St. 139, 100 Atl. 581.

Rhode Island. *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234.

Tennessee. *Bailey v. Apperson*, 134 Tenn. 716, 183 S. W. 710.

Wisconsin. *Kinney v. Dexter*, 81 Wis. 80, 51 N. W. 82.

¹⁰ *Vaughn v. Vaughn*, 100 Tenn. 282, 45 S. W. 677.

¹¹ *Erringdale v. Riggs*, 148 Ill. 403, 36 N. E. 93.

¹² *United States v. Jones v. Clifton*, 101 U. S. 225.

Arkansas. *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796;

Maupin v. Gains, 125 Ark. 181, 188 S. W. 552.

Connecticut. *Corr's Appeal*, 62 Conn. 403, 26 Atl. 478.

Delaware. *Williams v. Betts* (Del.), 98 Atl. 371.

District of Columbia. *McCormick v. Hammersley*, 1 D. C. App. 313.

Kentucky. *Eckermeyer v. Hoffmeier*, 98 Ky. 724, 34 S. W. 521.

Missouri. *Stark v. Kirchgraber*, 186 Mo. 633, 105 Am. St. Rep. 629, 85 S. W. 868.

New Jersey. *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. 489; *Lister v. Lister*, 86 N. J. Eq. 30, 97 Atl. 170.

Rhode Island. *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234.

¹³ *Carson v. Berthold & Jennings Lumber Co.*, 270 Mo. 238, 192 S. W. 1018.

¹⁴ *Stark v. Kirchgraber*, 186 Mo. 633, 105 Am. St. Rep. 629, 85 S. W. 868.

¹⁵ *Williams v. Betts* (Del.), 98 Atl. 371; *Wallace v. Pereles*, 109 Wis. 316, 83 Am. St. Rep. 898, 58 L. R. A. 644, 85 N. W. 371.

¹⁶ *Williams v. Betts* (Del.), 98 Atl. 371.

in part only from a diversity of the statutes. No question can arise where the statute specifically permits a husband and wife to make contracts with each other,¹ except where they attempt to modify the rights and duties growing out of the marriage relation itself. A promise by a husband to pay his wife for performing domestic duties is invalid,² and so seems to be a promise to pay her for assisting him in his business,³ or a promise by him that the property produced by their joint labor in farming shall be the property of the wife in consideration of her working for him.⁴ As additional reasons for the invalidity of such contracts have been suggested a lack of consideration,⁵ and the requirements of public policy.⁶ But a contract by a wife to furnish board for prisoners in jail, made with her husband who had a right to sublet his contract with the county to furnish such board, has been held to be so far outside the duties incident to the marriage relation as to be enforceable.⁷ Power to husband and wife to contract with each other does not include contracts for future separation.⁸ Power to a married woman to convey directly to her husband does not authorize mutual releases of dower rights.⁹

Under a statute which expressly forbids contracts between husband and wife, such contracts are invalid,¹⁰ even if they have

¹In *re* Davidson, 233 Fed. 462; *Larkin v. Baty*, 111 Ala. 303, 18 So. 666; *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. Rep. 117, 21 So. 320; *Jackson v. Beard*, 162 N. Car. 105, 78 S. E. 6; *Roth's Estate*, 6 Ohio N. P. 498.

²*Brittain v. Crowther*, 54 Fed. 295; *Lee v. Guano Co.*, 99 Ga. 572, 59 Am. St. Rep. 243, 27 S. E. 159; *Michigan, etc., Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490, 64 N. W. 334; *Birkbeek v. Ackroyd*, 74 N. Y. 356, 30 Am. Rep. 304; *Blaechinska v. Howard Mission*, 130 N. Y. 497, 15 L. R. A. 215, 29 N. E. 755.

³In *re* Kaufmann, 104 Fed. 768; *Brittain v. Crowther*, 54 Fed. 295; *Turner v. Davenport*, 61 N. J. Eq. 18, 47 Atl. 766; *Blaechinska v. Howard Mission*, 130 N. Y. 497, 15 L. R. A. 215, 29 N. E. 755.

⁴*Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444, 67 Pac. 816, 56 L. R. A. 739.

⁵*Lee v. Guano Co.*, 99 Ga. 572, 59 Am. St. Rep. 243, 27 S. E. 159.

⁶*Michigan, etc., Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490, 64 N. W. 334. See § 932.

⁷*Carse v. Reticker*, 95 Ia. 25, 58 Am. St. Rep. 421, 63 N. W. 461. (This case was also explained by the court as in effect a gift of the profits.)

⁸*Foote v. Nickerson*, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088. See § 938.

⁹*Pinkham v. Pinkham*, 95 Me. 71, 85 Am. St. Rep. 392, 49 Atl. 48.

¹⁰*Georgia. Munroe v. Baldwin*, 145 Ga. 215, 88 S. E. 947.

Iowa. Frazer v. Andrews, 134 Ia. 621, 11 L. R. A. (N.S.) 593, 112 N. W. 92. *Massachusetts. National Bank v. Delano*, 185 Mass. 424, 70 N. E. 444; *Caldwell v. Nash*, 190 Mass. 507, 77 N. E. 515; *Atkins v. Atkins*, 195 Mass. 124, 122 Am. St. Rep. 221, 11 L. R. A. (N.S.) 273, 80 N. E. 806.

separated.¹¹ A note given by a husband to his son with the understanding that it is to be endorsed over to the wife, is invalid.¹² The fact that the husband in making a contract with his wife is acting in a representative capacity, such as a trustee, does not render the contract valid under such a statute.¹³ A statute which provides that a married woman may contract as if she were unmarried, but that such statute shall not affect the existing law as to contracts between husband and wife, does not authorize a wife to enter into a contract with her husband.¹⁴ By statute in some jurisdictions husband and wife can not contract with each other with reference to their dower rights.¹⁵ Some statutes provide that contracts between husband and wife must be in writing.¹⁶

Statutes providing for separate property subject to the absolute disposition of the married woman are held to permit her to contract with her husband.¹⁷ Accordingly, her loan to him creates the relation of debtor and creditor,¹⁸ so that limitations begins to run.¹⁹ In some jurisdictions contracts between husband and wife are enforceable in equity and not at law.²⁰ Statutes conferring contractual power either generally or with reference to the separate estate have been held to make contracts between husband and wife valid.²¹ Even though the wife can not sue her husband in his life-

Minnesota. Phillips v. Blaker, 68 Minn. 152, 70 N. W. 1082.

New Jersey. Turner v. Davenport, 61 N. J. Eq. 18, 47 Atl. 766.

¹¹ Phillips v. Blaker, 68 Minn. 152, 70 N. W. 1082.

¹² Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515.

¹³ Atkins v. Atkins, 195 Mass. 124, 122 Am. St. Rep. 221, 11 L. R. A. (N.S.) 273, 80 N. E. 806.

¹⁴ People's Trust Co. v. Merrill, 78 N. H. 329, 99 Atl. 650.

¹⁵ Potter v. Potter, 43 Or. 149, 72 Pac. 702.

¹⁶ Wilson v. Mullins (Ky.), 119 S. W. 1180.

¹⁷ Luhrs v. Hancock, 181 U. S. 567, 45 L. ed. 1005; Maxwell v. Journey, 238 Fed. 566, 151 C. C. A. 502; In re Estate of Deaner, 126 Ia. 701, 106 Am. St. Rep. 374, 102 N. W. 825; De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S. E. 239; Es-

tate of Simonson, 164 Wis. 590, 160 N. W. 1040.

¹⁸ De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S. E. 239.

¹⁹ De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S. E. 239.

²⁰ Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655; First National Bank v. Albertson (N. J. Eq.), 47 Atl. 818; Rahway Bank v. Brewster, 49 N. J. L. 231, 12 Atl. 769.

²¹ England. Ward v. Shallet, 2 Ves. Sr. 16.

United States. Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908.

Alabama. Jones v. Chenault, 124 Ala. 610, 82 Am. St. Rep. 211, 27 So. 515.

Arizona. Luhrs v. Hancock, — Ariz. —, 57 Pac. 605.

Arkansas. Hood v. Roleson, 125 Ark. 30, 187 S. W. 1059.

District of Columbia. Magruder v. Belt, 7 D. C. App. 303.

time, she can enforce payment out of his estate after his death.²² Thus a contract by a wife to repay to her husband money advanced to improve her property, even if it is used as the family homestead;²³ or by a husband to repay to his wife a loan made by her,²⁴

Florida. *Fritz v. Fernandez*, — Fla. —, 34 So. 315.

Idaho. *Bates v. Papesh*, 30 Ida. 529, 166 Pac. 270.

Illinois. *North v. North*, 166 Ill. 179, 46 N. E. 729 [affirming, 63 Ill. App. 129]; *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171; *Herbert v. Mueller*, 83 Ill. App. 391.

Indiana. *Milburn v. Milburn*, 143 Ind. 187, 42 N. E. 611.

Kentucky. *Walker v. Walker* (Ky.), 41 S. W. 315; *McCann v. Letcher*, 47 Ky. (8 B. Mon.) 320; *Moayon v. Moayon*, — Ky. —, 60 L. R. A. 415, 72 S. W. 33.

Maine. *Matley v. Sawyer*, 38 Me. 68; *Peaks v. Hutchinson*, 96 Me. 530, 59 L. R. A. 279, 53 Atl. 38.

Maryland. *Sturmfelz v. Frickey*, 43 Md. 569; *Trader v. Lowe*, 45 Md. 1.

Massachusetts. *Bullard v. Briggs*, 24 Mass. (7 Pick.) 533; *Needham v. Sanger*, 34 Mass. (17 Pick.) 500, 19 Am. Dec. 292.

Michigan. *Just v. Bank*, — Mich. —, 94 N. W. 200; *Farwell v. Johnston*, 34 Mich. 342; *Jenne v. Marble*, 37 Mich. 319.

Mississippi. *Gregory v. Doods*, 60 Miss. 549.

Missouri. *Rice v. Sally*, 176 Mo. 107, 75 S. W. 398; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347.

Nebraska. *In re Cormick's Estate*, 100 Neb. 669, L. R. A. 1917D, 265, 160 N. W. 989.

Nevada. *Crawford v. Crawford*, 24 Nev. 410, 56 Pac. 94 [distinguishing, *Dickerson v. Dickerson*, 24 Neb. 530, 8 Am. St. Rep. 213].

New Jersey. *Lawshe v. Trenton Banking Co.*, 87 N. J. Eq. 56, 99 Atl.

617; *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 54 L. R. A. 585, 49 Atl. 544. (Decided under New York law.)

New Hampshire. *Nims v. Bigelow*, 44 N. H. 343.

New York. *In re Collister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268.

Pennsylvania. *Cornman's Estate*, 197 Pa. St. 125, 46 Atl. 940; *Fidelity Title & Trust Co. v. Graham*, — Pa. St. —, 105 Atl. 295.

South Dakota. *Kolbe v. Harrington*, 15 S. D. 263, 88 N. W. 572; *Keith v. Keith*, 37 S. D. 132, 156 N. W. 910.

Vermont. *Atkins v. Atkins*, 69 Vt. 270, 37 Atl. 746.

Virginia. *Ficklin v. Rixey*, 89 Va. 832, 37 Am. St. Rep. 891, 17 S. E. 325. Under such statutes conveyances between husband and wife are valid, if not specifically regulated by other statutory provisions. *Rich v. Rich*, 147 Ga. 488, 94 S. E. 566; *Yates v. Bank of Ringgold*, — Ga. —, 96 S. E. 427; *English v. English*, 229 Mass. 11, 118 N. E. 178; *Haguewood v. Britain*, 273 Mo. 89, 109 S. W. 950.

²² *In re Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268; *Atkins v. Atkins*, 69 Vt. 270, 37 Atl. 746.

²³ *North v. North*, 166 Ill. 179, 46 N. E. 729 [affirming, 63 Ill. App. 129].

²⁴ *Fritz v. Fernandez*, — Fla. —, 34 So. 315.

Idaho. *Bates v. Papesh*, 30 Ida. 529, 166 Pac. 270.

Illinois. *Herbert v. Mueller*, 83 Ill. App. 391.

Iowa. *In re Estate of Deaner*, 126 Ia. 701, 106 Am. St. Rep. 374, 102 N. W. 825; *Rule v. Carey*, 178 Ia. 184, 159 N. W. 699.

or interest thereon,²⁵ is valid, as is a contract to dismiss a divorce suit,²⁶ or a conveyance of real²⁷ or personal property,²⁸ or a contract by a wife to release her dower in her husband's realty in consideration of his promise to pay her a certain part of the purchase money received by him.²⁹ So is a contract by a married woman to repay her husband out of her share of her father's estate for advances to her by him.³⁰ So a husband signing a note as surety for his wife may recover from her estate.³¹ So under a contract whereby a wife authorizes her husband to buy property for her as her agent, the title to such property vests in the wife, even as against her husband's creditors.³² So a contract whereby it is agreed that

New York. In re Callister, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268.

South Dakota. Kolbe v. Harrington, 15 S. D. 263, 88 N. W. 572.

Virginia. De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S. E. 239. Accordingly, his note imports consideration. Rule v. Carey, 178 Ia. 184, 159 N. W. 699. In the absence of a promise by the husband to repay to his wife money belonging to her which he has used with her consent, the transaction is not a loan. Stone v. Curtis, 115 Me. 63, 97 Atl. 213.

²⁵ Cornman's Estate, 197 Pa. St. 125, 46 Atl. 940.

²⁶ Crawford v. Crawford, 24 Nev. 410, 56 Pac. 94 [distinguishing, Dickerson v. Dickerson, 24 Neb. 530, 8 Am. St. Rep. 213].

²⁷ **Alabama.** Manfredo v. Manfredo, 191 Ala. 322, 68 So. 157.

Maryland. Brandau v. McCurley, 124 Md. 243, L. R. A. 1915C, 767, 92 Atl. 540.

Michigan. Duffy v. White, 115 Mich. 264, 73 N. W. 363; Demerse v. Mitchell, 187 Mich. 683, 154 N. W. 22.

Missouri. Wrench v. Robertson (Mo.), 175 S. W. 587.

Nebraska. Currier v. Teske, 98 Neb. 660, 154 N. W. 234.

New Jersey. Lawshe v. Trenton Banking Co., 87 N. J. Eq. 56, 99 Atl. 627.

North Carolina. Butler v. Butler, 169 N. Car. 584, 86 S. E. 507.

Tennessee. Ferguson v. Booth, 128 Tenn. 259, Ann. Cas. 1915C, 1079, 160 S. W. 67; Battle v. Claiborne, 133 Tenn. 286, 180 S. W. 584.

Such conveyance may be through the intervention of a trustee. Brandau v. McCurley, 124 Md. 243, L. R. A. 1915C, 767, 92 Atl. 540; Young v. Brown, 136 Tenn. 184, 188 S. W. 1149.

If husband and wife hold as tenants by entireties, a conveyance by one to the other destroys such tenancy. Demerse v. Mitchell, 187 Mich. 683, 154 N. W. 22.

A married woman who leases to her husband has the same lien as if she had leased to a stranger. Maxwell v. Journey, 238 Fed. 566, 151 C. C. A. 502.

²⁸ Sherman v. Davenport, 106 Ia. 741, 75 N. W. 187; Butler v. Farmers' National Bank, 173 Ia. 659, 155 N. W. 999.

²⁹ Dailey v. Dailey, 26 Ind. App. 14, 58 N. E. 1065.

³⁰ Hendricks v. Isaacs, 117 N. Y. 411, 15 Am. St. Rep. 524, 6 L. R. A. 559, 22 N. E. 1029.

³¹ Feather v. Feather, 116 Mich. 384, 74 N. W. 524.

³² Jones v. Chenault, 124 Ala. 610, 82 Am. St. Rep. 211, 27 So. 515; Paull v. Parks (Ky.), 45 S. W. 873; Young v. Hurst (Tenn. Ch. App.), 48 S. W. 355.

a house built by a husband on his wife's land shall remain his property is valid.³³

A contract by which a husband agrees to pay his wife for unusual services is valid.³⁴

Under a statute which provides that a married woman can not sell property to her husband without the approval of the court,³⁵ she can not make a conveyance in adjustment of her claim against him for alimony.³⁶

Under statutes which allow a married woman to contract with reference to her separate estate as if she were unmarried it is generally held that she may contract with her husband.³⁷ She may lend him money and maintain an action at law against him,³⁸ and she may convey to her husband property which she had acquired before the Married Woman's Act was passed.³⁹

In other jurisdictions it has been held that such statutes do not authorize contracts between husband and wife.⁴⁰

A statute which confers general power to make contracts has been held to authorize contracts between husband and wife,⁴¹ as long as such contract did not purport to alter their rights and liabilities growing out of their relation. Under such statutes conveyances between husband and wife are valid,⁴² unless they are not

³³ *Peaks v. Hutchinson*, 96 Me. 530, 59 L. R. A. 279, 53 Atl. 38.

³⁴ *In re Cormick's Estate*, 100 Neb. 669, L. R. A. 1917D, 265, 160 N. W. 989.

³⁵ *Gordon v. Harris*, 141 Ga. 24, 80 S. E. 276.

³⁶ *Gordon v. Harris*, 141 Ga. 24, 80 S. E. 276.

³⁷ *Indiana*. *Huffman v. Copeland*, 139 Ind. 221, 38 N. E. 861; *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858.

Missouri: *O'Day v. Meadows*, 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; *Harvey v. Long*, 260 Mo. 374, 168 S. W. 708; *Regal Realty & Investment Co. v. Gallagher* (Mo.), 188 S. W. 151; *Smelser v. Meier*, 271 Mo. 178, 196 S. W. 22.

New York. *Suau v. Caffé*, 122 N. Y. 308, 9 L. R. A. 593, 25 N. E. 488; *Third National Bank v. Guenther*, 123 N. Y. 568, 20 Am. St. Rep. 780, 25 N. E. 986.

South Dakota. *Williams v. Harris*, 4 S. D. 22, 46 Am. St. Rep. 753, 54 N. W. 926.

³⁸ *Regal Realty & Investment Co. v. Gallagher* (Mo.), 188 S. W. 151.

³⁹ *Smelser v. Meier*, 271 Mo. 178, 196 S. W. 22.

⁴⁰ *O'Daily v. Morris*, 31 Ind. 111; *Jenne v. Marble*, 37 Mich. 319; *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524, 6 L. R. A. 559, 22 N. E. 1029.

⁴¹ *Koopman v. Mansolf* (Mont.), 149 Pac. 491; *Grubbe v. Grubbe*, 26 Or. 363, 38 Pac. 182. (Holding that the statute restricting the form of conveying realty did not apply to contracts.) *Worden v. Worden*, 96 Wash. 592, 165 Pac. 501.

⁴² *Kent v. Tallent* (Okla.), 183 Pac. 422; *Worden v. Worden*, 96 Wash. 592, 165 Pac. 501.

intended to take effect at once but are intended to operate in place of wills.⁴³ In other jurisdictions the opposite view has been taken, on the theory that though the wife's disabilities are removed, those of her husband are not.⁴⁴ So a husband and wife can not contract as to the distributive share of the husband in the wife's estate.⁴⁵ Contracts between husband and wife had previously been recognized in Iowa,⁴⁶ and as the statute allowed either to sue the other for conversion of property, it was held that a note given by the husband to the wife for property of hers which he had converted was valid.⁴⁷ A statute which authorizes a married woman to convey to her husband, is not retroactive and it does not make valid a prior conveyance by which she had attempted to convey property to him.⁴⁸ If such statute were given a retroactive effect, it would be unconstitutional.⁴⁹

A transaction by which a wife transfers her property to a third person, who, with her consent, gives a bond for the purchase price to herself and her husband jointly, is invalid under a statute which provides that a contract between husband and wife which tends to impair the corpus of her personal estate is void unless it is in writ-

⁴³ *Eves v. Roberts*, 96 Wash. 99, 164 Pac. 915.

⁴⁴ *Heacock v. Heacock*, 108 Ia. 540, 75 Am. St. Rep. 273, 79 N. W. 353 (a note given by husband to wife during coverture) [citing and following, *Hoker v. Boggs*, 63 Ill. 161; *Lord v. Parker*, 85 Mass. (3 All.) 127; *Knowles v. Hull*, 99 Mass. 562; *Rody v. Phelon*, 118 Mass. 541; *Aultman v. Obermeyer*, 6 Neb. 260; *White v. Wagner*, 25 N. Y. 328; *Real Estate, etc., Co. v. Roop*, 132 Pa. St. 496, 7 L. R. A. 211, 19 Atl. 278; which do not all sustain the proposition]. "Both husband and wife were under such legal disabilities at common law as that they could not contract with each other. To remove the disability of one will not validate the contract for one of the contracting parties has no assenting mind; and it would be strange doctrine to announce that because the disability was removed from one of the contracting parties, the contract is good, although

the other is without a concurring mind." *Heacock v. Heacock*, 108 Ia. 540, 544, 75 Am. St. Rep. 273, 79 N. W. 353. See the dissenting opinion in this case. To the same effect, see *National Granite Bank v. Whicher*, 173 Mass. 517, 73 Am. St. Rep. 317, 53 N. E. 1004 (also on a note).

⁴⁵ *Poole v. Burnham*, 105 Ia. 620, 75 N. W. 474. (Under a statute providing that if either husband or wife owned property the other had no interest therein which could be contracted for.)

⁴⁶ *Corse v. Reticker*, 95 Ia. 25, 58 Am. St. Rep. 421, 63 N. W. 461. (A contract by a wife to board prisoners for her husband, who had the care of them.)

⁴⁷ *Dunham v. Bentley*, 103 Ia. 136, 72 N. W. 437.

⁴⁸ *Elder v. Elder*, 256 Pa. St. 139, 100 Atl. 581.

⁴⁹ *Elder v. Elder*, 256 Pa. St. 139, 100 Atl. 581.

ing and an official certificate of a separate acknowledgment on the part of the wife is attached.⁵⁰

Whether a wife may make a contract with her husband or not, she may represent him as his agent in transactions with third persons.⁵¹ If not expressly forbidden by statute, a husband may act as his wife's agent to transact any business which she could have transacted in person.⁵²

§ 1680. Partnership between husband and wife. There is a lack of harmony on the question of whether husband and wife can act as partners with each other, due in part to differences in statutory provisions and in part to differences in determining the legal effect of similar statutes. A married woman may be a partner of her husband in business under statutes authorizing her to contract as if she were unmarried.¹ A statute which provides that she can not enter into a contract with her husband prevents her from entering into a contract with him.² A statute authorizing her to contract with reference to her separate estate specifically providing that she may contract with her husband allows her to form a partnership with him.³ Under a statute allowing her to contract with others than her husband as if she were unmarried, and forbidding her to become his surety except by a mortgage, it is held that she can

⁵⁰ Kilpatrick v. Kilpatrick, — N. Car. —, 96 S. E. 988.

⁵¹ Massachusetts. Vaughan v. Mansfield, 229 Mass. 352, 118 N. E. 652.

Michigan. McNamara v. Langguth, 198 Mich. 776, 165 N. W. 661.

North Dakota. Evenson v. Nelson, — N. D. —, 168 N. W. 36.

Oklahoma. Brownell v. Moorehead, — Okla. —, 165 Pac. 408.

South Carolina. Gore v. Whiteville Lumber Co., — S. Car. —, 96 S. E. 683.

Vermont. Seaver v. Lang, — Vt. —, 104 Atl. 877.

⁵² Arkansas. Williams v. O'Dwyer & Ahern Co., 127 Ark. 530, 192 S. W. 899.

Georgia. Faircloth v. Taylor, 147 Ga. 787, 95 S. E. 689.

Idaho. Libby v. Pelham, 30 Ida. 614, 166 Pac. 575.

Massachusetts. Girard Co. v. Lamoureux, 227 Mass. 277, 116 N. E. 572.

Michigan. Loveland v. Bump, 198 Mich. 564, 165 N. W. 855.

North Dakota. Buchanan Elevator Co. v. Lees, 37 N. D. 27, 163 N. W. 264.

Oregon. Bank v. Preble, 87 Or. 230, 167 Pac. 578, 170 Pac. 302.

South Dakota. Bethea v. Beaufort County Lumber Co., — S. Car. —, 96 S. E. 717.

¹ Burney v. Grocery Co., 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915; Hoaglin v. Henderson, 119 Ia. 720, 97 Am. St. Rep. 335, 61 L. R. A. 756, 94 N. W. 247; Louisville, etc., Ry. v. Alexander (Ky.), 27 S. W. 981; Snell v. Stone, 23 Or. 327, 31 Pac. 663.

² Bowker v. Bradford, 140 Mass. 521, 5 N. E. 480.

³ Belser v. Banking Co., 105 Ala. 514, 17 So. 40.

incur liability to third persons as his partner.⁴ Under statutes authorizing her to contract with reference to her separate estate, she can not enter into a partnership with her husband.⁵ She is not liable to third persons as a partner upon contracts made by her husband,⁶ but she is liable upon contracts which she has made personally on behalf of the partnership.⁷ From the cases cited it will be seen that this view is taken by states that allow a husband and wife to make contracts with reference to her separate estate,⁸ and by those which hold that a married woman may bind her separate estate by her contracts as effectually as her husband can bind his,⁹ as well as by states which restrict her power under the statute to contracts intended for the management and benefit of her estate.¹⁰ His management of her farm does not constitute a partnership, however;¹¹ nor does their leasing a hotel together and buying furniture.¹² A statute giving her the power to contract as a feme sole and providing that she should have the same powers in law as her husband, does not authorize her to form a partnership with him.

⁴ *Lane v. Bishop*, 65 Vt. 575, 27 Atl. 499.

⁵ *Arkansas. Gilkerson, etc., Co. v. Salinger*, 56 Ark. 294, 35 Am. St. Rep. 105, 16 L. R. A. 526, 19 S. W. 747.

Connecticut. Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 Atl. 205.

Indiana. Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607; *Scarlett v. Snodgrass*, 92 Ind. 262.

Massachusetts. Lord v. Parker, 85 Mass. (3 All.) 127; *Lord v. Davidson*, 85 Mass. (3 All.) 131; *Edwards v. Stevens*, 85 Mass. (3 All.) 315; *Palmer v. Lord*, 87 Mass. (5 All.) 460; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Voss v. Sylvester*, 203 Mass. 233, 89 N. E. 241.

Michigan. Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217; *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556, 2 L. R. A. 345, 40 N. W. 909; *Artman v. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572, 2 L. R. A. 343, 40 N. W. 907.

Ohio. Payne v. Thompson, 44 O. S. 192, 5 N. E. 654.

South Carolina. Gwynn v. Gwynn,

27 S. Car. 525, 4 S. E. 229; *Weisiger v. Wood*, 36 S. Car. 424, 15 S. E. 597.

Texas. Cox v. Miller, 54 Tex. 16.

Washington. Seattle Board of Trade v. Hayden, 4 Wash. 263, 31 Am. St. Rep. 919, 16 L. R. A. 530, 30 Pac. 87, 32 Pac. 224.

West Virginia. Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

Wisconsin. Fuller, etc., Co. v. McHenry, 83 Wis. 573, 18 L. R. A. 512, 53 N. W. 896.

⁶ *People's Trust Co. v. Merrill*, 78 N. H. 329, 99 Atl. 650.

⁷ *Orr v. Merrill*, 78 N. H. 175, 98 Atl. 303; *People's Trust Co. v. Merrill*, 78 N. H. 540, 102 Atl. 827.

⁸ *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

⁹ *Payne v. Thompson*, 44 O. S. 192, 5 N. E. 654.

¹⁰ *Fuller, etc., Co. v. McHenry*, 83 Wis. 573, 18 L. R. A. 512, 53 N. W. 896.

¹¹ *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241.

¹² *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168.

She is not liable to third persons as a partner.¹³ A statute making her personally liable on debts incurred in her own name does not authorize her to form a partnership with her husband.¹⁴ Under statutes allowing her to conduct business on her sole and separate account she can not form a partnership with her husband.¹⁵ As partners are principals, and not sureties each for the other, a statute forbidding a wife to act as surety for her husband does not of itself prevent them from acting as partners.¹⁶ Under a statute which provides that a married woman may contract as if she were unmarried, but that such statute does not affect the prior laws as to contracts between husband and wife, a married woman who has entered into a contract of partnership with her husband is liable to third persons upon contracts which she has made on behalf of such partnership,¹⁷ but she is not liable upon contracts which her husband has made on behalf of such partnership.¹⁸

§ 1681. Agent of married woman. Unless restrained by statute a married woman may appoint an agent, or an attorney in fact,¹ to make any contract or conveyance which she could make herself. If the contract is one which she can not make herself, she can not make it by an agent.² Where a married woman can not charge her general estate she can not appoint an agent to charge it.³

¹³ *Seattle Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, 16 L. R. A. 530, 32 Pac. 224, 30 Pac. 87.

¹⁴ *Haggett v. Hurley*, 91 Me. 542, 41 L. R. A. 362, 40 Atl. 561.

¹⁵ *Gilkerson, etc., Co. v. Salenger*, 56 Ark. 294, 35 Am. St. Rep. 105, 16 L. R. A. 526, 19 S. W. 747; *Lord v. Parker*, 85 Mass. (3 All.) 127.

Contra, *Suau v. Caffé*, 122 N. Y. 308, 9 L. R. A. 593, 25 N. E. 488.

¹⁶ *Belser v. Banking Co.*, 105 Ala. 514, 17 So. 40.

¹⁷ *Orr & Rolfe Co. v. Merrill*, 78 N. H. 175, 98 Atl. 303.

¹⁸ *People's Trust Co. v. Merrill*, 78 N. H. 329, 99 Atl. 650.

¹ *United States. Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658.

Arkansas. Davie v. Davie (Ark.), 18 S. W. 935.

District of Columbia. Williams v. Paine, 7 D. C. App. 116.

Georgia. Faircloth v. Taylor, 147 Ga. 787, 95 S. E. 689.

Idaho. Libby v. Pelham, 30 Ida. 614, 166 Pac. 575.

Massachusetts. Girard Co. v. Lamoureux, 227 Mass. 277, 116 N. E. 572.

Michigan. Loveland v. Bump, 198 Mich. 564, 165 N. W. 855.

North Dakota. Buchanan Elevator Co. v. Lees, 37 N. D. 27, 163 N. W. 264.

Oregon. Security Savings Bank v. Smith, 38 Or. 72, 62 Pac. 794; *Bank v. Preble*, 87 Or. 230, 167 Pac. 578, 170 Pac. 302.

Pennsylvania. Farmers', etc., Bank v. Loftus, 133 Pa. St. 97, 7 L. R. A. 313, 19 Atl. 347.

South Carolina. Bethea v. Beaufort County Lumber Co., — S. Car. —, 96 S. E. 717.

² *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112, 37 L. R. A. 452, 37 Atl. 420; *Weisbrod v. Ry.*, 18 Wis. 35, 86 Am. Dec. 743.

³ *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629, 29 S. W. 1030.

§ 1682. Ratification. As a married woman's contract is void and not voidable, it is incapable of ratification by any agreement or conduct after the woman acquires the power to make contracts,¹ whether such power is acquired by the death of the husband,² or by her obtaining an absolute divorce from him,³ or by a change in the law giving her power to make contracts,⁴ or by the rendition of a decree of court under local statutes, conferring the powers of a feme sole.⁵ In obiter, however, some dissent from this view may be found.⁶ Under some statutes, moreover, a contract of a married woman may be voidable only, and subject to ratification.⁷ A con-

¹ **England.** *Meyer v. Haworth*, 8 Ad. & El. 467.

Alabama. *New England, etc., Co. v. Powell*, 94 Ala. 423, 10 So. 324; *Trotter Bros. v. Downs*, — Ala. —, 75 So. 906.

Indiana. *Austin v. Davidson*, 128 Ind. 472, 25 Am. St. Rep. 456, 12 L. R. A. 20, 26 N. E. 890; *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Davis v. Schmidt* (Ind. App.), 31 N. E. 84.

Kentucky. *Ruppel v. Kissel* (Ky.), 74 S. W. 220; *Gilbert v. Brown*, 123 Ky. 703, 7 L. R. A. (N.S.) 1053, 97 S. W. 40.

Mississippi. *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329.

Missouri. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780.

North Carolina. *Weathers v. Borders*, 121 N. Car. 387, 28 S. E. 524.

Pennsylvania. *Glidden v. Strupler*, 52 Pa. St. 400; *Buchanan v. Hazzard*, 95 Pa. St. 240.

Rhode Island. *Radican v. Radican*, 22 R. I. 405, 48 Atl. 143.

Vermont. *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239. But where the instrument takes effect on delivery, a redelivery after acquiring capacity makes the instrument valid. *Brown v. Bennett*, 75 Pa. St. 420; *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724.

² **England.** *Meyer v. Haworth*, 8 Ad. & El. 467, 35 E. C. L. 442.

Alabama. *Union, etc., Bank v. Hartwell*, 84 Ala. 379, 4 So. 156.

Indiana. *Long v. Brown*, 66 Ind. 160; *Austin v. Davis*, 128 Ind. 472, 25 Am. St. Rep. 456, 12 L. R. A. 20, 26 N. E. 890.

Kentucky. *Gilbert v. Brown*, 123 Ky. 703, 7 L. R. A. (N.S.) 1053, 97 S. W. 40.

Mississippi. *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329.

New Jersey. *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614.

Pennsylvania. *Nesbitt v. Turner*, 155 Pa. St. 429, 23 Atl. 750.

³ *Putnam v. Tennyson*, 50 Ind. 456; *Thompson v. Warren*, 47 Ky. (8 B. Mon.) 488; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762.

⁴ *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632; *New England, etc., Co. v. Powell*, 94 Ala. 423, 10 So. 324; *Loomis v. Brush*, 36 Mich. 40; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251.

⁵ *Russell v. Rice* (Ky.), 44 S. W. 110.

⁶ "Her contracts independent of statute were merely voidable and to avoid them she must plead her disability." *Strauss v. Glass*, 108 Ala. 546, 551; 18 So. 526.

⁷ *Steiner v. Tramum*, 98 Ala. 315, 13 So. 365. This case was decided under a statute allowing a wife to authorize her husband to sell or exchange her estate; and it was held that she might ratify an exchange made by him so as to vest in herself title to the property received in exchange.

tract by which a married woman agreed to adopt a child and to devise realty to it was said to be ratified by her continued recognition of such contract after the enactment of a statute which conferred upon her power to make contracts.⁸ Ratification must be at least as formal, even under these statutes, as an original contract.⁹ It must also be effected by conduct unequivocally intended as a ratification. Thus if it was possible to ratify business debts after the act of 1897, authorizing a married woman to incur such debts, the mere recognition, after the passage of the act, of the existence of a note given for such debts before the passage of the act, does not make her liable.¹⁰ While perfectly harmonious with the views already expressed, it must be noticed that if the contract could cause any liability in equity, such liability would support a promise made after capacity had been acquired and this contract would be enforceable at law.¹¹ So a subsequent promise after acquiring capacity to contract, to perform a contract made before such capacity is acquired is enforceable if based on a new consideration. Thus a note executed by a married woman and her husband was void as to her before 1881, in Indiana,¹² but a renewal after 1881 by husband and wife of note given before is good as to both.¹³

§ 1683. Restitution. If a married woman invokes coverture as a defense to an executory contract,¹ or a means of recovering what she has parted with under an executed contract,² she is liable for whatever she has received under such contract.³ Thus a married woman to obtain a loan gave her note payable to her husband, who indorsed it over to the creditor. The note itself was held to be void, as being a contract between husband and wife;⁴ but recovery

⁸ *Lindale v. Patterson* (Mo.), L. R. A. 1915F, 680, 177 S. W. 826.

⁹ *Duncan v. Freeman*, 109 Ala. 186, 19 So. 433.

¹⁰ *Mercantile Co. v. Bowers*, 105 Tenn. 138, 58 S. W. 287.

¹¹ *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614; *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239.

¹² *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412.

¹³ *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412.

¹ *National Granite Bank v. Tyndale*, 176 Mass. 547, 51 L. R. A. 477, 57 N. E.

1022; *Willock's Estate*, 165 Pa. St. 522, 30 Atl. 1043; *Bucknor's Estate*, 136 Pa. St. 23, 20 Am. St. Rep. 891, 19 Atl. 1069.

See *Verneuille v. Stann*, 143 La. 681, 79 So. 219.

² *Pilcher v. Smith*, 39 Tenn. (2 Head.) 208.

³ *Contra*, where her acknowledgment to the conveyance of her separate estate was not taken as provided by law. *Silcock v. Baker*, 25 Tex. Civ. App. 508, 61 S. W. 939.

⁴ *National Granite Bank v. Whicher*, 173 Mass. 517, 73 Am. St. Rep. 317, 53 N. E. 1004.

of the amount so loaned was allowed in *assumpsit*.⁵ In some jurisdictions, no personal liability exists against her if the contract is void, and the only remedy of the adversary party is an action in rem against the money received by her under the contract or against any property into which it can be traced.⁶ If the money was paid to her husband and it is not shown to have been paid over to her, she is not liable for it on avoiding her contract.⁷ She can not retain the property conveyed to her and avoid having the purchase money collected by a sale of such property therefor.⁸

§ 1684. Estoppel. Within the limits of her statutory capacity she may be bound by estoppel like a person of full capacity.¹ Thus a deed by a married woman of lands devised to her estops her from setting up an after-acquired title.² So if she ostensibly borrows money, the fact that she indorses the check to her husband does not relieve her from liability, though she could not act as his surety.³ If she signs the instrument first and represents that she is the principal thereon, she is estopped from avoiding liability by claiming to be surety.⁴ If a note is dated and made payable in a state in which a married woman may bind herself by contract of endorsement, and she endorses it in another state where such contract is invalid, she is estopped as against a bona fide holder for value, to deny that she endorsed it where it is dated and made payable.⁵

Without the limits of her statutory capacity she is not bound by estoppel,⁶ even if she has misrepresented facts which, if true, would

⁵ *National Granite Bank v. Tyndale*, 176 Mass. 547, 51 L. R. A. 447, 57 N. E. 1022.

⁶ *Smith v. Ingram*, 130 N. Car. 100, 61 L. R. A. 878, 40 S. E. 984.

⁷ *McKinney v. Street*, 107 Tenn. 526, 64 S. W. 482.

⁸ *Kennedy v. Harris*, 3 Ind. Ter. 487, 58 S. W. 567; *Blantz v. Bain*, 95 Tenn. 87, 31 S. W. 159.

¹ Estoppel by deed. *Jones v. Hill*, 70 Ark. 34, 66 S. W. 194; *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707; *Sandwich, etc., Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379; *Chemical National Bank v. Kellogg*, 183 N. Y. 92, 2 L. R. A. (N.S.) 299, 75 N. E. 1103.

² *Bruce v. Goodbar*, 104 Tenn. 638, 58 S. W. 282.

See also, *Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645; *Krauth v. Thiele*, 45 N. J. Eq. 407, 18 Atl. 351.

³ *Hackettstown, etc., Bank v. Ming*, 52 N. J. Eq. 156, 27 Atl. 920.

⁴ *Tompkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472, 62 S. W. 1021.

⁵ *Chemical National Bank v. Kellogg*, 183 N. Y. 92, 2 L. R. A. (N.S.) 299, 75 N. E. 1103.

⁶ *Alabama. Marbury Lumber Co. v. Woolfolk*, 186 Ala. 254, 65 So. 43; *Corinth Bank & Trust Co. v. Pride*, — Ala. —, 79 So. 255.

New Jersey. Sherwin v. Sternberg, 78 N. J. L. 557, 74 Atl. 510.

have conferred capacity upon her.⁷ If by statute she can not bind herself as surety for her husband, she can not become liable by estoppel.⁸ Where by statute she can not mortgage her property for the debt of her husband, she is not estopped to deny the validity of such mortgage,⁹ nor is she estopped by joining in her husband's deed of her property, releasing dower therein as if it were his.¹⁰ Thus if she has no capacity to make a covenant of warranty she is not estopped to set up an after-acquired title in realty conveyed by her by deed containing such covenant.¹¹ However, if she has agreed to a separation, the written agreement for which is not acknowledged by her as required by statute, but which is immediately performed, she can not retain what she has received under such contract and claim the dower released by such defective contract.¹² Mere delay in giving notice of the fact that an instrument is a forgery has been held not to estop her.¹³

§ 1685. Right to avoid executed contracts. In some jurisdictions a married woman may acquire property and yet may not bind herself by an executory contract. In such jurisdictions a married woman can not avoid a purchase of property, and recover money paid therefor by her, after such purchase has been executed, even if she might have avoided liability under the contract while it was executory.¹

Indiana. *Powers v. Nesbit*, 127 Ind. 497, 27 N. E. 501.

North Carolina. *Vanderbilt v. Brown*, 128 N. Car. 498, 39 S. E. 36.

Tennessee. *Taylor v. Swafford*, 122 Tenn. 303, 123 S. W. 350.

⁷ *Buchanan v. Hubbard*, 96 Ind. 1; *Keen v. Coleman*, 39 Pa. St. 299, 80 Am. Dec. 524.

⁸ *Corinth Bank & Trust Co. v. Pride*, — Ala. —, 79 So. 255.

⁹ *Bentley v. Goodwin*, 26 Ind. App. 689, 60 N. E. 735.

¹⁰ *Gibson v. Clark*, 132 Ala. 370, 31 So. 472.

Contra, *Jones v. Hill*, 70 Ark. 34, 66 S. W. 194.

¹¹ *Threefoot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 So. 513; *Menard v. Campbell*, 180 Mich.

583, 147 N. W. 556; *Wadkins v. Watson*, 86 Tex. 194, 22 L. R. A. 779, 24 S. W. 385.

¹² *Kaiser's Estate*, 199 Pa. St. 269, 85 Am. St. Rep. 785, 49 Atl. 79.

¹³ *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707, 52 Atl. 681. (Delay for three years.)

¹ **Arkansas.** *Sellmeyer v. Welch*, 47 Ark. 485, 1 S. W. 777.

Mississippi. *Johnson v. Jones*, 51 Miss. 860.

Pennsylvania. *Gould v. McFall*, 118 Pa. St. 455, 4 Am. St. Rep. 606, 12 Atl. 336.

Tennessee. *Edwards v. Stacey*, 113 Tenn. 257, 106 Am. St. Rep. 831, 82 S. W. 470.

Texas. *Pitts v. Elser*, 87 Tex. 347, 28 S. W. 518.

§ 1686. Coverture must be pleaded. To be available as a defense coverture must be pleaded.¹ If such defense is not made, a judgment against her on a void contract is valid.² If under the law a married woman is liable except in certain cases, an answer alleging coverture, but not alleging facts within one of such cases is insufficient.³ As to a petition filed against a married woman the weight of authority is that facts must appear both in pleading and evidence to bring the married woman within the provisions of the statute in order to hold her on her contracts, her liability not being presumed.⁴

§ 1687. Who can use coverture as a defense. Only the married woman can take advantage of coverture as a defense.¹ Thus under a statute forbidding a married woman to act as surety only she or her privies in blood representation or estate can interpose coverture as a defense.² The husband or those claiming under him can not plead her coverture.³ So the adversary party to the contract can not avoid the contract on the ground of coverture if the married woman offers to perform.⁴ Thus if she has agreed to convey realty,

¹ *Strauss v. Glass*, 108 Ala. 546, 18 So. 526; *Rogers v. Shewmaker*, 27 Ind. App. 631, 87 Am. St. Rep. 274, 60 N. E. 462; *Perkins v. Blethen*, 107 Me. 443, 31 L. R. A. (N.S.) 1148, 78 Atl. 574; *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854.

² *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854.

³ *Strauss v. Glass*, 108 Ala. 546, 18 So. 526.

⁴ *Arkansas. Warner v. Hess*, 66 Ark. 113, 49 S. W. 489.

Indiana. Emmett v. Yandes, 60 Ind. 548.

Nebraska. Westervelt v. Baker, 56 Neb. 63, 76 N. W. 440 [citing and following, *Grand, etc., Co. v. Wright*, 53 Neb. 574, 74 N. W. 82].

North Carolina. Moore v. Wolfe, 122 N. Car. 711, 30 S. E. 120.

Pennsylvania. Hecker v. Haak, 88 Pa. St. 238; *Koechling v. Henkel*, 144 Pa. St. 215, 22 Atl. 808.

Virginia. Duval v. Chef, 92 Va. 489, 23 S. E. 893.

¹ *Alabama. Crumbley v. Searcey*, 46 Ala. 328; *Dudley v. Witter*, 51 Ala. 456.

Arkansas. Gardner v. Barnett, 36 Ark. 476.

Florida. Ocklewaha River Farms Co. v. Young, — Fla. —, 74 So. 644.

Georgia. Jones v. Harrell, 110 Ga. 373, 35 S. E. 690.

Illinois. Hawes v. Favor, 161 Ill. 440, 43 N. E. 1076.

Indiana. Bennett v. Maltingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; *Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099; *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412.

Missouri. Lindsley v. Patterson (Mo.), L. R. A. 1915F, 680, 177 S. W. 826.

² *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412.

³ *Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099; *Lindsley v. Patterson (Mo.)*, L. R. A. 1915F, 680, 177 S. W. 826.

⁴ *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076; *Carpenter v. Mitchell*, 54 Ill. 126; *Holmes v. Holmes*, 107 Ky. 163, 92 Am. St. Rep. 342, 53 S. W. 29.

and tenders a valid deed,⁵ the adversary party can not interpose the objection of her original lack of capacity. So he can not recover payments made by him under such contract.⁶ If she has performed and can not be placed in statu quo, she may have specific performance.⁷ So after she has performed, the adversary party is liable for the payments stipulated in the contract.⁸ One who has purchased realty from a married woman can not set up her coverture in order to avoid her prior conveyance of the same realty on the sole ground that it was conveyed for her husband's debt.⁹ If, however, the contract is executory on both sides, and the promise of the married woman is the sole consideration for the promise of the adversary party, no consideration exists for such promise of the adversary party, where the promise of the married woman is void. In cases of this sort, the adversary party does not use coverture as a defense; but there is no consideration, and hence no contract.¹⁰

⁵ *Holmes v. Holmes*, 107 Ky. 163, 92 Am. St. Rep. 342, 53 S. W. 29. (She was a feme covert when the contract was made, but discoverd when the deed was tendered.)

⁶ *Keystone Iron Co. v. Logan*, 55 Minn. 537, 57 N. W. 156.

⁷ *Richards v. Doyle*, 36 O. S. 37, 38 Am. Rep. 550.

⁸ *Lindsey v. Lindsey*, 116 Ia. 480, 89 N. W. 1096. (In this case she had authority to contract for her own serv-

ices. She was living with her husband, and contracted with a third party to furnish board to his employes. It was held that a settlement between such third person and her husband could not discharge her right under the contract.)

⁹ *Ocklawaha River Farms Co. v. Young*, — Fla. —, 74 So. 644.

¹⁰ *Shirk v. Stafford*, 31 Ind. App. 247, 67 N. E. 542.

CHAPTER LIII

PARTNERSHIP

- § 1688. Nature of partnership.
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- § 1719. Peculiarities of enforcement of contract between partners—Accounting involved.
- § 1720. Accounting not involved.
- § 1721. Accounts involving three or more parties, or common member.
- § 1722. Personal liability of partner on unauthorized contract.

§ 1688. Nature of partnership. A partnership is a business relation between two or more persons arising out of a contract,¹ by which they agree to unite their property, credit, services, skill or influence in some business, so that they have a community of interest in such business,² and usually divide the profits and losses between themselves in a fixed proportion.³ While this is a fairly correct statement of the nature of a partnership, it is generally conceded that it is much easier to give an illustration of a partner-

¹ **United States.** *London Assurance Co. v. Drennen*, 116 U. S. 461, 29 L. ed. 688; *Ryan v. Cavanagh*, 238 Fed. 604.
California. *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777.

Connecticut. *Samstag & Hilder Bros. v. Ottenheimer*, 90 Conn. 475, 97 Atl. 865.

Illinois. *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Briggs v. Rice Co.*, 83 Ill. App. 618.

Indiana. *Bacon v. Christian*, 184 Ind. 517, 111 N. E. 628; *Driscoll v. Sullivan*, 186 Ind. 178, 115 N. E. 331.

Kansas. *Wade v. Hornaday*, 92 Kan. 293, 140 Pac. 870.

Kentucky. *Crawford v. Wiedemann*, 159 Ky. 18, 166 S. W. 595.

Minnesota. *Meagher v. Fogarty*, 129 Minn. 417, 152 N. W. 833.

Missouri. *Ringolsky v. Maud L. Mining Co.*, 262 Mo. 241, 171 S. W. 56; *Simmons v. Ingram*, 78 Mo. App. 603.

Pennsylvania. *Martin v. Baird*, 175 Pa. St. 540, 34 Atl. 809.

South Dakota. *Rotzein v. Merchants' Loan & Trust Co.*, — S. D. —, 170 N. W. 128.

West Virginia. *Clark v. Emery*, 58 W. Va. 637, 5 L. R. A. (N.S.) 503, 52 S. E. 770.

² **Alabama.** *Stafford v. Sibley*, 113 Ala. 447, 21 So. 459; *Herren v. Harris*, — Ala. —, 78 So. 921.

California. *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777.

Illinois. *National Surety Co. v. Townsend, etc., Co.*, 176 Ill. 156, 52 N. E. 938 [affirming, 74 Ill. App. 312].

Indiana. *Bacon v. Christian*, 184 Ind. 517, 111 N. E. 628.

Massachusetts. *Arnold v. Maxwell*, 223 Mass. 47, 111 N. E. 687.

Minnesota. *Baldwin v. Eddy*, 64 Minn. 425, 67 N. W. 349; *McKasy v. Huber*, 65 Minn. 9, 67 N. W. 650; *Meagher v. Fogarty*, 129 Minn. 417, 152 N. W. 833.

Mississippi. *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (N.S.) 975, 46 So. 73.

Missouri. *Dixon v. Dixon*, — Mo. —, 181 S. W. 34.

New Mexico. *Willey v. Renner*, 8 N. M. 641, 45 Pac. 1132.

North Carolina. *Gorham v. Cotton*, 174 N. Car. 727, 94 S. E. 450.

Ohio. *Harvey v. Childs*, 28 O. S. 319, 22 Am. Rep. 387.

Oregon. *Northwestern Transfer Co. v. Investment Co.*, 81 Or. 75, 158 Pac. 281.

Pennsylvania. *Frazier v. Linton*, 183 Pa. St. 186, 38 Atl. 589.

South Dakota. *Rotzein v. Merchants' Loan & Trust Co.*, — S. D. —, 170 N. W. 128.

Tennessee. *Carter v. McClure*, 98 Tenn. 109, 60 Am. St. Rep. 842, 36 L. R. A. 282, 38 S. W. 585.

West Virginia. *Clark v. Emery*, 58 W. Va. 637, 5 L. R. A. (N.S.) 503, 52 S. E. 770.

³ *Bacon v. Christian*, 184 Ind. 517, 111 N. E. 628.

"In order that persons may be partners in the legal acceptance of the word, it is requisite that they shall share something by virtue of an agree-

ship than it is to give a comprehensive and accurate definition; and indeed it has been said that an accurate definition is impossible.⁴

A partnership ordinarily involves a mutual agency among the different partners, and this is sometimes referred to as if it were the distinguishing characteristic of the partnership.⁵ As between the partners, however, one partner may be authorized to make contracts to the exclusion of the others.⁶ One partner may be authorized to take exclusive charge of some line of the partnership business.⁷ One of the partners may be authorized to supervise the actions of the other partners in certain lines of the partnership business.⁸

The fact that each associate has a lien on the stock for his share of the profits has been said to be decisive that a partnership was created,⁹ although the existence of such lien would seem to be a consequence of a partnership rather than a determining fact of the existence of a partnership.

While a partner may maintain a suit in equity for an accounting,¹⁰ the fact that a party is entitled to bring a suit for an accounting

ment to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business, engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every 'partnership,' and is the leading feature of nearly every definition of the term." *Miller v. Simpson*, 107 Va. 476, 18 L. R. A. (N.S.) 962, 59 S. E. 378.

⁴ *Pooley v. Driver*, L. R. 5 Ch. Div. 458; *McMurtrie v. Guiler*, 183 Mass. 451, 67 N. E. 358; *Langley v. Sanborn*, 135 Wis. 178, 114 N. W. 787.

⁵ *Alabama*. *Herren v. Harris*, — Ala. —, 78 So. 921.

California. *Stenian v. Tashjian*, — Cal. —, 174 Pac. 883.

Connecticut. *Samstag & Hilder Bros. v. Ottenheimer*, 90 Conn. 475, 97 Atl. 865.

Missouri. *Dixon v. Dixon*, — Mo. —, 181 S. W. 84.

North Carolina. *Robinson v. Daughtry*, 171 N. Car. 200, 88 S. E. 252; *Gorham v. Cotton*, 174 N. Car. 727, 94 S. E. 450; *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 Pac. 1067; *Northwestern Transfer Co. v. Investment Co.*, 81 Or. 75, 158 Pac. 281.

"A copartnership is in its essence a contract of agency. Each partner is the general agent of the firm, and the firm is the agent of each partner, with power to bind him to a personal liability in favor of partnership creditors." *Lapenta v. Lettieri*, 72 Conn. 377, 383, 77 Am. St. Rep. 315, 44 Atl. 730.

⁶ *Gill v. Crosby*, 63 Ill. 190; *Richard v. Mouton*, 109 La. 465, 33 So. 563; *Groth v. Payment*, 79 Mich. 290, 44 N. W. 611.

⁷ *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777; *Gill v. Crosby*, 63 Ill. 190.

⁸ *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777.

⁹ *Pratt v. Langdon*, 94 Mass. (12 All.) 544.

¹⁰ See § 1719; *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (N.S.) 975, 46 So. 73.

does not of itself establish conclusively the fact that he is a partner. Accordingly, one whose compensation is measured by a share of the profits and who accordingly has a right to bring a suit for an accounting, is not a partner as a matter of law.¹¹

§ 1689. Partnership as legal entity. A partnership differs from a corporation in that a corporation is a legal personality,¹ while a partnership is merely a relation between two or more persons,² and "is not a being distinct from its members."³ Under statutes which provide that a partnership may sue or may be sued in its firm name, it is said, however, that a partnership is a legal entity distinct from the individuals who make up the partnership.⁴ The civil law is inclined to regard a partnership as a distinct legal entity.⁵

In most jurisdictions, however, a partnership is not an artificial person at law. Its liability exists only through the liability of its partners. Without statutory authority it can not be sued in its firm name.⁶ A statute allowing a suit against a firm by the firm name does not destroy the common-law right to sue the individual.⁷

§ 1690. Form and content of partnership contract. The contract of partnership may be express, and either written¹ or oral.² An oral contract of partnership to last for more than one year from the date of the making is held to be within the Statute of Frauds in some jurisdictions and unenforceable with reference to its duration.³ The contract of partnership may be implied from the conduct

¹¹ *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (N.S.) 975, 46 So. 73.

¹ See § 1971.

² *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, 1 A. L. R. 556; *Harris v. Visscher*, 57 Ga. 229; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418.

³ *Chambers v. Sloan*, 19 Ga. 84, 85.

A deed to "A & Co." passes title to the members of the firm as tenants in common. *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, 1 A. L. R. 556.

⁴ *Van Dyk v. Mosterd*, 171 Ia. 3, 153 N. W. 206; *Smith v. Smith*, 179 Ia. 1365, 160 N. W. 756; *Heaton v. Shaef-*

fer, 34 Okla. 631, 43 L. R. A. (N.S.) 540, 126 Pac. 797; *Holmes v. Alexander*, 52 Okla. 122, 152 Pac. 819.

⁵ *Newman v. Eldridge*, 107 La. 315, 31 So. 688.

⁶ *Fox v. Grocery Co. (Ky.)*, 60 S. W. 414.

⁷ *Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413; *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391; *Craig v. Smith*, 10 Colo. 220, 15 Pac. 337; *Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac. 234.

¹ *Gibbs's Estate*, 157 Pa. St. 59, 22 L. R. A. 276, 27 Atl. 383.

² *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484.

³ *Wahl v. Barnum*, 116 N. Y. 87, 5 L. R. A. 623, 22 N. E. 280.

of the parties.⁴ It may include a single transaction⁵ as well as an extended series of transactions.⁶ As between the parties the question of partnership is one of intention,⁷ being in the first instance a question of fact,⁸ but when the facts are conceded or established, a question of law.⁹

As in other cases of construction,¹⁰ the question whether the parties have formed a partnership or not is to be determined by what they have agreed to do and not by what they have agreed to

⁴United States. *Ryan v. Cavanagh*, 238 Fed. 604.

Illinois. *Haug v. Haug*, 90 Ill. App. 604.

New Jersey. *Hallenback v. Rogers*, 57 N. J. Eq. 199, 40 Atl. 576 [affirmed, 58 N. J. Eq. 580, 43 Atl. 1098].

Oklahoma. *Mendonca v. Russell*, 50 Okla. 376, 150 Pac. 1061.

West Virginia. *William Deering, etc., Co. v. Coberly*, 44 W. Va. 606, 29 S. E. 512. An actual partnership in which the partnership contract is inferred as a fact from the conduct of the parties must be distinguished from those cases where there is no partnership, but the persons have estopped themselves from denying its existence.

See §§ 1706 et seq.

⁵California. *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777.

Illinois. *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628.

Indiana. *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735.

Iowa. *Richards v. Grinnell*, 63 Ia. 44, 50 Am. Rep. 727, 18 N. W. 668; *Pennybacker v. Leary*, 65 Ia. 220, 21 N. W. 575.

Kansas. *Simpson v. Tenney*, 41 Kan. 561, 21 Pac. 634; *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484.

Missouri. *Hunter v. Whitehead*, 42 Mo. 524.

New York. *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550.

Ohio. *Yeoman v. Lasley*, 40 O. S. 190; *Hulett v. Fairbanks*, 40 O. S. 233.

Texas. *Spencer v. Jones*, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118.

Utah. *Morgan v. Child*, 47 Utah 417, 155 Pac. 451.

Virginia. *Canada v. Barksdale*, 76 Va. 899.

⁶*Morgan v. Child*, 47 Utah 417, 155 Pac. 451.

⁷*Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777; *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 Pac. 1067; *Morgan v. Child*, 47 Utah 417, 155 Pac. 451; *Clark v. Emery*, 58 W. Va. 637, 5 L. R. A. (N.S.) 503, 52 S. E. 770.

⁸Indiana. *Aylesworth v. Aylesworth*, 184 Ind. 80, 109 N. E. 750.

Massachusetts. *Adamson v. Guild*, 177 Mass. 331, 58 N. E. 1081.

Michigan. *Densmore v. Mathews*, 58 Mich. 616, 26 N. W. 146.

New Jersey. *Seabury v. Bolles*, 51 N. J. L. 103, 11 L. R. A. 136, 16 Atl. 54.

Texas. *Spencer v. Jones*, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118.

⁹Connecticut. *Morgan v. Farrel*, 58 Conn. 413, 18 Am. St. Rep. 282, 20 Atl. 614.

Illinois. *Schmidt v. Balling*, 91 Ill. App. 388.

Iowa. *Janney v. Springer*, 78 Ia. 617, 16 Am. St. Rep. 460, 43 N. W. 461.

Michigan. *Kingsbury v. Thorp*, 61 Mich. 216, 28 N. W. 74.

Ohio. *Farmers' Ins. Co. v. Ross*, 29 O. S. 429.

¹⁰See §§ 2038 et seq.

call themselves.¹¹ If the contract contains the elements which are necessary to make it a contract of partnership, the relationship of the partners is not altered by the fact that they have agreed expressly that they will not call themselves a partnership.¹²

If the parties enter into a relationship which the law holds to be a partnership they are partners, although they may not have known the legal effect of their acts,¹³ or though they may have called the contract one of employment.¹⁴

As between an alleged partnership on the one hand and persons who have dealt with it on the other, it is frequently said that the members of the alleged partnership can be held liable as partners only if there is really a partnership agreement between them or if they have estopped themselves as against such third persons to deny the existence or powers of the partnership,¹⁵ or if they have ratified the transaction.¹⁶ Where this view prevails there is no such thing as a partnership by construction which in the absence of estoppel or ratification can impose partnership liability upon persons who, as between themselves, are not partners in fact.¹⁷ It is, however, held by some authorities,¹⁸ following an English case,¹⁹ which is no longer authority in England on this point,²⁰ that there may be a

¹¹ *Indiana*. *Bacon v. Christian*, 184 Ind. 517, 111 N. E. 628.

Kansas. *Wade v. Hornaday*, 92 Kan. 293, 140 Pac. 870.

Louisiana. *Cameron v. Orleans & J. Ry.*, 108 La. 83, 32 So. 208.

Michigan. *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785.

Texas. *Freeman v. Huttig Sash & Door Co.*, 105 Tex. 560, 153 S. W. 122.

¹² *Bacon v. Christian*, 184 Ind. 517, 111 N. E. 628; *Gunnison v. Langley*, 85 Mass. (3 All.) 337; *Cameron v. Orleans & Jefferson Ry.*, 108 La. 83, 32 So. 208.

¹³ *California*. *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777.

Florida. *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 27 L. R. A. 126, 16 So. 601.

Kansas. *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484.

New York. *Magovern v. Robertson*,

116 N. Y. 61, 5 L. R. A. 589, 22 N. E. 398.

Wisconsin. *Spaulding v. Stubbings*, 86 Wis. 255, 39 Am. St. Rep. 888, 56 N. W. 469; *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022.

¹⁴ *Cameron v. Ry.*, 108 La. 83, 32 So. 208.

¹⁵ *McCormick v. Stimson*, 54 Mont. 272, 169 Pac. 726; *St. Paul Machinery Mfg. Co. v. Bruce*, 54 Mont. 549, 172 Pac. 330; *Rotzien v. Merchants' Loan & Trust Co.*, — S. D. —, 170 N. W. 128. See § 1706.

¹⁶ See §§ 953 et seq.

¹⁷ *Bullen v. Sharp*, L. R. 1 C. P. 86; *Thompson v. First National Bank*, 111 U. S. 529, 28 L. ed. 507.

¹⁸ *Bromley v. Elliott*, 38 N. H. 287, 75 Am. Dec. 182; *Wessels v. Weiss*, 166 Pa. St. 490, 31 Atl. 247; *Cothran v. Marmaduke*, 60 Tex. 370.

¹⁹ *Waugh v. Carver*, 2 H. Bl. 235.

²⁰ *Cox v. Hickman*, 8 H. L. Cas. 268.

partnership as to third persons by construction without any element of estoppel or ratification and without the existence of a partnership relation between the partners themselves.

§ 1691. Name of partnership. A partnership may, in the absence of statutory provision, transact business under an arbitrary or fictitious name.¹ If the members of a corporation purchase its business and proceed to carry on such business in the name of the corporation, they are liable as partners.² Some statutes forbid a partnership to use a name which will deceive the general public as to the identity of the members of the partnership.³ Under many of the statutes allowing a firm to sue in its firm name it must file a certificate with some specified officer showing the true names of the partners.⁴ This statute does not apply to a firm whose name shows the surnames of its partners,⁵ or to a foreign partnership which has no place of doing business within the state.⁶ A partnership having a fictitious name must file a new certificate on a change in membership, or it can not take a cognovit judgment.⁷

§ 1692. Joint ownership. The real test of the existence of a partnership is a community of interest in the partnership business.¹ The fact that two or more persons are joint owners of property does not of itself make them partners.² An agreement between A and B

¹ *United States*. *Winship v. Bank*, 30 U. S. (5 Pet.) 529, 8 L. ed. 216.

Georgia. *Kahn v. Thompson*, 113 Ga. 957, 39 S. E. 322.

Maine. *Cummings Manufacturing Co. v. Smith*, 113 Me. 347, 93 Atl. 968.

Massachusetts. *Manufacturers', etc., Bank v. Winship*, 22 Mass. (5 Pick.) 11, 16 Am. Dec. 369.

Minnesota. *Holbrook v. Ins. Co.*, 25 Minn. 229.

Oregon. *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 40; *Frazier v. Cottrell*, 83 Or. 614, 162 Pac. 834.

² *Cummings Manufacturing Co. v. Smith*, 113 Me. 347, 93 Atl. 968.

³ *Rennie v. Stetler*, 196 Mich. 480, 162 N. W. 997.

Such statute does not apply to an individual who does business in the name of another. *Robinovitz v. Hamill*,

44 Okla. 437, L. R. A. 1915D, 981, 144 Pac. 1024.

See also, *Sagal v. Fylar*, 89 Conn. 293, L. R. A. 1915E, 747, 93 Atl. 1027.

⁴ *Sloman v. Bender*, 189 Mich. 258, 155 N. W. 581; *Calvert v. Newberger*, 20 Ohio C. C. 353, 11 Ohio C. D. 184; *Farquharson v. Wadkins*, 54 Okla. 450, 153 Pac. 1160.

⁵ *Carlock v. Cognacci*, 88 Cal. 600, 26 Pac. 597; *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659; *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566; *Czatt v. Case*, 61 O. S. 392, 55 N. E. 1004.

⁶ *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

⁷ *Cobble v. Bank*, 63 O. S. 528, 59 N. E. 221.

¹ See § 1688.

² *Alabama*. *Peck v. Lampkin*, — Ala. —, 75 So. 580.

to buy land "in partnership," does not amount to a partnership if A buys such land, takes the title in his own name, and pays therefor and B promises to repay the purchase price to him on demand.³ The fact that joint owners of notes agree that they shall be the property of the survivor does not constitute a partnership.⁴ Tenants in common are not partners with reference to a crop which they have produced and divided between them.⁵ A transfer by A of his business to B and C to convert into money for the purpose of paying A's debts, and then paying an annuity to A, does not make B and C partners.⁶ In the absence of some special contract, the part owners of a ship are not partners;⁷ nor are joint owners of a patent.⁸ A joint leasing of property does not constitute a partnership.⁹ A partnership was not formed where the owner of property transferred it to others to enable them to form a corporation, stock in which was to be part consideration for the property.¹⁰ A communistic society owning all property in common but not carrying on any business is not a partnership.¹¹

Arkansas. *Harrison v. Walker*, 124 Ark. 555, 188 S. W. 17.

California. *Fischer v. Carey*, 173 Cal. 185, L. R. A. 1917A, 1100, 159 Pac. 577.

Missouri. *Green v. Whaley*, 271 Mo. 636, 197 S. W. 355.

Montana. *Anaconda, etc., Co. v. Mining Co.*, 17 Mont. 519, 43 Pac. 924; *Croft v. Bain*, 49 Mont. 484, 143 Pac. 960.

Nebraska. *State Bank v. Kelley Co.*, 47 Neb. 678, 66 N. W. 619 [rehearing, 49 Neb. 242, 68 N. W. 481]; *Norton v. Brink*, 75 Neb. 566, 7 L. R. A. (N.S.) 945, 110 N. W. 668.

North Carolina. *Gorham v. Cotton*, 174 N. Car. 727, 94 S. E. 450.

Pennsylvania. *Dunham v. Loverock*, 158 Pa. St. 197, 38 Am. St. Rep. 838, 27 Atl. 990; *First National Bank v. Gitt*, 259 Pa. St. 84, 102 Atl. 428.

South Dakota. *Rotzien v. Merchants' Loan & Trust Co.*, — S. D. —, 170 N. W. 128.

Utah. *Strickley v. Hill*, 22 Utah 257, 83 Am. St. Rep. 786, 62 Pac. 893; *Rocky Mountain Stud Farm Co. v. Lunt*, 46 Utah 299, 151 Pac. 521.

Vermont. *Fish v. Thompson*, 68 Vt. 273, 35 Atl. 174.

Virginia. *Ferguson v. Gooch*, 94 Va. 1, 40 L. R. A. 234, 26 S. E. 397.

³ *Norton v. Brink*, 75 Neb. 566, 7 L. R. A. (N.S.) 945, 110 N. W. 669.

See also, *Gorham v. Cotton*, 174 N. Car. 727, 94 S. E. 450.

⁴ *Green v. Whaley*, 271 Mo. 636, 197 S. W. 355.

⁵ *First National Bank v. Gitt*, 259 Pa. St. 84, 102 Atl. 428.

⁶ *First National Bank v. Gitt*, 259 Pa. St. 84, 102 Atl. 428.

⁷ *Fischer v. Carey*, 173 Cal. 185, L. R. A. 1917A, 1100, 159 Pac. 577; *French v. Price*, 41 Mass. (24 Pick.) 13.

⁸ *Williams v. Knibbs*, 213 Mass. 534, 100 N. E. 666.

⁹ *Ottison v. Edmonds*, 15 Wash. 362, 46 Pac. 398.

¹⁰ *Mosier v. Parry*, 60 O. S. 388, 54 N. E. 364.

See also, *Harrison v. Walker*, 124 Ark. 555, 188 S. W. 17.

¹¹ *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044 [reversing, 100 Ill. App. 342].

§ 1693. Sharing profits—Necessity in partnership. Among the different tests for determining the existence of a partnership, sharing in profits and losses, or both, has been regarded as of great importance. It is sometimes said that a partnership can not exist unless there is a provision for sharing profits.¹ Whether or not this can be laid down as an arbitrary rule, it is a fact that in the contracts in which the partners agree to share losses and not to share profits, the transaction is as a rule not intended as a partnership. It has also been said that a partnership can not exist unless the partners are to share in the profits and losses.²

This principle has been so applied as to mean that sharing profits and losses is so usual an attribute of a partnership that it is implied from the relationship, and there need not be an express agreement to share losses.³ If the transaction shows that a partnership is intended, a contract to share net profits implies an agreement to share losses, in the absence of any specific provision to the contrary.⁴ So where A is to furnish capital, B to furnish labor, and both to share in the profits, a sharing of losses is implied.⁵ In most jurisdictions, however, a partner may, by express contract, share in the profits, but not in the losses.⁶ As a matter of fact, though most of the contracts which provide for sharing profits but not for sharing losses are not intended to create partnership, but to provide a measure of compensation which will depend upon the success of the enterprise.

§ 1694. Sharing profits—Effect as making parties partners. If the contract provides for a sharing in profits and losses in business

¹ Westcott v. Gilman, 170 Cal. 562, Ann. Cas. 1916E, 437, 150 Pac. 777.

² California. Jones v. Title Guarantee & Trust Co., — Cal. —, 173 Pac. 586; Stenian v. Tashjian, — Cal. —, 174 Pac. 883.

Colorado. Baldwin v. Patrick, 39 Colo. 347, 91 Pac. 828.

Iowa. Johnson v. Carter, 120 Ia. 355, 94 N. W. 850; Francis v. Francis, 180 Ia. 1191, 162 N. W. 839; Williams v. Herring, — Ia. —, L. R. A. 1918F, 798, 165 N. W. 342.

Missouri. Gill v. Ferris, 82 Mo. 156.

Pennsylvania. Hays v. Colonial Trust Co., 217 Pa. St. 53, 66 Atl. 143.

Vermont. Flint v. Eureka Marble Co., 53 Vt. 609.

³ Lutz v. Billick, 172 Ia. 543, 154 N. W. 884; Gates v. Johnson, 56 Neb. 808, 77 N. W. 407.

⁴ Johnson v. Carter, 120 Ia. 355, 94 N. W. 850; Lutz v. Billick, 172 Ia. 543, 154 N. W. 884; Municipal Paving Co. v. Herring, 50 Okla. 470, 150 Pac. 1067.

⁵ Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355; Wagner v. Butties, 151 Wis. 668, 139 N. W. 425.

⁶ Leeds v. Townsend, 89 Ill. App. 646; Jones v. Murphy, 93 Va. 214, 24 S. E. 825; Miller v. Simpson, 107 Va. 476, 18 L. R. A. (N.S.) 962, 59 S. E. 378; Cothran v. Marmaduke, 60 Tex. 379.

it is *prima facie* a partnership contract.¹ At least, such an arrangement tends very strongly to show that the parties thereto are partners.²

However, as the question is one of the intention of the parties, it is not safe to make this an arbitrary test. If there is no community of interest in the business transaction, mere sharing of profits and losses by special contract does not constitute a partnership.³ A contract by which A agrees to buy an interest in realty and B agrees to sell it as A's broker, and the profits after reimbursing A are to be divided, does not make A and B partners.⁴ A contract by which the owner of a farm leases it to one who is to manage it in consideration of which the profits and losses are to be divided in fixed proportions between the lessor and the lessee,⁵ or in consideration of which the crops produced upon such farm are to be divided between the lessor and the lessee in fixed proportions,⁶ does not make the parties thereto partners. So one partner's sharing

¹ Alabama. *Herren v. Harris*, — Ala. —, 78 So. 921.

Georgia. *Walls v. Atlanta Newspaper Union*, 141 Ga. 594, 81 S. E. 866.

Illinois. *Straus v. Kohn*, 83 Ill. App. 497; *Leeds v. Townsend*, 228 Ill. 451, 13 L. R. A. (N.S.) 191, 81 N. E. 1069.

Indiana. *Bacon v. Christian*, 184 Ind. 517, 111 N. E. 628; *Driscoll v. Sullivan*, — Ind. —, 115 N. E. 331; *Noyes v. Tootle*, 2 Ind. Terr. 144, 48 S. W. 1031; *Hart v. Hiatt*, 2 Ind. Terr. 245, 48 S. W. 1038.

Iowa. *Winter v. Pipher*, 96 Ia. 17, 64 N. W. 663; *Lutz v. Billick*, 172 Ia. 543, 154 N. W. 884.

Kansas. *Atchison, etc., Ry. v. Hucklebridge*, 62 Kan. 506, 64 Pac. 58.

Massachusetts. *Arnold v. Maxwell*, 223 Mass. 47, 111 N. E. 687.

North Carolina. *Bryan v. Bullock*, 119 N. Car. 193, 25 S. E. 865.

Virginia. *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812.

Wisconsin. *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077 [rehearing denied, 83 N. W. 288].

² United States. *Sun Insurance Co. v. Kountz Line*, 122 U. S. 583, 30 L. ed. 1137.

Colorado. *Richardson v. Keely*, 58 Colo. 47, 142 Pac. 167.

Massachusetts. *Phipps v. Little*, 213 Mass. 414, 100 N. E. 615.

Minnesota. *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

New Hampshire. *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192.

Wisconsin. *Whitney v. Ludington*, 17 Wis. 140, 84 Am. Dec. 734.

³ United States. *Drake v. Hall*, 220 Fed. 905, 136 C. C. A. 471.

Arkansas. *Wilson v. Todhunter*, — Ark. —, 207 S. W. 221.

District of Columbia. *Wilkinson v. Lincoln*, 46 D. C. App. 193, L. R. A. 1918E, 909.

Georgia. *Ruff v. Anderson*, 145 Ga. 83, 88 S. E. 545.

Illinois. *National Surety Co. v. Townsend, etc., Co.*, 176 Ill. 156, 52 N. E. 938 [affirming, 74 Ill. App. 312].

Mississippi. *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (N.S.) 975, 46 So. 73.

West Virginia. *Tyler v. Teter*, 75 W. Va. 217, 83 S. E. 906.

⁴ Jones v. Title Guarantee & Trust Co., — Cal. —, 173 Pac. 586.

⁵ Bradley v. Ely, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44.

⁶ Blue v. Leathers, 15 Ill. 31.

profits and losses with a stranger does not make such stranger a partner.⁷

An agreement to share profits alone is *prima facie* a partnership contract, though the inference is not as strong as from a sharing of both profits and losses.⁸

At English law an attempt was made to distinguish between a compensation equal to a share of the profits and a share of the profits as profits, holding a partnership always to exist in the latter case as a matter of law.⁹ This test is occasionally repeated in recent cases.¹⁰ Occasionally the distinction between right to a share of the proceeds and a right to a compensation equal to a part of the profits is repeated;¹¹ but such a statement is generally found in a case in which the contract is evidently one of agency and not of partnership. The rule that one who shared in the profits was a partner as to third persons was applied without regard to the intention of the parties,¹² and without any element of intent to become partners, estoppel to deny partnership liability, or ratification.¹³

⁷ *O'Connor v. Sherley*, 107 Ky. 70, 52 S. W. 1056.

⁸ *United States. Pleasants v. Fant*, 89 U. S. (22 Wall.) 116, 22 L. ed. 780; *Beauregard v. Case*, 91 U. S. 134, 23 L. ed. 263; *London, etc., Corp. v. Drennen*, 116 U. S. 461, 29 L. ed. 688; *Paul v. Cullum*, 132 U. S. 539, 33 L. ed. 430.

Connecticut. Tyler v. Waddingham, 58 Conn. 375, 8 L. R. A. 657, 20 Atl. 335.

Massachusetts. Dame v. Kempster, 146 Mass. 454, 15 N. E. 927.

Missouri. Fourth National Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823.

New York. First National Bank v. Gallaudet, 122 N. Y. 655, 25 N. E. 909.

North Carolina. Southern Fertilizer Co. v. Reams, 105 N. Car. 283, 11 S. E. 467; *Cossock v. Burgwyn*, 112 N. Car. 304, 16 S. E. 900; *Sawyer v. Bank*, 114 N. Car. 13, 18 S. E. 949; *Burroughs Adding Machine Co. v. Morrow*, 174 N. Car. 198, 93 S. E. 722.

Ohio. Wood v. Vallette, 7 O. S. 172; *First National Bank v. Ballard*, 19 Ohio C. C. 63, 10 Ohio C. D. 298.

Pennsylvania. Walker v. Tupper,

152 Pa. St. 1, 25 Atl. 172; *Wessels v. Weiss*, 166 Pa. St. 490, 31 Atl. 247.

West Virginia. Teter v. Moore, 80 W. Va. 443, 93 S. E. 342.

Wisconsin. Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336; *Spaulding v. Stubbings*, 86 Wis. 255, 39 Am. St. Rep. 888, 56 N. W. 469.

⁹ *Waugh v. Carver*, 2 H. Bl. 235.

¹⁰ "The principles of the law of partnership lead to the conclusion that, if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner in the resulting profits while they are undivided and remain as profits, the two are partners; the general rule being that, to constitute a partnership, there must be a community of interests *inter sese*, and that the parties should share the profits and losses." [Citing, *Jackson v. Haynie*, 106 Va. 365, 56 S. E. 148.] *Miller v. Simpson*, 107 Va. 476, 18 L. R. A. (N.S.) 962, 59 S. E. 378.

¹¹ *In re De Haven's Estate*, 248 Pa. St. 271, 93 Atl. 1013.

¹² *Waugh v. Carver*, 2 H. Bl. 235.

¹³ *Leggett v. Hyde*, 58 N. Y. 272, 17 Am. Rep. 244; *Townley v. Crickenberger*, 64 W. Va. 379, 63 S. E. 320.

This arbitrary distinction was overthrown in England.¹⁴ By the great weight of modern authority a contract to share profits does not amount to a partnership,¹⁵ even as to third persons,¹⁶ if the

¹⁴ *Cox v. Hickman*, 8 H. L. Cas. 268.
¹⁵ *England. Cox v. Hickman*, 8 H. L. Cas. 268.

United States. *Wilson v. Edmonds*, 130 U. S. 472, 32 L. ed. 1025; *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 835; *Bankers' Surety Co. v. Maxwell*, 222 Fed. 797, 138 C. C. A. 345; *Reid v. Shaffer*, 249 Fed. 553.

Arkansas. *Johnson v. Rothschilds*, 63 Ark. 518, 41 S. W. 996; *Wilson v. Todhunter*, — Ark. —, 207 S. W. 221.

California. *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425; *Cadenasso v. Antonelle*, 127 Cal. 382, 59 Pac. 765; *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777.

Colorado. *Butler v. Hinckley*, 17 Colo. 523, 30 Pac. 250.

Georgia. *Ruff v. Anderson*, 145 Ga. 83, 88 S. E. 545.

Illinois. *Morton v. Nelson*, 145 Ill. 586, 32 N. E. 916; *Grinton v. Strong*, 148 Ill. 587, 36 N. E. 559; *Gottschalk v. Smith*, 156 Ill. 377, 40 N. E. 937.

Iowa. *Clark v. Barnes*, 72 Ia. 563, 34 N. W. 419; *Winter v. Pipher*, 96 Ia. 17, 64 N. W. 663; *Porter v. Curtiss*, 96 Ia. 539, 65 N. W. 824; *Williams v. Herring*, — Ia. —, L. R. A. 1918F, 798, 165 N. W. 342.

Kansas. *Grantham v. Conner*, 97 Kan. 150, 154 Pac. 246.

Louisiana. *McWilliams v. Elder*, 52 La. Ann. 995, 27 So. 352; *Leonard v. Sparks*, 109 La. 543, 33 So. 594.

Maryland. *Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688; *Drovers', etc., Bank v. Roller*, 85 Md. 495, 60 Am. St. Rep. 344, 36 L. R. A. 767, 37 Atl. 30.

Michigan. *Murphy v. Craig*, 76 Mich. 155, 42 N. W. 1097.

Mississippi. *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (N.S.) 975, 46 So. 73.

Missouri. *Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Clifton v. Howard*,

89 Mo. 192, 58 Am. Rep. 97, 1 S. W. 26; *Breman Savings Bank v. Saw Co.*, 104 Mo. 425, 16 S. W. 209.

Montana. *Congdon v. Olds*, 18 Mont. 487, 46 Pac. 261; *Flathead County State Bank v. Ingham*, 51 Mont. 438, 153 Pac. 1005.

Nebraska. *Aetna Ins. Co. v. Bank*, 48 Neb. 544, 67 N. W. 449; *Whitney v. Bank*, 50 Neb. 438, 69 N. W. 933.

New Hampshire. *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192.

New Jersey. *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295; *Seabury v. Bolles*, 51 N. J. L. 103, 11 L. R. A. 136, 16 Atl. 54.

New York. *Grapel v. Hodges*, 112 N. Y. 419, 20 N. E. 542.

North Carolina. *American Trust Co. v. Life Insurance Co.*, 173 N. Car. 558, 92 S. E. 706.

Oklahoma. *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 Pac. 1067.

Pennsylvania. *Waverly National Bank v. Hall*, 150 Pa. St. 466, 30 Am. St. Rep. 823, 24 Atl. 665; *Dunhan v. Loverock*, 158 Pa. St. 197, 38 Am. St. Rep. 838, 27 Atl. 990; *Butler Savings Bank v. Osborne*, 159 Pa. St. 10, 39 Am. St. Rep. 665, 28 Atl. 163; *Taylor v. Fried*, 161 Pa. St. 53, 28 Atl. 993; *Ryder v. Jacobs*, 182 Pa. St. 624, 38 Atl. 471; *In re De Haven's Estate*, 248 Pa. St. 271, 93 Atl. 1013; *Producers' Lumber Co. v. Guiniven*, 260 Pa. St. 423, 103 Atl. 916.

Texas. *Brown v. Watson*, 72 Tex. 216, 10 S. W. 395.

Utah. *Morgan v. Child*, 47 Utah 417, 155 Pac. 451.

Virginia. *Miller v. Simpson*, 107 Va. 476, 18 L. R. A. (N.S.) 962, 59 S. E. 378.

Washington. *Griffiths v. Von Herberg*, 99 Wash. 236, 169 Pac. 587.

Wisconsin. *Riedeburg v. Schmitt*, 71 Wis. 644, 38 N. W. 336.

¹⁶ *United States. Berthold v. Gold-*

parties to the contract do not intend that there shall be a community of interest in the transaction and accordingly do not intend that the transaction shall be a partnership. Thus a promise to pay a certain percentage of profits for the use of a machine,¹⁷ or of a manufacturing plant,¹⁸ or for a lease of property,¹⁹ or for services rendered in the business,²⁰ as for managing and selling land,²¹ or

smith, 65 U. S. (24 How.) 536, 16 L. ed. 702; Wilson v. Edmonds, 130 U. S. 472, 32 L. ed. 1025.

Colorado. Richardson v. Keeley, 58 Colo. 47, 142 Pac. 167.

Kansas. Wade v. Hornaday, 92 Kan. 293, 140 Pac. 870.

Michigan. Colwell v. Britton, 59 Mich. 350, 26 N. W. 538.

Missouri. Hughes v. Ewing, 162 Mo. 261, 62 S. W. 463.

Nebraska. Garrett v. Republican Publishing Co., 61 Neb. 541, 85 N. W. 537.

¹⁷ Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

¹⁸ Thornton v. McDonald, 108 Ga. 3, 33 S. E. 680.

¹⁹ **Indiana.** Bradley v. Ely, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44.

Kansas. Weiland v. Sell, 83 Kan. 229.

Nebraska. Garrett v. Publishing Co., 61 Neb. 541, 85 N. W. 537.

New Jersey. Austin v. Neil, 62 N. J. L. 462, 41 Atl. 834.

New Mexico. Wormser v. Lindauer, 9 N. M. 23, 49 Pac. 896.

South Carolina. State v. Sanders, 52 S. Car. 580, 30 S. E. 616.

Texas. Houston, etc., Co. v. McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593.

²⁰ **United States.** Bankers' Surety Co. v. Maxwell, 222 Fed. 797, 138 C. C. A. 345; The Mettacommet, 230 Fed. 308 [decree affirmed, The Mettacommet, 233 Fed. 261, 147 C. C. A. 267].

Alabama. Gulf, etc., Co. v. Boyles, 129 Ala. 192, 29 So. 300.

Iowa. Johnson v. Carter, 120 Ia. 355, 94 N. W. 850; Williams v. Herring, — Ia. —, L. R. A. 1918F, 798, 165 N. W. 342.

Kentucky. Studebaker Corporation v. Dobbs, 161 Ky. 542, 171 S. W. 167.

Michigan. Canton Bridge Co. v. Eaton Rapids, 107 Mich. 613, 65 N. W. 761; Morrow v. Murphy, 120 Mich. 204, 79 N. W. 193 [modified, 80 N. W. 255].

Nebraska. Donahue v. Hanighen, 96 Neb. 180, 147 N. W. 464.

New Jersey. Stone v. Mfg. Co., 65 N. J. L. 20, 46 Atl. 696; Cornell v. Redrow, 60 N. J. Eq. 251, 47 Atl. 56.

North Carolina. Kootz v. Tuvian, 118 N. Car. 393, 24 S. E. 776; American Trust Co. v. Life Insurance Co., 173 N. Car. 558, 92 S. E. 706.

Oklahoma. Municipal Paving Co. v. Herring, 50 Okla. 470, 150 Pac. 1067.

Oregon. Sevier v. Mitchell, 72 Or. 483, 142 Pac. 780.

Pennsylvania. In re De Haven's Estate, 248 Pa. St. 271, 93 Atl. 1013; Producers' Lumber Co. v. Guiniven, 260 Pa. St. 423, 103 Atl. 916.

Texas. Murray City Ginning Co. v. Bank (Tex. Civ. App.), 61 S. W. 508.

Virginia. Manor v. Hindman, 123 Va. 767, 97 S. E. 332.

West Virginia. Clark v. Emery, 58 W. Va. 637, 5 L. R. A. (N.S.) 503, 52 S. E. 770.

Wisconsin. Wagner v. Buttles, 151 Wis. 668, 139 N. W. 425.

²¹ Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; Mayfield v. Turner, 180 Ill. 332, 54 N. E. 418; Grigsby v. Day, 9 S. D. 585, 70 N. W. 881. A contract by an employer to pay to his employees

for services and the use of a patent-right,²² or for sawing logs for another,²³ or cutting and rafting logs,²⁴ or for getting out rock asphalt for a paving company which is to use it in street paving,²⁵ or for selling cross-ties for another,²⁶ or for inducing an owner of realty to erect a building thereon and to lease it,²⁷ or to share commissions for customers furnished,²⁸ as commissions for insurance,²⁹ are none of them partnership contracts if the elements of community of interest and common control of business are lacking. A contract by which A, who has an option on land, agrees to divide profits with B, and B is to resell such property in case A is absent, does not create a partnership.³⁰ A contract between A, who has an option upon certain land, and B, by which B is to buy the land in his own name and to resell it and to divide the profits of the transaction with A, does not create a partnership.³¹ A contract by which the members of a crew are to receive a certain portion of the profits of the voyage as compensation for their services does not make them partners so as to make them liable together with the master for advances which the owner has made.³² A loan of money for use in partnership business,³³ even if a percentage of the profits is given therefor,³⁴ or a certain portion of the profits in addition to inter-

fixed salaries together with a certain share of the profits does not make them partners. *Williams v. Herring*, — Ia. —, L. R. A. 1918F, 798, 165 N. W. 342; *Goodin v. Pitt*, 36 Nev. 156, 134 Pac. 459; *Manor v. Hindman*, 123 Va. 767, 97 S. E. 332.

²² *Warwick v. Stockton*, 56 N. J. Eq. 61, 36 Atl. 488.

²³ *Hodges v. Rogers*, 115 Ga. 951, 42 S. E. 251.

²⁴ *Gore v. Benedict* (Tenn. Ch. App.), 61 S. W. 1054.

²⁵ *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 Pac. 1067.

²⁶ *Padgett v. Ford*, 117 Ga. 508, 43 S. E. 1002.

²⁷ *Griffiths v. Von Herberg*, 99 Wash. 235, 169 Pac. 587.

²⁸ *Wheeler v. Lack*, 37 Or. 238, 61 Pac. 849.

²⁹ *Peck v. Lampkin*, — Ala. —, 75 So. 580.

³⁰ *Clark v. Emery*, 58 W. Va. 637, 5 L. R. A. (N.S.) 503, 52 S. E. 770.

³¹ *Grantham v. Conner*, 97 Kan. 150, 154 Pac. 246.

³² *The Mettacomet*, 230 Fed. 308 [decree affirmed, *The Mettacomet*, 233 Fed. 261, 147 C. C. A. 267].

³³ *Johnson v. Carter*, 120 Ia. 355, 94 N. W. 850; *Richardson v. Carlton*, 109 Ia. 515, 80 N. W. 532; *Krall v. Forney*, 182 Pa. St. 6, 37 Atl. 846.

³⁴ *England*. In re *Young* [1896], 2 Q. B. 484; *King v. Whichelow*, 64 L. J. Q. B. N. S. 801.

United States. *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 835; *Randle v. Barnard*, 81 Fed. 682.

California. *Cadenasso v. Antonelle*, 127 Cal. 382, 59 Pac. 765.

Maryland. *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485.

Montana. *Hunter v. Conrad*, 18 Mont. 177, 44 Pac. 523.

New Jersey. *Clayton v. Davett* (N. J. Eq.), 38 Atl. 308.

Rhode Island. *State v. Hunt*, 25 R. I. 69, 54 Atl. 937.

est,³⁶ and even if the lender gives advice,³⁷ or manages the business as an agent,³⁷ or leases a fishery and lends money to operate it for one-half of the net proceeds as rental,³⁸ none of them constitute the lender a partner. A contract by which a debt is to be paid out of the net profits of the business is not necessarily a partnership contract.³⁹ A contract to indemnify against a certain per cent. of loss in consideration of a corresponding per cent. of the profits is not a partnership.⁴⁰ So a contract by which one furnishes logs and the other saws them into lumber and they divide the lumber,⁴¹ or the profits,⁴² is not a partnership.

If, however, there is a community of interest in the capital of the business the transaction creates a partnership,⁴³ even if the transaction assumes the outward form of a loan.⁴⁴ So contracts between A and B, whereby A is to buy goods of certain kinds and B is to sell them, are held to create partnerships, whether profits alone,⁴⁵ or both profits and losses,⁴⁶ are to be shared.⁴⁷ But a contract whereby A sells land to B, and C is to erect certain car-shops on part of it, and on resale the profits are to be divided between B and C, does not create a partnership. A can not, therefore, hold

Texas. *Contra*, *Rahl v. Orendorff Co.*, 27 Tex. Civ. App. 72, 64 S. W. 1007.

³⁶ *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 835.

³⁷ *Pape v. Simpson*, 188 Pa. St. 393, 68 Am. St. Rep. 874, 41 Atl. 638.

³⁸ *In re Young* [1896], 2 Q. B. 484; *Flathead County State Bank v. Ingham*, 51 Mont. 438, 153 Pac. 1005.

³⁹ *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817.

⁴⁰ *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (N.S.) 975, 46 So. 73.

⁴¹ *Haines's Estate*, 176 Pa. St. 354, 35 Atl. 237.

⁴² *Thornton v. George*, 108 Ga. 9, 33 S. E. 633.

⁴³ A share of profits for sawing logs, drying lumber and shipping it. *J. A. Fay, etc., Co. v. Ouachita, etc., Co.*, 51 La. Ann. 1708, 26 So. 386.

Contra, where one was to furnish logs, the other to saw them, and the profits to be divided. *Loveland v. Peter*, 108 Mich. 154, 65 N. W. 748.

⁴⁴ **Arkansas.** *Bank v. Goolsby*, 129 Ark. 416, 196 S. W. 803.

Georgia. *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 750.

Minnesota. *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

New York. *Snyder v. Lindsey*, 157 N. Y. 616, 52 N. E. 592; *Ortis v. Curtiss*, 157 N. Y. 657, 68 Am. St. Rep. 810, 52 N. E. 690 [rehearing denied, 53 N. E. 1129].

Washington. *Cassutt v. George W. Miller Co.*, 103 Wash. 222, 174 Pac. 433.

⁴⁵ *Johnson v. Rothschilds*, 63 Ark. 518, 41 S. W. 996 [citing, *Pooley v. Driver*, L. R. 5 Ch. Div. 458; *Dubos v. Jones*, 34 Fla. 539, 16 So. 392; *Harvey v. Childs*, 28 O. S. 319, 22 Am. Rep. 387].

⁴⁶ *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823.

⁴⁷ *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777; *Atchison, etc., Ry. v. Hucklebridge*, 62 Kan. 506, 64 Pac. 58.

⁴⁸ *Teter v. Moore*, 80 W. Va. 443, 93 S. E. 342.

C for the purchase price of the realty.⁴⁸ Sharing in gross receipts is not of itself a partnership,⁴⁹ as where attorneys make a contract for division of fees to be received in a certain case,⁵⁰ or where A trained B's horses, and they divided the winnings.⁵¹ So the ordinary form of a contract between a depot company and a railroad company,⁵² or between connecting carriers,⁵³ does not constitute a partnership.

It has been suggested that a joint interest in profits constitutes a partnership while a common interest in profits does not constitute a partnership.⁵⁴ This suggestion was made, however, in a case in which A agreed to pay a certain share of his profits to B as compensation for B's furnishing certain raw material which A was to use.⁵⁵

§ 1695. Examples of partnership. A partnership is formed by a combination of two land owners to sell the timber off their lands;¹ or to construct a lumber road to cut timber from the land of one of the parties and to operate such road;² or to sell land;³ or to buy and sell land;⁴ or where one is to furnish money to manufacture an article patented by the other;⁵ or where one is to furnish estimates

⁴⁸ Hughes v. Ewing, 162 Mo. 261, 62 S. W. 465.

A contract by which A is to erect houses on B's land and the property is then to be divided does not create a partnership, and B is not liable for debts incurred by A in performing such contract. Wilkinson v. Lincoln, 46 D. C. App. 193, L. R. A. 1918E, 909.

⁴⁹ Indiana. Shrum v. Simpson, 155 Ind. 160, 49 L. R. A. 792, 57 N. E. 708. (A cropping contract.)

Kansas. Concannon v. Rose, 9 Kan. App. 791, 59 Pac. 729.

Kentucky. Ohio Valley Tie Co. v. Hayes, 180 Ky. 469, 203 S. W. 193.

Michigan. Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785.

Ohio. McArthur v. Ladd, 5 Ohio 514.

South Dakota. Cedarberg v. Guernsey, 12 S. D. 77, 80 N. W. 159.

Massachusetts. Lawrence v. Snow, 156 Mass. 412, 31 N. E. 486.

North Carolina. Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445.

⁵⁰ Willis v. Crawford, 38 Or. 522, 53 L. R. A. 904, 63 Pac. 985, 64 Pac. 866.

⁵¹ Stone v. Supply Co., 103 Ky. 318, 45 S. W. 78.

⁵² Brady v. Ry., 114 Fed. 100, 57 L. R. A. 712.

⁵³ Post v. R. R., 103 Tenn. 184, 55 L. R. A. 481, 52 S. W. 301.

⁵⁴ Municipal Paving Co. v. Herring, 50 Okla. 470, 150 Pac. 1067.

⁵⁵ Municipal Paving Co. v. Herring, 50 Okla. 470, 150 Pac. 1067.

¹ Tanner v. Hughes (Ky.), 50 S. W. 1099.

² Mitchell v. Elizabeth River Lumber Co., 174 N. Car. 119, 93 S. E. 464.

³ Cronkrite v. Trexler, 187 Pa. St. 100, 41 Atl. 22.

⁴ Teter v. Moore, 80 W. Va. 443, 93 S. E. 342.

⁵ Illinois, etc., Co. v. Reed, 102 Ia. 538, 71 N. W. 423.

and iron for bridges and the other is to furnish other material and work and solicit orders;⁶ or where two attorneys take specified cases together, and assume the costs and divide the profits.⁷ A contract by which A is to furnish money to buy land on which B has an option, and B is to employ agents to sell the land and to attend to the sales thereof, and A and B are to divide the profits, creates a partnership.⁸ A contract by which A furnishes a place of business for B, and advertises for B, and B contributes his services, and they divide the profits;⁹ a contract by which a bank furnishes money to a pawnbroker, who contributes his services, the profits being divided;¹⁰ or a contract by which A buys a fractional interest in a brokerage business, under a contract by which he receives a salary for his services and shares in profits and losses,¹¹ is held in each case to create a partnership. But an agreement between A and B, attorneys, on the one part, and C, a client, on the other, whereby A and B were to manage certain litigation for C, C to pay costs, expenses and fees, and A and B to divide the fees, does not constitute A and B partners.¹² A contract between the owner of a department store and the head of a department by which the parties agree to share in the profits of such department, the former employe is to contribute his entire time and pay expenses of alteration, the former employer is to furnish a store-room, the services of his clerks, and a certain amount of capital, and that other expenses shall be charged to the department, amounts to a partnership.¹³ So creditors of an insolvent partnership who allowed the business to be carried on to make a profit for them were held as partners.¹⁴ A voluntary association of dredgers to fix prices and divide up work is not a part-

⁶ *Clinton, etc., Works v. Bank*, 103 Wis. 117, 79 N. W. 47.

⁷ *Southworth v. People*, 183 Ill. 621, 56 N. E. 407 [affirming, 85 Ill. App. 289].

⁸ *Moore v. Thorpe*, 233 Minn. 244, 158 N. W. 235.

See also, *Teter v. Moore*, 80 W. Va. 443, 93 S. E. 342.

⁹ *Cassutt v. George W. Miller Co.*, 103 Wash. 222, 174 Pac. 433.

¹⁰ *Bank v. Goolsby*, 129 Ark. 416, 196 S. W. 803.

¹¹ *Herren v. Harris*, — Ala. —, 78 So. 921.

¹² *Willis v. Crawford*, 38 Or. 522, 53 L. R. A. 904, 64 Pac. 866, 63 Pac. 985.

¹³ *Miller v. Simpson*, 107 Va. 476, 18 L. R. A. (N.S.) 962, 59 S. E. 378. For a similar contract which was held not to create a partnership because the losses were not divided, see *Williams v. Herring*. — Ia. —, L. R. A. 1918F, 798, 165 N. W. 342.

¹⁴ *Webb v. Hicks*, 123 N. Car. 244, 31 S. E. 479 [citing, *Taylor v. Bush*, 75 Ala. 432; *Hitchings v. Ellis*, 78 Mass. (12 Gray) 449].

Contra, *Fewell v. Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625, 28 So. 755.

nership. An organization under the trust plan which originated in Massachusetts is in legal effect a partnership.¹⁵

§ 1696. Limited partnerships. Statutes of many states provide for limited partnerships, in which one partner is the general partner, personally liable for all the firm's debts, while the others are special partners, liable only for the amount contributed by them.¹ The statute in such cases provides fully for filing a certificate showing the facts about the limited partnership and for publication as a means of giving notice. An attempted limited partnership which does not comply fully with the statute is a general partnership,² as where publication is omitted,³ or the statutory statement is omitted,⁴ or does not show the value of the contribution of the special partner as required by statute,⁵ or is false, as where it omits a mortgage,⁶ or where it recites that a partner's share is paid in when it is not paid in for a week thereafter.⁷ An attempted limited partnership becomes a general partnership where the assets on renewal were substantially less than at the original formation,⁸ or where assets of the old partnership are taken of such a value that it does not leave enough to pay old debts and the new firm assumes some of such debts,⁹ or where all the property of the old insolvent partnership was set aside as the property of the special partner.¹⁰ A limited partnership becomes a general partnership on expiration of the time for which it was formed.¹¹ But under a statute allowing a limited partnership to succeed to a firm name it may succeed to the name of one who becomes a limited partner, even if without

¹⁵ *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 571 [citing, *Elliott v. Freeman*, 220 U. S. 178, 55 L. ed. 424; *Garnett v. Richardson*, 35 Ark. 144; *Forbes v. Whittemore*, 62 Ark. 229]; *Potter v. Dredging Co.*, 59 N. J. Eq. 422, 46 Atl. 537.

¹ *Robbins Electric Co. v. Weber*, 172 Pa. St. 635, 34 Atl. 116.

² *Van Horne v. Corcoran*, 127 Pa. St. 255, 4 L. R. A. 386, 18 Atl. 16; *Ussery v. Crusman* (Tenn. Ch. App.), 47 S. W. 567.

³ *Davis v. Sanderlin*, 119 N. Car. 84, 25 S. E. 815.

⁴ *Spencer, etc., Co. v. Johnson*, 53 S. Car. 533, 31 S. E. 392.

⁵ *Blumenthal v. Whitaker*, 170 Pa. St. 309, 33 Atl. 103. (Where a reference to an appraisement of such contribution filed in court was held insufficient.)

⁶ *First National Bank v. Creveling*, 177 Pa. St. 270, 35 Atl. 595.

⁷ *Myers v. Electric Co.*, 59 N. J. L. 153, 35 Atl. 1069.

⁸ *Durgin v. Colburn*, 176 Mass. 110, 57 N. E. 213.

⁹ *Lee v. Burnley*, 195 Pa. St. 58, 45 Atl. 668.

¹⁰ *Fourth Street National Bank v. Whitaker*, 170 Pa. St. 297, 33 Atl. 100.

¹¹ *Sarmiento v. The Catharine C.*, 110 Mich. 120, 67 N. W. 1085.

such succession the use of his name would have made him a general partner.¹²

§ 1697. Joint stock companies. A partnership may by agreement issue stock and thus resemble a corporation in outward form without losing any of the essential attributes of a partnership,¹ and even if, by statute, the profits which can be divided annually among the members are limited to a certain per cent. of the capital.² One who buys stock and receives dividends is prima facie a shareholder in a corporation and not a partner.³ If a proposed corporation is abandoned before its corporate organization is completed, the persons who have incurred expenses under such an arrangement have been said to be partners.⁴

§ 1698. Form of contracts entered into by partnership. A partnership obligation may be signed by the name of the partnership, or by one of the partners in his own name,¹ or by the individual names of the different partners.² A negotiable instrument which is given as a part of a partnership transaction is a partnership obligation, although it is signed by the names of the individual partners.³

If the articles of partnership are not under seal, a partner can not execute a sealed instrument on behalf of the firm,⁴ such as a note under seal containing power of attorney which authorizes

¹² *Groves v. Wilson*, 168 Mass. 370, 47 N. E. 100.

¹ *Arkansas. Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 571.

Illinois. Hodgson v. Baldwin, 65 Ill. 532; *Wadsworth v. Duncan*, 164 Ill. 360, 45 N. E. 132.

Indiana. Kenyon v. Williams, 19 Ind. 44.

Massachusetts. Edwards v. Gasoline Works, 168 Mass. 564, 38 L. R. A. 791, 47 N. E. 502; *Ashley v. Dowling*, 203 Mass. 311, 89 N. E. 434.

New Hampshire. Farnum v. Patch, 60 N. H. 294, 49 Am. Rep. 313.

Tennessee. Carter v. McClure, 98 Tenn. 109, 60 Am. St. Rep. 842, 36 L. R. A. 282, 38 S. W. 585.

Vermont. Willis v. Chapman, 68 Vt. 459, 35 Atl. 459. A partnership is not a "corporation, joint-stock company, or association, or acting corporation or association" for purposes of serving summons. *In re Grossmayer*, 177 U. S. 48, 50, 44 L. ed. 665.

² *Ashley v. Dowling*, 203 Mass. 311, 89 N. E. 434.

³ *In re Gibbs*, 157 Pa. St. 59, 22 L. R. A. 276, 27 Atl. 383.

⁴ *Hall Lithographing Co. v. Crist*, 98 Kan. 723, 160 Pac. 198. See § 2107.

¹ *Blake v. Atlantic National Bank*, 33 R. I. 464, 39 L. R. A. (N.S.) 874, 82 Atl. 225.

² *In re Kendrick*, 226 Fed. 978.

³ *In re Kendrick*, 226 Fed. 978.

⁴ *Massachusetts. Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665

judgment to be confessed upon such note,⁵ even if a sealed instrument is negotiable by law in the state in which it is executed;⁶ but if a seal is not necessary to its validity, it may be rejected as surplusage.⁷ If the remaining partners are present and acquiesce in his use of a seal as their act,⁸ or if they ratify and adopt the seal as their own after he has affixed it,⁹ the instrument is their sealed instrument in law, not because of his power to bind them by his act, however, but because of their adoption of his seal.¹⁰

In a few states it is provided by statute that no debt shall be contracted or liability incurred by a joint stock association except by one or more of the managers; and that no liability for an amount exceeding a specified sum shall be incurred, except as against the person who incurs it, so as to bind the association unless it is reduced to writing and signed by at least two managers.¹¹ In determining whether the contract is executed in compliance with the statute, the records of the association may be considered as well as the contract itself,¹² and if the records of the association show that at

Michigan. *Fox v. Norton*, 9 Mich. 207.

North Carolina. *Aycock Supply Co. v. Windley*, — N. Car. —, 96 S. E. 664.

Pennsylvania. *Schmertz v. Shreeve*, 62 Pa. St. 457, 1 Am. Rep. 439; *Funk v. Young*, 254 Pa. St. 548, 99 Atl. 76.

South Carolina. *Milwee v. Jay*, 47 S. Car. 430, 25 S. E. 298.

West Virginia. *Waldron v. Hughes*, 44 W. Va. 128, 29 S. E. 505.

Such instrument may be treated as the sealed obligation of the partner who sealed it and the simple contract of the partnership. *Aycock Supply Co. v. Windley*, — N. Car. —, 96 S. E. 664.

⁵ *Funk v. Young*, 254 Pa. St. 548, 99 Atl. 76.

⁶ *Hull v. Young*, 30 S. Car. 121, 3 L. R. A. 521, 8 S. E. 695. (Note controlled by law of Georgia.)

Contra in Georgia under a statute providing that a partner may "execute any writing or bond in the course of the business" of the firm. *Merchants' & Farmers' Bank v. Johnston*, 130 Ga. 661, 17 L. R. A. (N.S.) 969, 61 S. E. 543.

⁷ *Edwards v. Dillon*, 147 Ill. 14, 37

Am. St. Rep. 199, 35 N. E. 135; *Sterling v. Bock*, 40 Minn. 11, 41 N. W. 236; *Waldron v. Hughes*, 44 W. Va. 128, 29 S. E. 505.

⁸ *Day v. Lafferty*, 4 Ark. 450; *Miller v. Royal Flint Glass Works*, 172 Pa. St. 70, 33 Atl. 350.

⁹ *Bond v. Aitkin*, 6 Watts & S. (Pa.) 165, 40 Am. Dec. 550.

¹⁰ See § 1158.

¹¹ *Citizens' Savings Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143; *Rhoades v. Malta Vita Pure Food Co.*, 149 Mich. 235, 112 N. W. 940; *Armstrong v. Stearns*, 156 Mich. 597, 121 N. W. 312; *Hoyt v. Paw Paw Grape Juice Co.*, 158 Mich. 619, 123 N. W. 529; *Beach v. Business Man's Publishing Co.*, 163 Mich. 226, 128 N. W. 177; *Howard v. Factory Land Co.*, 167 Mich. 251, 131 N. W. 113; *Geel v. Goulden*, 168 Mich. 413, 134 N. W. 484; *Pittsburgh Melting Co. v. Reese*, 118 Pa. St. 355, 12 Atl. 362; *Walker v. Keystone Brewing Co.*, 131 Pa. St. 546, 20 Atl. 309; *Mercantile National Bank v. Lauth*, 143 Pa. St. 53, 21 Atl. 1017.

¹² *Howard v. Factory Land Co.*, 167 Mich. 251, 131 N. W. 113.

a regular meeting all the managers and directors voted to enter into the contract, it has been held that the contract is valid, although the contract itself was signed by only one manager.¹³

Under such a statute no legal liability arises as against the partnership or association upon a contract which falls within the class fixed by the statute and which does not comply with the terms thereof.¹⁴ If the statute contains an exception in favor of merchandise contracts, such exception does not extend to a contract of employment.¹⁵ Such statutes apply to contracts for the purchase of land,¹⁶ or the sale of goods,¹⁷ or employment contracts,¹⁸ to contracts of endorsement,¹⁹ and to the acceptance of a bill of exchange.²⁰ The fact that the adversary party does not know that the law requires such formal execution on the part of the joint stock association does not excuse a failure to comply with such statute.²¹

The fact that the contract has been performed in part by the adversary party does not render it enforceable.²²

Where a limited partnership can incur a debt exceeding five hundred dollars only by a written contract signed by two managers, an oral contract by such a partnership exceeding such sum is no consideration for a promise by the adversary party.²³

§ 1699. Scope of partnership. The scope of a partnership is primarily a question of the intention of the partners. There is no

¹³ Howard v. Factory Land Co., 167 Mich. 251, 131 N. W. 113.

¹⁴ Citizens' Savings Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940; Armstrong v. Stearns, 156 Mich. 507, 121 N. W. 312; Hoyt v. Paw Paw Grape Juice Co., 158 Mich. 619, 123 N. W. 529; Beach v. Business Man's Publishing Co., 163 Mich. 226, 128 N. W. 177; Geel v. Goulden, 168 Mich. 413, 134 N. W. 484; Pittsburgh Melting Co. v. Reese, 118 Pa. St. 355, 12 Atl. 362; Walker v. Keystone Brewing Co., 131 Pa. St. 546, 20 Atl. 309; Mercantile National Bank v. Lauth, 143 Pa. St. 53, 21 Atl. 1017.

¹⁵ Beach v. Business Man's Publishing Co., 163 Mich. 226, 128 N. W. 177.

¹⁶ Geel v. Goulden, 168 Mich. 413, 134 N. W. 484.

¹⁷ Pittsburgh Melting Co., v. Reese, 118 Pa. St. 355, 12 Atl. 362.

¹⁸ Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940; Hoyt v. Paw Paw Grape Juice Co., 158 Mich. 619, 123 N. W. 529; Beach v. Business Man's Publishing Co., 163 Mich. 226, 128 N. W. 177; In re Hooper's Estate, 179 Mich. 67, 146 N. W. 275.

¹⁹ Citizens' Savings Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143.

²⁰ Mercantile National Bank v. Lauth, 143 Pa. St. 53, 21 Atl. 1017.

²¹ Citizens' Savings Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; Mercantile National Bank v. Lauth, 143 Pa. St. 53, 21 Atl. 1017.

²² Geel v. Goulden, 168 Mich. 413, 134 N. W. 484; Walker v. Keystone Brewing Co., 131 Pa. St. 546, 20 Atl. 309.

²³ Park Bros. v. Harwi, 2 Kan. App. 629, 42 Pac. 939.

restriction on the exercise of such powers as it chooses at any time to exercise, except such prohibitions on illegal, immoral or fraudulent conduct as apply equally to individuals.¹ As between the partners the scope of the partnership may be altered by mutual consent.² A partnership may itself be a member of another firm if the partners of the constituent firm consent thereto.³

If it appears that all the partners have either authorized or ratified the specific contract, no further question as to its validity ordinarily remains. The cases where the question of the validity of partnership contracts arises is where one partner has made the contract without specific authority from his co-partners.

As to their implied scope partnerships may be divided into the classes of the non-trading and the trading partnerships. Some powers can be exercised by partners in partnership of either type. Thus a partner may retain an attorney to protect the interests of the firm.⁴ Many powers, however, may be exercised by a partner in a trading firm that can not be exercised by a partner in a non-trading firm.⁵

§ 1700. Liability of partners on contract within scope of business. The liability of a partner to a third person upon a partnership contract depends in part upon whether the contract in question was within the actual scope of the partnership business or within its apparent scope.¹ It also depends upon whether the contract was within the actual power of the partner who made it or within his apparent power.² If the contract was outside of both the real or apparent scope of the partnership business and was outside of the real and apparent power of the partner who made it, the partner against whom liability is sought to be enforced may

¹In this respect it differs sharply from corporations. See §§ 1977 et seq.

²England. *England v. Curling*, 8 Beav. 129.

Iowa. *Smith v. Smith*, 179 Ia. 1365, 160 N. W. 756.

Maine. *Buffum v. Buffum*, 49 Me. 108, 77 Am. Dec. 249.

New York. *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979.

Wisconsin. *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022.

³*Willson v. Morse*, 117 Ia. 581, 91 N. W. 823; *Meador v. Hughes*, 77 Ky. (14 Bush) 652; *McLaughlin v. Mulloy*, 14 Utah 490, 47 Pac. 1031; *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812.

⁴*Tomlinson v. Broadsmith* [1896], 1 Q. B. 386.

⁵See §§ 1701 et seq.

¹See this section and the following sections.

²See this section and the following sections.

also be liable, if he has acquiesced in the particular contract or if he has ratified it subsequently.³ As between themselves, the authority of any one of the partners may be limited by their actual agreement.⁴ If the party who deals with the partners does not know of a limitation upon the authority of the partner with whom he is dealing, and if a partnership exists in fact, the other partners are liable on contracts within the scope of the partnership business made by such partner,⁵ even where the adversary party did not know who such partners were when he entered into such contract.⁶ In the absence of some limitation upon the authority of a partner, each partner is a general agent of the partners within the scope of its business.⁷ If the contract is within the actual scope of the partnership business, the members are liable thereon, without any reference

³ See §§ 1703 and 1709 et seq.

⁴ *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328.

⁵ *Alabama*. *Conner v. Ray*, 195 Ala. 170, 70 So. 130.

Arkansas. *Williams v. Carson*, 126 Ark. 618, 191 S. W. 401.

Colorado. *Clark v. Ball*, 34 Colo. 223, 2 L. R. A. (N.S.) 100, 82 Pac. 529.

Connecticut. *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328.

Florida. *Taylor v. Dauthry*, — Fla. —, 78 So. 267.

Idaho. *Bates v. Price*, 30 Ida. 521, 166 Pac. 261.

Illinois. *Flagg v. Stowe*, 85 Ill. 164.

Iowa. *Baxter v. Rollins*, 90 Ia. 217, 48 Am. St. Rep. 432, 57 N. W. 838; *Lingenfelter v. St. Clair*, 179 Ia. 11, 161 N. W. 87.

Kansas. *Exchange State Bank v. Jacobs*, 97 Kan. 798, 156 Pac. 771.

Massachusetts. *Warren v. French*, 88 Mass. (6 All.) 317.

Minnesota. *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

Nebraska. *Mace v. Heath*, 30 Neb. 620, 46 N. W. 918.

Tennessee. *Pooley v. Whitmore*, 57 Tenn. (10 Heisk.) 629, 27 Am. Rep. 733.

Utah. *Rocky Mountain Stud Farm Co. v. Lunt*, 46 Utah 299, 151 Pac. 521.

⁶ *California*. *Blanchard v. Kaul*, 44 Cal. 440.

Illinois. *Bigelow v. Gregory*, 73 Ill. 197; *Metzger v. Manlove*, 241 Ill. 113, 89 N. E. 249.

Indiana. *Coleman v. Coleman*, 78 Ind. 344.

Iowa. *Kaiser v. Bank*, 56 Ia. 104, 41 Am. Rep. 85, 8 N. W. 772; *Johnston v. Carter*, 120 Ia. 355, 94 N. W. 850.

Kentucky. *Parrish v. Maupin* (Ky.), 42 S. W. 1121; *Bahon Co. v. Moren*, 151 Ky. 811, 152 S. W. 944.

Minnesota. *Holbrook v. Ins. Co.*, 25 Minn. 229.

Missouri. *Weir Furnace Co. v. Bodwell*, 73 Mo. App. 389.

New Jersey. *Jones v. Beekman* (N. J. L.), 47 Atl. 71.

New York. *Central, etc., Bank v. Walker*, 66 N. Y. 424.

Pennsylvania. *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818.

Washington. *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1039.

Wisconsin. *Harrod v. Hamer*, 52 Wis. 162.

⁷ *Williams v. Carson*, 126 Ark. 618, 191 S. W. 401; *Northwestern Transfer Co. v. Investment Co.*, 81 Or. 75, 158 Pac. 281.

to principles of estoppel.⁸ The act of one partner in declaring that he is no longer liable for future debts is inoperative if he remains a member of the firm and permits it to continue business.⁹ A partner who has been induced to enter into a partnership by means of fraud or misrepresentation, may avoid such contract as to the remaining partners, but he can not avoid liability to third persons who dealt with the firm in good faith, not knowing of such fraud.¹⁰ If a partner has authority to obtain certain information the partnership is liable for acts done by him to obtain such information.¹¹ If a partner has authority to bind the partnership, one of the other partners can not deprive him of such authority while the partnership continues.¹² Notice to a partner operates in law as notice to the partnership.¹³ An undisclosed partner may enforce his rights growing out of a partnership transaction against one who has dealt with the partnership and who has not altered his position to his prejudice through ignorance of the fact that it was a partnership,¹⁴ even though such person believed that he was dealing with an individual or a corporation.¹⁵

⁸ **Alabama.** *Shackelford v. Williams*, 182 Ala. 87, 62 So. 54.

California. *Webster v. Lowe*, — Cal. —, 170 Pac. 850.

Colorado. *Clark v. Ball*, 34 Colo. 223, 2 L. R. A. (N.S.) 100, 82 Pac. 529.

Georgia. *Merchants' & Farmers' Bank v. Johnston*, 130 Ga. 661, 17 L. R. A. (N.S.) 969, 61 S. E. 543.

Illinois. *Chicago, etc., Bank v. Kinare*, 174 Ill. 358, 51 N. E. 607 [reversing, 67 Ill. App. 186; *Slater v. Clark*, 68 Ill. App. 433].

Iowa. *Lingenfelter v. St. Clair*, 179 Ia. 11, 161 N. W. 87.

Kansas. *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

Kentucky. *Patterson v. Swickard* (Ky.), 41 S. W. 435.

Massachusetts. *Craig v. Warner*, 216 Mass. 386, 103 N. E. 1032; *Grossman v. Lewis*, 226 Mass. 163, 115 N. E. 236.

Minnesota. *Vetsch v. Neiss*, 66 Minn. 459, 69 N. W. 315.

New Jersey. *Blanchard v. Hilton*, 83 N. J. L. 780, 85 Atl. 456.

North Carolina. *Oakley v. Morrow*, — N. Car. —, 96 S. E. 891.

Utah. *Rocky Mountain Stud Farm Co. v. Lunt*, 46 Utah 299, 151 Pac. 521.

If the partnership buys property and the partner in whose name the business is transacted gives his personal obligation therefor, the creditor may, nevertheless, recover as against the silent partner. *Webster v. Lowe*, — Cal. —, 170 Pac. 850.

⁹ *Barber v. Emery*, 101 Kan. 314, 167 Pac. 1044.

¹⁰ *Grossman v. Lewis*, 226 Mass. 163, 115 N. E. 236.

¹¹ *Hamlyn v. Houston* [1903], 1 K. B. 81.

¹² *Burns v. Treadway*, 174 Ky. 123, 191 S. W. 868.

¹³ *Northwestern Transfer Co. v. Investment Co.*, 81 Or. 75, 158 Pac. 281.

¹⁴ *Kefauver v. Price*, 136 Ark. 342, 206 S. W. 664; *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

¹⁵ *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

Illustrations of the power of a partner to bind the firm within the general scope of its business are given in subsequent sections.¹⁰

§ 1701. Non-trading firms. Since a non-trading firm engages in business of a limited scope, a partner in such firm has a very limited power to bind the partnership.¹

A firm which is engaged in the business of practicing law,² or medicine,³ or contracting and building,⁴ or in operating a saw-mill and making lumber to sell,⁵ or digging tunnels,⁶ or constructing ditches,⁷ or in paving and curbing streets,⁸ or drilling wells,⁹ or constructing a drainage ditch,¹⁰ or in keeping a tavern,¹¹ or in operating a theater,¹² or in milling,¹³ is a non-trading firm.

A partner in a non-trading partnership has power to bind his partners within the scope of the partnership business.¹⁴ He may bind the firm by a contract for necessary supplies.¹⁵ A member of a law firm may bind the firm by an agreement to buy law books.¹⁶ He may make a valid contract of employment on behalf of the firm for the purpose of carrying on the partnership business.¹⁷ He can not otherwise contract firm debts,¹⁸ and he can not give the firm's note even for the firm's debt, so as to bind his partners if they object

¹⁰ See §§ 1701 et seq.

¹ Tilden v. Pederson, 88 Wash. 254, 152 Pac. 1021.

² Worster v. Forbush, 171 Mass. 423, 50 N. E. 936.

³ Crosthwait v. Ross, 20 Tenn. (1 Humph.) 23, 34 Am. Dec. 613.

⁴ Snively v. Matheson, 12 Wash. 88, 50 Am. St. Rep. 877, 40 Pac. 628.

⁵ Dowling v. National Exchange Bank, 145 U. S. 512, 36 L. ed. 795.

⁶ Gray v. Ward, 18 Ill. 32.

⁷ Tilden v. Pederson, 88 Wash. 254, 152 Pac. 1021.

⁸ Harris v. Baltimore, 73 Md. 22, 25 Am. St. Rep. 565, 8 L. R. A. 677, 17 Atl. 1046, 20 Atl. 111, 985.

⁹ Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315.

¹⁰ Tilden v. Pederson, 88 Wash. 254, 152 Pac. 1021.

¹¹ Cocke v. Bank, 3 Ala. 175.

¹² Pease v. Cole, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681.

¹³ Lanier v. McCabe, 2 Fla. 32, 48 Am. Dec. 173.

¹⁴ Sharkey v. Candiani, 48 Or. 112, 7 L. R. A. (N.S.) 791, 85 Pac. 219; Condon v. Callahan, 115 Tenn. 285, 112 Am. St. Rep. 833, 1 L. R. A. (N.S.) 643, 89 S. W. 400; Tilden v. Pederson, 88 Wash. 254, 152 Pac. 1021.

¹⁵ McPherson v. Bristol, 122 Mich. 354, 81 N. W. 254; Tilden v. Pederson, 88 Wash. 254, 152 Pac. 1021.

¹⁶ Alley v. Bowen-Merrill Co., 76 Ark. 4, 113 Am. St. Rep. 73, 188 S. W. 838.

¹⁷ Condon v. Callahan, 115 Tenn. 285, 112 Am. St. Rep. 833, 1 L. R. A. (N.S.) 643, 89 S. W. 400.

¹⁸ Schellenbeck v. Studebaker, 13 Ind. App. 437, 55 Am. St. Rep. 240, 41 N. E. 845; Breckinridge v. Shrieve, 34 Ky. (4 Dana) 375; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

thereto.¹⁹ Thus a member of a law firm can not borrow money for the firm,²⁰ or bind the firm by a note,²¹ or agree to collect a note without charge,²² or be a constructive trustee so as to charge his partner with knowledge.²³ One of a firm of solicitors can not allow a third person to use the firm name.²⁴ A member of a partnership formed to construct drainage ditches has no implied power to sell the securities which are delivered to such partnership in compensation for its services.²⁵ A member of a mining partnership has not general power to bind his partners.²⁶ The negligence of the managing partner of a mining partnership in permitting the location of a conflicting claim and its improvement precludes the partners from asserting their former rights to land within the location of such conflicting claim.²⁷ The managing partner of a mining partnership may, however, borrow money on behalf of the partnership.²⁸ A member of a firm of physicians,²⁹ publishers,³⁰ or planters,³¹ can not

¹⁹ *United States*. *Dowling v. Bank*, 145 U. S. 512, 36 L. ed. 795.

Illinois. *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044 [reversing, 100 Ill. App. 342].

Indiana. *Schellenbeck v. Studebaker*, 13 Ind. App. 437, 55 Am. St. Rep. 240, 41 N. E. 845.

Kansas. *Lee v. Bank*, 45 Kan. 8, 11 L. R. A. 238, 25 Pac. 196.

Maryland. *Harris v. Baltimore*, 73 Md. 22, 25 Am. St. Rep. 565, 8 L. R. A. 677, 17 Atl. 1046, 20 Atl. 111, 985.

Michigan. *McPherson v. Bristol*, 115 Mich. 258, 73 N. W. 236.

Missouri. *Stavnow v. Keneflick*, 79 Mo. App. 41.

New Hampshire. *National, etc., Bank v. Noyes*, 62 N. H. 35.

Vermont. *Walker v. Walker*, 66 Vt. 285, 29 Atl. 146.

Washington. *Snively v. Matheson*, 12 Wash. 88, 50 Am. St. Rep. 877, 40 Pac. 628.

Wisconsin. *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757.

²⁰ *Worster v. Forbush*, 171 Mass. 423, 50 N. E. 936.

²¹ *Hedley v. Bainbridge*, 3 Q. B. 316; *Garland v. Jacomb*, L. R. 8 Exch. 216; *Levy v. Pyne, Car. & M.* 453; *Breckinridge v. Shrieve*, 34 Ky. (4 Dana) 375.

²² *Davis v. Dodson*, 95 Ga. 716, 51 Am. St. Rep. 108, 29 L. R. A. 496, 22 S. E. 645. (Hence if he misappropriates the money, the firm is not liable.)

²³ *Mara v. Browne* (C. A.) [1896], 1 Ch. 199.

²⁴ *Marsh v. Joseph* [1897], 1 Ch. 213.

²⁵ *Tilden v. Pederson*, 88 Wash. 254, 152 Pac. 1021.

²⁶ *California*. *Skillman v. Lachman*, 23 Cal. 199, 83 Am. Dec. 96; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107.

Colorado. *Patrick v. Weston*, 22 Colo. 45, 43 Pac. 446.

Kentucky. *Judge v. Brasewell*, 76 Ky. (13 Bush) 67.

Montana. *Congdon v. Olds*, 18 Mont. 487, 46 Pac. 261.

West Virginia. *Waldron v. Hughes*, 44 W. Va. 126, 29 S. E. 505.

²⁷ *Sharkey v. Candiani*, 48 Or. 112, 7 L. R. A. (N.S.) 791, 85 Pac. 219.

²⁸ *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

²⁹ *Crosthwait v. Ross*, 20 Tenn. (1 Humph.) 23, 34 Am. Dec. 613.

³⁰ *Pooley v. Whitmore*, 57 Tenn. (10 Heisk.) 629, 27 Am. Rep. 733.

³¹ *Benton v. Roberts*, 4 La. Ann. 216; *Prince v. Crawford*, 50 Miss. 344.

bind the firm by a note. If the members of a real estate firm acquiesce, a member of such firm may bind it by the purchase of an automobile on its behalf.³²

§ 1702. Trading firms. Since a trading firm engages in business of a very wide scope, a partner in such firm has a very wide power to bind the partnership. A partnership which is engaged in buying and selling lumber is a trading partnership.¹

A member of a trading firm may bind his firm by borrowing money on their behalf,² especially if the partnership has acquiesced in similar loans on former occasions,³ and giving their note,⁴ or renewing a note,⁵ or making drafts for them,⁶ even if the money thus advanced in good faith is in fact diverted by the borrowing partner.⁷ Even as between the partners, no objection can be made to the fact that the managing partner borrows money instead of assessing the

³² *Felker v. Meyer & Sons Milling Co.*, 123 Ark. 619, 185 S. W. 276.

¹ *First National Bank v. Webster*, 130 Minn. 277, 153 N. W. 736.

² *Idaho*. *First National Bank v. Grignon*, 7 Ida. 646, 65 Pac. 365.

Kansas. *Rains v. Weiler*, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

Massachusetts. *Phipps v. Little*, 213 Mass. 414, 100 N. E. 615.

Mississippi. *Bank v. Ethridge*, 112 Miss. 208, 72 So. 902.

Oregon. *Frazier v. Cottrell*, 82 Or. 614, 162 Pac. 834.

³ *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199, 66 Pac. 1058. (A loan by a brewery to a saloon, borrowed to cash miners' checks.)

⁴ *Alabama*. *Lewis v. Isbell National Bank*, — Ala. —, 73 So. 655.

Georgia. *Morris v. Maddox*, 97 Ga. 575, 25 S. E. 487; *Winkles v. Simpson Grocery Co.*, 133 Ga. 482, 75 S. E. 640.

Idaho. *First National Bank v. Grignon*, 7 Ida. 646, 65 Pac. 365.

Iowa. *Dickson v. Dryden*, 97 Ia. 122, C3 N. W. 148; *Stockhausen v. Johnson*, 173 Ia. 413, 155 N. W. 823.

Kansas. *Exchange State Bank v. Jacobs*, 97 Kan. 708, 156 Pac. 771.

Minnesota. *First National Bank v. Webster*, 130 Minn. 277, 153 N. W. 736.

Missouri. *Carter v. Steele*, 83 Mo. App. 211.

Oregon. *Frazier v. Cottrell*, 82 Or. 614, 162 Pac. 834.

⁵ *Lewis v. Isbell National Bank*, — Ala. —, 73 So. 655.

⁶ *Farmer v. Bank* (Ky.), 51 S. W. 586.

⁷ *United States*. *Dowling v. Bank*, 145 U. S. 512, 36 L. ed. 795; *Winship v. Bank*, 30 U. S. (5 Pet.) 529, 8 L. ed. 216.

Idaho. *Camas Prairie State Bank v. Newman*, 15 Ida. 719, 21 L. R. A. (N.S.) 703, 99 Pac. 833.

Iowa. *Sherwood v. Snow*, 46 Ia. 481, 26 Am. Rep. 155.

Kansas. *Exchange State Bank v. Jacobs*, 97 Kan. 708, 156 Pac. 771.

Massachusetts. *Smith v. Collins*, 115 Mass. 388; *Fuller v. Percival*, 126 Mass. 381; *Atlas National Bank v. Savery*, 127 Mass. 75, 34 Am. Rep. 345; *Stimson v. Whitney*, 130 Mass. 591; *Reed v. Bacon*, 175 Mass. 407, 56 N. E. 716.

Michigan. *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627.

Minnesota. *First National Bank v. Webster*, 130 Minn. 277, 153 N. W. 736.

remaining partners.⁸ Where A indorsed a note for a firm, in good faith, though the proceeds were not applied to the firm's debts, and A had to pay the note, he may recover from the firm.⁹ If X engages A and B as partners, to obtain a loan, a loan by A to X of a part of such amount is in legal effect a loan by A and B.¹⁰ A partner may give a chattel mortgage,¹¹ or he may assign to a creditor of the firm accounts which are due to the firm.¹² A partner can not bind the firm by accommodation paper,¹³ or by an accommodation indorsement.¹⁴

A member of an ordinary trading partnership can not bind the firm by a contract of suretyship,¹⁵ even if he attempts to bind the firm as surety for the corporation which is formed to take over the business of the partnership,¹⁶ or by a contract of guaranty,¹⁷ or by an indemnity bond.¹⁸ If a partnership is formed for the purpose of making contracts of guaranty or suretyship,¹⁹ such as an underwriting syndicate,²⁰ one of the partners may bind the remaining partners by a contract of guaranty. A contract of a banking partnership by which it agrees to become surety on the bond of a public officer who handles public funds in order to secure deposits of such public funds, is within the scope of such partnership business.²¹

A partner can not bind the firm by a note for a debt of their predecessors;²² nor by a note given for an individual debt in whole,²³

New York. First National Bank v. Morgan, 73 N. Y. 593.

Pennsylvania. Real Estate Investment Co. v. Smith, 162 Pa. St. 441, 29 Atl. 855.

⁸ Rains v. Weiler, 101 Kan. 294, L. R. A. 1917F, 571, 166 Pac. 235.

⁹ Meyran v. Abel, 189 Pa. St. 215, 69 Am. St. Rep. 806, 42 Atl. 122.

¹⁰ Harston v. Ralston, 174 Ky. 509, 192 S. W. 646.

¹¹ Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25; Rock v. Collins, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426. But in Louisiana a partner must have express authority to execute a mortgage. Kahn v. Becnel, 108 La. 296, 32 So. 444.

¹² Bates v. Price, 30 Ida. 521, 166 Pac. 261.

¹³ Lewis v. Isbell National Bank, — Ala. —, 73 So. 655; Union National

Bank v. Wickham, 18 Ohio C. C. 685, 6 Ohio C. D. 790.

¹⁴ Lewis v. Isbell National Bank, — Ala. —, 73 So. 655.

¹⁵ Seufert v. Gille, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

¹⁶ Seufert v. Gille, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

¹⁷ Lewis v. Isbell Nat. Bank, — Ala. —, 73 So. 655; Kelly-Goodfellow Shoe Co. v. Lumber Co., 86 Mo. App. 438.

¹⁸ Burke v. Mountain Timber Co., 224 Fed. 591.

¹⁹ Union Land Co. v. Gwynn, 216 N. Y. 664, 110 N. E. 162.

²⁰ Union Land Co. v. Gwynn, 216 N. Y. 664, 110 N. E. 162.

²¹ Wexford Township v. Seeley, 196 Mich. 634, 163 N. W. 16.

²² Broughton v. Sumner, 80 Mo. App. 386.

²³ Terry v. Platt, 1 Penn. (Del.) 185, 40 Atl. 243; Cody v. Bank, 103 Ga.

or in part,²⁴ even to prevent such creditor from reaching such partner's interest in such firm;²⁵ nor can he give a note in renewal of a debt from which the firm has been released by failure to protest;²⁶ nor can he give a note due at once for debt not yet due.²⁷ Ordinarily he can not assume debts of others,²⁸ or bind the firm for his own debt,²⁹ and he can not pay individual debts with firm money,³⁰ or with checks which belong to the firm,³¹ or prefer individual debts in assignment,³² or mortgage firm property for an individual debt.³³

In order that the partners may be bound, the partner must act on behalf of the partnership.³⁴ A partnership is not bound by an act of a partner upon his individual behalf.³⁵ He can not use the firm's property to pay his personal debt.³⁶ If a partnership has assumed the business of an individual and his debt has become a partnership debt, a note given in settlement of an individual debt is binding upon the partnership.³⁷ If a partnership has ordered

789, 30 S. E. 281; *McRae v. Campbell*, 101 Ga. 662, 28 S. E. 920; *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350.

²⁴ *Hatch v. Reid*, 112 Mich. 430, 70 N. W. 889; *Huttig, etc., Co. v. McMahon*, 81 Mo. App. 440.

²⁵ *Durrell v. Staples*, 169 Mass. 49, 47 N. E. 441.

²⁶ *Meyer v. Hegler*, 121 Cal. 682, 54 Pac. 271.

²⁷ *McCord Co. v. Callaway*, 109 Ga. 796, 35 S. E. 171.

²⁸ *Rice v. Jackson*, 171 Pa. St. 89, 32 Atl. 1036.

²⁹ *Colorado. Lewin v. Barry*, 15 Colo. App. 461, 63 Pac. 121. (For rent.)

Maryland. Werntz v. Wells, 130 Md. 53, 99 Atl. 956.

Missouri. Talbott v. Plaster Co., 86 Mo. App. 558.

Oklahoma. Nichols v. Thomas (Okla.), L. R. A. 1916B, 908, 151 Pac. 847.

Vermont. Woolson v. Fuller, 71 Vt. 335, 45 Atl. 753. (For clothes.)

³⁰ *Alabama. Jones v. Nichols*, — Ala. —, 80 So. 71.

Georgia. Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 1 L. R. A. (N.S.) 650, 51 S. E. 661.

Nebraska. Columbia National Bank v. Rice, 48 Neb. 428, 67 N. W. 165.

Oklahoma. Nichols & Co. v. Thomas, 51 Okla. 212, L. R. A. 1916B, 908, 151 Pac. 847.

Pennsylvania. Brown v. Pettit, 178 Pa. St. 17, 56 Am. St. Rep. 742, 34 L. R. A. 723, 35 Atl. 865.

South Dakota. Fillaus v. Greenfield, 39 S. D. 226, 164 N. W. 63.

³¹ *Nichols v. Thomas*, 51 Okla. 212, L. R. A. 1916B, 908, 151 Pac. 847.

³² *Field v. Romero*, 7 N. M. 630, 41 Pac. 517.

³³ *McCord Co. v. Callaway*, 109 Ga. 796, 35 S. E. 171; *Johnson v. Shirley*, 152 Ind. 453, 53 N. E. 459; *Mansur, etc., Co. v. Ritchie*, 143 Mo. 587, 45 S. W. 634 (even if all partners concur). But see *Buchanan v. Bank (Tenn. Ch. App.)*, 57 S. W. 207.

³⁴ *Stringer v. Stevenson*, 240 Fed. 892, 153 C. C. A. 578 [modifying decree, *In re Stringer*, 234 Fed. 454].

³⁵ *Stringer v. Stevenson*, 240 Fed. 892, 153 C. C. A. 578 [modifying decree, *In re Stringer*, 234 Fed. 454].

³⁶ *Fillaus v. Greenfield*, 39 S. D. 226, 164 N. W. 63.

³⁷ *Montgomery-Ferguson Co. v. Hardie*, 139 La. 644, 71 So. 931.

packages of goods to be delivered C. O. D., and A, one of the partners, has notified the express company that he is opposed to their being delivered before the charges are paid, A is not liable to the express company if the goods are delivered to B and if B's note is taken for such charges.³⁵

A partner can not bind the firm by a promise to indemnify a surety,³⁶ though he may bind the firm as surety on their own debt.³⁷ Thus he may guarantee a note sold by them,⁴¹ or may buy a stock of goods and assume debts against it, in order to secure their own debt,⁴² or may give a mortgage to secure a firm debt, even though the notes of individual partners were originally given therefor.⁴³ He can not confess judgment against the firm,⁴⁴ though as such judgment is voidable only at the election of the partners, a creditor can not attack it.⁴⁵ One partner can not make a general assignment for the benefit of the firm's creditors if the other partners are accessible,⁴⁶ though he can if they have absconded.⁴⁷ He can not mortgage all the property of the firm, even for firm debts if the other partners are accessible,⁴⁸ but he may give a chattel mortgage on all the firm's property in the absence of his partners.⁴⁹ He may pledge property of the firm to secure a loan to the firm.⁵⁰

While a partner in a trading firm has power to sell property of the firm in the general course of the firm's business, he has no power to sell partnership property, the sale of which will make it practically impossible for the firm to continue in business.⁵¹

³⁵ Grubbe v. Pierce, 156 Wis. 29, 51 L. R. A. (N.S.) 358, 145 N. W. 207.

³⁶ Seeberger v. Wyman, 108 Ia. 527, 79 N. W. 290.

³⁷ McLaughlin v. Mulloy, 14 Utah 490, 47 Pac. 1031.

⁴¹ McNeal v. Gossard, 6 Okla. 363, 50 Pac. 159.

⁴² National Bank v. Dickinson, 107 Ala. 265, 18 So. 144.

⁴³ West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35.

⁴⁴ Harper v. Cunningham, 8 D. C. App. 430.

⁴⁵ Contra, Adams v. Leeds Co., 195 Pa. St. 70, 45 Atl. 666.

⁴⁶ Belcher v. Curtis, 119 Mich. 1, 75 Am. St. Rep. 376, 77 N. W. 310; McAlpin Co. v. Finsterwald, 57 O. S. 524, 49 N. E. 784.

⁴⁶ Parker v. Brown, 85 Fed. 595, 29 C. C. A. 357; Loeb v. Pierpont, 58 Ia. 469, 43 Am. Rep. 122, 12 N. W. 544; Mills v. Miller, 109 Ia. 688, 81 N. W. 169; Shattuck v. Chandler, 40 Kan. 516, 10 Am. St. Rep. 227, 20 Pac. 225; Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952.

⁴⁷ Voshmik v. Urquhart, 91 Wis. 513, 65 N. W. 60.

⁴⁸ McGrath v. Cowen, 57 O. S. 385, 49 N. E. 338; McManus v. Smith, 37 Or. 222, 61 Pac. 844.

⁴⁹ Beckman v. Noble, 115 Mich. 523, 73 N. W. 803.

⁵⁰ Taylor v. Dauthry, — Fla. —, 78 So. 267.

⁵¹ Arkansas. Reeves Lumber Co. v. Davis, 124 Ark. 143, 187 S. W. 171.

Indiana. Lowman v. Sheets, 124 Ind. 416, 7 L. R. A. 784, 24 N. E. 351.

In an ordinary partnership a partner has no implied power to convey partnership realty which is necessary for the business of the partnership.⁵² He can not make such a sale of the property of the firm as will amount to winding up the business of the firm.⁵³ The majority may, however, dispose of all of the assets of a partnership in a bona fide compromise of a claim against it.⁵⁴

If a contract entered into by a partnership is of such a character that its release would terminate the partnership business, an individual partner has no implied authority to release such contract.⁵⁵ A member of a farming firm can not sell the live stock and farming implements.⁵⁶ One partner can not sell the realty of an ordinary partnership.⁵⁷ If, however, a partnership is formed for the purpose of buying and selling realty, one of the partners has authority to make a binding contract to sell partnership realty.⁵⁸ A partner may bind the firm by a contract to sell its samples.⁵⁹ He can not sell property of the firm in which it does not deal.⁶⁰ A partner may assign a partnership contract by which it has agreed to buy certain realty.⁶¹ He can buy and sell such articles as are proper in the exercise of the business of the firm, and the firm will be bound by such contract,⁶² even if the other partners have already sold all of such goods on hand.⁶³ He may buy realty if it is necessary for the use of the partnership.⁶⁴ He can not buy, on speculation, articles

Kentucky. *Hewitt v. Sturdevant*, 43 Ky. (4 B. Mon.) 453.

Missouri. *Cayton v. Hardy*, 27 Mo. 536.

North Carolina. *Robinson v. Daughtry*, 171 N. Car. 200, 88 S. E. 252.

Oklahoma. *Phillips v. Thorp*, 12 Okla. 617, 73 Pac. 268.

⁵² *Robinson v. Daughtry*, 171 N. Car. 200, 88 S. E. 252.

⁵³ *Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171.

⁵⁴ *Reiser v. Johnston*, — Okla. —, 166 Pac. 723. (The partnership was formed for a single transaction.)

⁵⁵ *Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171.

⁵⁶ *Rutherford v. McDonnell*, 66 Ark. 448, 51 S. W. 1060.

Contra, one partner may sell the en-

tire stock. *Hetterman Bros. Co. v. Young* (Tenn. Ch. App.), 52 S. W. 532.

⁵⁷ *Oliver v. Piatt*, 44 U. S. (3 How.) 333, 11 L. ed. 622.

⁵⁸ *Robinson v. Daughtry*, 171 N. Car. 200, 88 S. E. 252.

⁵⁹ *Feingold v. Supovitz*, — Me. —, 104 Atl. 697.

⁶⁰ *Plimpton v. Taylor*, 21 Ohio C. C. 260, 11 Ohio C. D. 570.

⁶¹ *Milwaukee Land Co. v. Ruesink*, 50 Mont. 489, 148 Pac. 396.

⁶² *Thompson v. Gosserand*, 131 La. 1056, 60 So. 682; *Ashley v. Dowling*, 203 Mass. 311, 89 N. E. 434; *Smith & Cheney Co. v. Schmidt*, 142 Mich. 1, 105 N. W. 39.

⁶³ *Bass Dry Goods Co. v. Mfg. Co.*, 113 Ga. 1142, 39 S. E. 471.

⁶⁴ *Brooke v. Washington*, 49 Va. (8 Gratt.) 248, 56 Am. Dec. 142.

in which the firm deals regularly.⁶⁵ A member of a firm of cotton factors can not make a valid sale of cotton for his firm on speculation.⁶⁶ He can compromise claims if in good faith,⁶⁷ but not where the only consideration for such compromise is a personal advantage received by such partner.⁶⁸ One partner can not contract for liquidated damages,⁶⁹ or waive exemptions,⁷⁰ or bind his partner by representations as to property formerly owned by the firm which has been divided between the partners and has become individual property.⁷¹ A member of a firm of real estate brokers may agree to pay a commission to an agent acting for the firm in making sales,⁷² or may revoke a contract to give his firm exclusive right to sell realty on commission in a certain time.⁷³ A partner has no implied authority to bind the partnership by a contract to pay commissions for the sale of property not belonging to the partnership,⁷⁴ even if such property is stock in a corporation which is formed to acquire the business of such partnership.⁷⁵ A partner of a firm in the bicycle business may give a note for a rubber and cement business.⁷⁶ A partner in a saw mill may contract to return borrowed lumber.⁷⁷ A partner in a stage line has no power to contract for mining.⁷⁸ A partner to train and race horses can not sell one owned by them as tenants in common,⁷⁹ and power to reorganize and issue new bonds is not power to change the gauge of the road.⁸⁰ If a partner-

⁶⁵ *Maurin v. Lyon*, 69 Minn. 257, 65 Am. St. Rep. 568, 72 N. W. 72.

⁶⁶ *Sparks v. Flannery*, 104 Ga. 323, 30 S. E. 823.

⁶⁷ *Walker v. Lumber Co. (Ky.)*, 35 S. W. 272; *Burns v. Treadway*, 174 Ky. 123, 191 S. W. 868.

⁶⁸ *Remington v. Ry. Co.*, 109 Wis. 154, 84 N. W. 898, 85 N. W. 321. (Where a fee due to a firm of attorneys was compromised by one of them by accepting employment as attorney at a salary which formed a reasonable compensation for such services.) So, *Davis v. Dodson*, 95 Ga. 718, 51 Am. St. Rep. 108, 29 L. R. A. 496, 22 S. E. 645.

⁶⁹ *Waldron v. Hughes*, 44 W. Va. 126, 29 S. E. 505.

⁷⁰ *Guscott v. Roden*, 112 Ala. 632, 21 So. 313.

⁷¹ *Spencer v. Jones*, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118 [reversing, 47 S. W. 29, 665].

⁷² *Boyd v. Watson*, 101 Ia. 214, 70 N. W. 120.

⁷³ *Harper v. McKinnis*, 53 O. S. 434, 42 N. E. 251 (even in order to buy such realty himself).

⁷⁴ *In re Farmers' & Merchants' Bank* (*Smith v. Mosier*), 194 Mich. 200, 160 N. W. 601.

⁷⁵ *In re Farmers' & Merchants' Bank* (*Smith v. Mosier*), 196 Mich. 200, 160 N. W. 601.

⁷⁶ *Ketcham National Bank v. Hagen*, 164 N. Y. 446, 58 N. E. 523.

⁷⁷ *Forbes v. Morehead (Ky.)*, 58 S. W. 982.

⁷⁸ *Gutheil v. Gilmer*, 23 Utah 84, 63 Pac. 817; *Cavanaugh v. Salisbury*, 22 Utah 465, 63 Pac. 39.

⁷⁹ *Williams v. Tam*, 131 Cal. 64, 63 Pac. 133.

⁸⁰ *Browning v. Kelley*, 124 Ala. 645, 27 So. 391 [modifying on rehearing, 113 Ala. 420, 21 So. 928].

ship is organized for the purpose of operating a mill, a partner has an implied authority to advertise the product of such mill.⁶¹ If a partnership is formed for the purpose of leasing and repairing a mill but not operating it, a partner has no implied power for advertising its product.⁶²

§ 1703. Acquiescence of partners. A contract to which all the members of a partnership give their consent is binding upon them,¹ even if outside the ordinary business of the partnership.² The acquiescence of the members of a non-trading firm may make the act of one partner in signing a note binding upon the firm.³ All the partners may agree to an assignment for the benefit of creditors.⁴ With the consent of all the partners, one partner may apply partnership funds to an individual liability,⁵ or give a partnership note for an individual debt,⁶ or assume the debts of an earlier firm.⁷ A member of a partnership who has agreed that the partnership may purchase an automobile can not avoid liability upon a note given for the purchase price.⁸

Such acquiescence may be shown by conduct as well as by express words.⁹

⁶¹ *Miller Publishing Co. v. Orth*, 133 Minn. 139, 157 N. W. 1083.

⁶² *Miller Publishing Co. v. Orth*, 133 Minn. 139, 157 N. W. 1083.

¹ *Alabama*. *Kling v. Tunstall*, 109 Ala. 608, 19 So. 907.

Arkansas. *Felker v. Meyer & Sons Milling Co.*, 123 Ark. 619, 185 S. W. 276.

Illinois. *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192.

Iowa. *Seeberger v. Wyman*, 108 Ia. 527, 79 N. W. 290; *Chumbley v. Courtney*, 181 Ia. 482, 164 N. W. 945.

Kansas. *Kincaid v. Nat. Wall-paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243, 54 L. R. A. 412, 65 Pac. 247.

Kentucky. *Hewitt v. Sturdevant*, 43 Ky. (4 B. Mon.) 453.

Maryland. *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 Atl. 793.

South Dakota. *Jansen v. McNamara*, — S. D. —, 166 N. W. 630.

² *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192 [reversing, 77 Ill. App. 365]; *Kincaid v. Paper Co.*, 63 Kan. 288, 88

Am. St. Rep. 243, 54 L. R. A. 412, 65 Pac. 247; *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 Atl. 793.

³ *Chumbley v. Courtney*, 181 Ia. 482, 164 N. W. 945.

⁴ *Drucker v. Wellhouse*, 82 Ga. 129, 2 L. R. A. 328, 8 S. E. 40.

⁵ *Peabody Buggy Co. v. Cooper*, — Ia. —, 165 N. W. 1023; *Kincaid v. Paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243, 54 L. R. A. 412, 65 Pac. 247; *Hutchinson v. Morris*, 86 Mo. App. 40.

⁶ *Randall v. Hunter*, 66 Cal. 512, 6 Pac. 331; *Randall v. Hunter*, 76 Cal. 255, 18 Pac. 317; *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 Atl. 793; *Levi v. Latham*, 15 Neb. 509, 48 Am. Rep. 361, 19 N. W. 460.

⁷ *Jansen v. McNamara*, — S. D. —, 166 N. W. 630.

⁸ *Felker v. Meyer & Sons Milling Co.*, 123 Ark. 619, 185 S. W. 276.

⁹ *Chumbley v. Courtney*, 181 Ia. 482, 164 N. W. 945; *Peabody Buggy Co. v. Cooper*, — Ia. —, 165 N. W. 1023.

§ 1704. Liability of partners on contract without scope of business. If a contract is made by one partner in excess of his authority and no circumstances of estoppel exist, the remaining partners are not liable upon such contract,¹ even though the party who deals with the partnership is acting in good faith.² A partner can not bind the firm by consenting to an adjudication in bankruptcy.³

Still less can a firm be held liable on a contract with an individual member, where it is not shown that such contract was made on behalf of the firm.⁴

The partner who makes an unauthorized contract is personally liable thereon,⁵ especially if such contract is made for his personal advantage.

§ 1705. Dissent of partner. If the firm consists of two partners, one of them can avoid liability on future contracts by giving notice of his dissent to the person with whom such contract is made,¹ even if under such contract property was actually received by the

¹ **United States.** *Thompson v. Bank*, 111 U. S. 529, 28 L. ed. 507; *Steiner v. Faulk*, 222 Fed. 61, 137 C. C. A. 599.

Alabama. *Vinegar Bend Lumber Co. v. Howard*, 186 Ala. 451, 65 So. 172.

Arkansas. *Felker v. Meyer & Son Milling Co.*, 123 Ark. 619, 185 S. W. 276.

California. *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425.

Connecticut. *Samstag & Hilder Bros. v. Ottenheimer*, 90 Conn. 475, 97 Atl. 865.

Georgia. *Eady v. Newton Coal & Lumber Co.*, 123 Ga. 557, 1 L. R. A. (N.S.) 650, 51 S. E. 661.

Iowa. *Van Dyk v. Mosterdt*, 171 Ia. 3, 153 N. W. 206.

Michigan. *Wexford Township v. Seeley*, 196 Mich. 634, 163 N. W. 16.

Minnesota. *Miller Publishing Co. v. Orth*, 133 Minn. 139, 157 N. W. 1083.

North Carolina. *Reed Coal Co. v. Fain*, 171 N. Car. 646, 89 S. E. 29.

Ohio. *Cook v. Slate Co.*, 36 O. S. 135, 38 Am. Rep. 568.

Oklahoma. *Anderson v. Guymon*, 51 Okla. 233, 151 Pac. 863.

South Dakota. *Fillaus v. Greenfield*, 39 S. D. 226, 164 N. W. 63.

Tennessee. *Bank v. Mason*, 139 Tenn. 659, 202 S. W. 931.

Utah. *Peterson v. Armstrong*, 24 Utah 96, 66 Pac. 767.

Washington. *Tilden v. Pederson*, 88 Wash. 254, 152 Pac. 1021.

Wisconsin. *Grubbe v. Pierce*, 156 Wis. 29, 51 L. R. A. (N.S.) 358, 145 N. W. 207.

² *Samstag & Hilder Bros. v. Ottenheimer*, 90 Conn. 475, 97 Atl. 865; *Anfenson v. Banks*, 180 Ia. 1066, 163 N. W. 606.

³ *Steiner v. Faulk*, 222 Fed. 61, 137 C. C. A. 599.

⁴ *Wood v. Martin*, 115 Ga. 147, 41 S. E. 490; *Rothrock Construction Co. v. Mfg. Co.*, 80 Miss. 517, 32 So. 484.

⁵ *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 Atl. 793.

¹ **Colorado.** *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966.

firm.² If A and B are partners, and X, before selling to the firm through A on credit, is notified by B not to sell on credit, X can not, after selling on credit, hold B.³ If A, a partner, notifies the bank, X, not to pay checks given by B, the other partner, unless there is money in the bank to meet them, X can not hold A upon an overdraft made in violation of such instructions.⁴ If A, a member of a partnership, forbids the delivery of C. O. D. express packages to the partnership, unless payment therefor is made at the time, and an express company delivers such packages to the other partner, B, without such payment, and subsequently takes B's note, A is discharged thereby.⁵

If the firm consists of more than two members, a minority can not revoke the authority of agents previously appointed and empowered to act.⁶ So employment of an attorney by the majority may bind the firm even as against the active dissent of one partner.⁷

Any notice which fairly shows that the partner does not intend to be bound is operative, although he does not so state in express language.⁸

If, after giving such notice of dissent, the partner continues to be a member of the firm and acquiesces in the transactions to which he objected originally, he is liable therefor.⁹

§ 1706. Estoppel. Although no partnership in fact exists, or although its powers have been exceeded, third persons who have been misled as to the existence or powers of the partnership and

Iowa. *Knox v. Buffington*, 50 Ia. 320.

North Carolina. *Johnston v. Bernheim*, 86 N. Car. 339.

Pennsylvania. *Yeager v. Wallace*, 57 Pa. St. 365.

Tennessee. *Bank v. Mason*, 139 Tenn. 659, 202 S. W. 931.

²*Dawson v. Elrod*, 105 Ky. 624, 88 Am. St. Rep. 320, 49 S. W. 465; *Monroe v. Conner*, 15 Me. 178, 32 Am. Dec. 148.

³*Dawson v. Elrod*, 105 Ky. 624, 88 Am. St. Rep. 320, 49 S. W. 465; *Monroe v. Conner*, 15 Me. 178, 32 Am. Dec. 148.

⁴*Bank v. Mason*, 139 Tenn. 659, 202 S. W. 931.

⁵*Grubbe v. Pierce*, 156 Wis. 29, 51 L. R. A. (N.S.) 358, 145 N. W. 207.

⁶*Johnston v. Dutton*, 27 Ala. 245; *Lerch v. Bard*, 177 Pa. St. 197, 35 Atl. 714.

⁷At least such attorney may represent the firm in court. *Clark v. Ry.*, 136 Pa. St. 408, 10 L. R. A. 238, 20 Atl. 562. So the majority if acting in good faith can not be charged with losses caused by events that could not be foreseen, as long as they act within the scope of the partnership business, even though the minority object. *Markle v. Wilbur*, 200 Pa. St. 457, 50 Atl. 204.

⁸*Bank v. Mason*, 139 Tenn. 659, 202 S. W. 931.

⁹*Barber v. Emery*, 101 Kan. 314, 167 Pac. 1044.

have acted in reliance on such belief, may enforce partnership liability against those persons who have so misled them and held themselves out as members of the partnership in question or have held out the person with whom such third person dealt as a member thereof.¹ A partnership is liable for the transactions of one whom they allow to act as a partner.² So where creditors trust persons as partners, and property as firm property, they may subject such property to their debts as against individual partners or their creditors.³ If a number of persons hold themselves out to the public as one firm which operates two or more places of business, they are liable as such, although as between themselves there were really

¹ **United States.** McGowan v. Tan Bark Co., 121 U. S. 575, 30 L. ed. 1027.

Alabama. Tillis v. McKinna, 114 Ala. 311, 21 So. 465; Conner v. Ray, 195 Ala. 170, 70 So. 130.

Arkansas. Baker-McGrew Co. v. Union Seed & Fertilizer Co., 125 Ark. 146, 188 S. W. 571.

California. Westcott v. Gilman, 170 Cal. 562, 150 Pac. 777.

Connecticut. United States Wood Preserving Co. v. Lawrence, 89 Conn. 633, 95 Atl. 8.

Georgia. Carlton v. Grissom, 98 Ga. 118, 26 S. E. 77; Gray v. Blasingame, 110 Ga. 343, 35 S. E. 653; McPhaul v. Curry, 146 Ga. 305, 91 S. E. 89.

Illinois. Janes v. Gilbert, 168 Ill. 627, 48 N. E. 177 [affirming, 68 Ill. App. 611]; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; Janes v. Bergevin, 83 Ill. App. 607; Wilson v. Roelofs, 88 Ill. App. 480; Dooley v. Vance, 97 Ill. App. 42.

Iowa. Wallerich v. Smith, 97 Ia. 308, 66 N. W. 184.

Kansas. Rider v. Hammell, 63 Kan. 733, 66 Pac. 1026.

Kentucky. Green v. Taylor, 98 Ky. 330, 56 Am. St. Rep. 375, 32 S. W. 945; Safety, etc., Association v. O'Meara (Ky.), 58 S. W. 775.

Louisiana. Houston River Canal Co. v. Kopke, 106 La. 609, 31 So. 156; Johnson v. Marx, 109 La. 1036, 34 So.

68; State v. Jackson, 137 La. 931, 69 So. 751; Culligan v. Danziger, 140 La. 1052, 74 So. 550.

Maine. Feingold v. Supovitz, 117 Me. 371, 104 Atl. 697; Look v. Watson, 117 Me. 476, 104 Atl. 850.

Maryland. Sakelos v. Hutchinson, 129 Md. 300, 99 Atl. 357; Erdman v. Trustees of Eutaw Methodist Protestant Church, 129 Md. 595, 99 Atl. 793.

Massachusetts. Stimson v. Whitney, 130 Mass. 591.

Minnesota. Wise v. Morrissey, 135 Minn. 481, 160 N. W. 487.

New Jersey. Princeton, etc., Co. v. Gulick, 16 N. J. L. 161.

Oklahoma. Gwinnup v. Walton Trust Co., — Okla. —, 172 Pac. 936.

South Carolina. Green v. People's Warehouse Co., 85 S. Car. 40, 27 L. R. A. (N.S.) 1015, 67 S. E. 14.

Tennessee. Fowler v. Bank (Tenn. Ch. App.), 57 S. W. 209.

Wisconsin. Bartlett v. Clough, 94 Wis. 196, 68 N. W. 875.

² Chicago, etc., Bank v. Kinnare, 174 Ill. 358, 51 N. E. 607 [reversing, 67 Ill. App. 186]; State v. Jackson, 137 La. 931; 69 So. 751; Feingold v. Supovitz, 117 Me. 371, 104 Atl. 697; Tyler v. Omeis, 76 Minn. 537, 79 N. W. 528.

³ Thayer v. Humphrey, 91 Wis. 276, 51 Am. St. Rep. 887, 30 L. R. A. 549, 64 N. W. 1007.

two different firms operating different places of business.⁴ The fact that a liquor license is issued to A does not make A liable for debts incurred by B in carrying on business under such license,⁵ although A has not notified the person who dealt with B that A had no interest in such business.⁶

Secret limitations on the apparent power of a partner are ineffectual as to one dealing with him in ignorance thereof,⁷ as where a partner had been for years accustomed to sign his firm's name to accommodation papers and they had acquiesced therein.⁸ So introducing one as a partner, putting his name on letterheads, and signing a letter announcing that he is a member of the firm, is admissible to prove liability as a partner.⁹ So a contract with a firm whereby the firm is to furnish goods as a set-off against a debt incurred against the firm, is binding upon a subsequent secret partner, so that after such goods are furnished the new firm can not recover from the party to whom they are furnished.¹⁰ If B buys C's interest in the firm of A, B and C, under a contract by which the new firm assumes the liabilities of the original firm, A's act in signing as a witness to such contract is said to estop him from denying liability thereon.¹¹ If a member of a partnership which is formed to operate a tobacco warehouse, purchases tobacco in the firm name but really upon a private speculation, the partnership is liable upon such purchases, although as between the partners it was agreed that the firm was not to be responsible therefor.¹² If partners have for a considerable period of time acquiesced in the payment by one partner of his personal debts out of partnership property, they can

⁴ *Sakelos v. Hutchinson*, 129 Md. 300, 99 Atl. 357.

⁵ *Harris v. North* 78 W. Va. 76, 88 S. E. 603.

⁶ *Harris v. North* 78 W. Va. 76, 88 S. E. 603.

⁷ *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Bass Dry Goods Co. v. Mfg. Co.*, 113 Ga. 1142, 39 S. E. 471; *McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783 [affirming, 58 Ill. App. 384]; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715 [reversing, 75 Ill. App. 354]; *Rice v. Jackson*, 171 Pa. St. 89, 32 Atl. 1036.

⁸ *Bank, etc., v. Weston*, 159 N. Y. 201, 45 L. R. A. 547, 54 N. E. 40; *Second*

National Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080.

⁹ *Peninsular Savings Bank v. Currie*, 123 Mich. 666, 82 N. W. 511.

¹⁰ *Neeley v. Flummerfelt*, 116 Mich. 344, 74 N. W. 1118; and see *Rogers v. Batchelor*, 37 U. S. (12 Pet.) 221, 9 L. ed. 1063; *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631.

Though such prior debt was not of itself binding on the incoming partner. See § 1715.

¹¹ *Jansen v. McNamara*, — S. D. —, 166 N. W. 630.

¹² *Green v. People's Warehouse Co.*, 85 S. Car. 40, 27 L. R. A. (N.S.) 1016, 67 S. E. 14.

not repudiate such authority as to reasonable amounts without previous notice.¹³ A payee of a check which is given by a partner on partnership funds for his personal debt may hold the firm thereof if he does not know that it is given for a personal debt.¹⁴

In order to hold a partner liable upon contracts outside of the scope of the partnership business which he did not authorize expressly, it must be shown that he has acquiesced not only in specific prior contracts of the same general kind, but in a regular course of dealing.¹⁵ The fact that A permitted B to endorse the firm name upon negotiable paper of a corporation which was formed to take over the partnership, does not bind A by such exercise of authority several years later, after A has parted with his interest in such corporation.¹⁶

The reason for this general rule is that third persons are not bound to know of the existence, scope or powers of a partnership, and under principles of estoppel may rely upon representations made to them, believed by them and acted on by them, so as to preclude those making such representations from afterwards denying them.¹⁷ A member of a corporation, who represents that it is a partnership, may be estopped to deny partnership liability.¹⁸

Estoppel may operate conversely to prevent proof of an existing partnership. Thus if A has by his conduct induced X to believe

¹³ *Peabody Buggy Co. v. Cooper*, — Ia. —, 165 N. W. 1023.

¹⁴ *Camas Prairie State Bank v. Newman*, 15 Ida. 719, 21 L. R. A. (N.S.) 703, 99 Pac. 833.

¹⁵ *Eady v. Newton Coal & Lumber Co.*, 123 Ga. 557, 1 L. R. A. (N.S.) 650, 51 S. E. 661; *Seufert v. Gille*, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

¹⁶ *Seufert v. Gille*, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

¹⁷ *Alabama*. *Conner v. Ray*, 195 Ala. 170, 70 So. 130.

Arkansas. *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 571.

Connecticut. *United States Wood Preserving Co. v. Lawrence*, 89 Conn. 633, 95 Atl. 8.

Louisiana. *Culligan v. Danziger*, 140 La. 1052, 74 So. 550.

Maryland. *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 Atl. 793.

Minnesota. *Wise v. Morrissey*, 135 Minn. 481, 160 N. W. 487.

An interesting example arising occasionally under estoppel, of those cases where a person can not lie though he tries strenuously to do so, exists where a retiring partner allows a third person to deal with the firm after dissolution under the belief that he is still a member. As he is thus estopped to deny the partnership, he is not guilty of fraud. *Wilson v. Roelofs*, 88 Ill. App. 480.

¹⁸ *Look v. Watson*, 117 Me. 476, 104 Atl. 850.

that B is the sole party in interest and to deal with him accordingly, A is estopped from proving that he was in fact B's partner.¹⁹

This last principle is not, however, acquiesced in by all the courts. One who purchases goods as an individual is not estopped to show that he is acting for a firm of which he is a member, when the vendor undertakes to apply a payment made for such goods to an individual debt due from such individual.²⁰

It is not necessary that A, in maintaining an action against B and C as partners, should join D, as plaintiff, if D was not in fact a partner, although B and C might hold him as a partner by estoppel.²¹

§ 1707. Wrongful act or omission necessary to create estoppel. Estoppel can exist only where there is some wrongful act or omission of the person against whom estoppel is sought to be enforced. Where the person held out as a partner does not know that he is thus held out and is guilty of no negligence, he can not be held liable.¹ The fact that A has the general reputation of being a member of the firm of B & Co., is not sufficient to establish his liability as a partner.² One who is generally believed to be a partner in a firm is not bound to exercise any diligence in discovering the existence of such general reputation.³ If such person has learned that his name is being used as an alleged partner, it is sufficient if he prevents such misuse of his name,⁴ at least if he takes reasonable precaution to prevent such subsequent misuse.⁵

¹⁹ *Banks v. Strong*, 197 Mich. 544, 164 N. W. 398; *Willard v. Bullen*, 41 Or. 25, 67 Pac. 924, 68 Pac. 422; *Hanson v. Roesch*, — Wash. —, 176 Pac. 349.

²⁰ *Hoaglin v. Henderson*, 119 Ia. 720, 97 Am. St. Rep. 335, 61 L. R. A. 756, 94 N. W. 247.

²¹ *Wheelock v. Zevitas*, 229 Mass. 167, 118 N. E. 279.

¹ *Alabama*. *Weil v. Hanks*, — Ala. —, 77 So. 333.

California. *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425.

Connecticut. *Samstag v. Oppenheimer*, 90 Conn. 475, 97 Atl. 865.

Indiana. *Williams v. Lewis*, 115 Ind. 45, 7 Am. St. Rep. 403, 17 N. E. 262.

Iowa. *Anfenson v. Banks*, 180 Ia. 1066, L. R. A. 1918D, 482, 163 N. W. 608.

Michigan. *Munton v. Rutherford*, 121 Mich. 418, 80 N. W. 112.

New Jersey. *Seabury v. Bolles*, 52 N. J. L. 413, 51 N. J. L. 103, 11 L. R. A. 136, 21 Atl. 952.

Washington. *Lansdown v. Huff*, 103 Wash. 277, 174 Pac. 21.

² *Anfenson v. Banks*, 180 Ia. 1066, L. R. A. 1918D, 482, 163 N. W. 608.

³ *Anfenson v. Banks*, 180 Ia. 1066, L. R. A. 1918D, 482, 163 N. W. 608.

⁴ *Anfenson v. Banks*, 180 Ia. 1066, L. R. A. 1918D, 482, 163 N. W. 608.

⁵ *Anfenson v. Banks*, 180 Ia. 1066, L. R. A. 1918D, 482, 163 N. W. 608.

Conduct not calculated or intended to mislead can not be relied on as an estoppel. Thus the fact that a partnership has often given its check against funds in a certain bank to pay the individual debt of a partner is not such a course of dealing that it is estopped to deny the validity of a note signed with the partnership name, and given to such bank by one of the partners to take up his individual debt.⁶ The fact that A transacts business in B's store does not estop B from denying the existence of a partnership.⁷ The declaration of one alleged partner as to the existence of the partnership does not bind the other,⁸ and is not even admissible against such other,⁹ though it is as against the party making it.¹⁰ A declaration of an intention to form a partnership in the future does not operate as an estoppel.¹¹

§ 1708. Reliance necessary to create estoppel. In order to estop one from denying his liability as a partner, the person in whose favor the estoppel is alleged must have acted in reliance upon the facts which are claimed to create the estoppel.¹ First, to create estoppel such facts must be known to the party alleging the estoppel at the time at which he enters into the transaction with reference to which the estoppel is invoked. Thus where he did not then know that the person against whom he is seeking to enforce liability was held out as a partner, he can not claim that by reason of a holding out as a partner to others, an estoppel exists in his favor.² So one who knows that no partnership exists can not enforce liability as partners against members of an alleged firm

⁶ *People's Savings Bank v. Smith*, 114 Ga. 185, 39 S. E. 920.

⁷ *Weil v. Hanks*, — Ala. —, 77 So. 333.

⁸ *California. Vanderhurst v. De Witt*, 95 Cal. 57, 20 L. R. A. 595, 30 Pac. 94.

Georgia. First National Bank v. Cody, 93 Ga. 127, 19 S. E. 831.

Iowa. Anfenson v. Banks, 180 Ia. 1066, L. R. A. 1918D, 482, 163 N. W. 608.

Vermont. Frisbie v. Felton, 65 Vt. 138, 26 Atl. 110.

Virginia. Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812.

⁹ *Thompson v. Mallory*, 108 Ga. 797, 33 S. E. 986.

¹⁰ *Dodds v. Ragan Co.*, 110 Ga. 303, 34 S. E. 1004.

¹¹ *Rotzien v. Merchants' Loan & Trust Co.*, — S. D. —, 170 N. W. 128.

¹ *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425; *Gwinnup v. Walton Trust Co.*, — Okla. —, 172 Pac. 936.

² *United States. Thompson v. Bank*, 111 U. S. 529, 28 L. ed. 507.

Florida. Webster v. Clark, 34 Fla. 637, 43 Am. St. Rep. 217, 27 L. R. A. 126, 16 So. 601.

Maine. Wood v. Pennell, 51 Me. 52.

Montana. Parchen v. Anderson, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588.

New Jersey. Carey v. Marshall, 67 N. J. L. 236, 51 Atl. 698.

Ohio. Cook v. Slate Co., 36 O. S. 135, 38 Am. Rep. 568.

other than the person with whom he dealt.³ Second, to cause estoppel there must be an actual belief of third persons based on facts known to them when they deal with the partnership.⁴ Where the representation was known to be untrue and not relied on, no estoppel can be claimed to exist.⁵ If a wholesale liquor dealer knows that the person in whose name a license has been issued has no interest in the business, he can not hold such licensee as a partner.⁶ Thus if the powers of a partner are actually known to one who deals with him, the latter can not claim that the partnership is bound by estoppel if such partner exceeds his powers.⁷ A partnership is therefore not liable on a contract made in excess both of the real and of the apparent scope of partnership.⁸

§ 1709. Ratification—Nature and effect. If a contract has been entered into on behalf of a partnership by one of the partners in excess of his authority or in excess of the business of the partnership, and the remaining partner subsequently ratifies such transaction, questions as to the effect of such ratification may arise where the adversary parties to the transaction attempt to enforce the contract against the partnership; where the partnership attempts to enforce the contract after ratification as against the adversary party to the contract; or where other creditors, especially judgment creditors, attack the validity of the transaction in question.

As between a partnership and the adversary party to a contract, the members of the partnership who have ratified the unauthorized contract are liable, whether the contract was in excess of the authority of the partner who made it or in excess of the scope of business of the partnership.¹ Acquiescence by all the partners in a contract,

Oklahoma. *Gwinnup v. Walton Trust Co.*, — Okla. —, 172 Pac. 936.

Pennsylvania. *Denithorne v. Hook*, 112 Pa. St. 240, 3 Atl. 777.

Vermont. *Hicks v. Cram*, 17 Vt. 449.

³ *Thornton v. McDonald*, 108 Ga. 3, 33 S. E. 680; *Baldwin's Estate*, 170 N. Y. 156, 58 L. R. A. 122, 63 N. E. 62.

⁴ *Wilson v. Edmonds*, 130 U. S. 472, 32 L. ed. 1025; *Fisher v. McDonald Co.*, 85 Ill. App. 653; *Fletcher v. Pullen*, 70 Md. 205, 14 Am. St. Rep. 355, 16 Atl. 887; *Harris v. North*, 78 W. Va. 76, 83 S. E. 603.

⁵ **United States.** *Nightingale v. Furniture Co.*, 71 Fed. 234.

Georgia. *Thornton v. McDonald*, 108 Ga. 3, 33 S. E. 680.

Massachusetts. *Pratt v. Langdon*, 97 Mass. 97, 93 Am. Dec. 61.

Missouri. *Martin v. Fewell*, 79 Mo. 401.

West Virginia. *Harris v. North*, 78 W. Va. 76, 83 S. E. 603.

⁶ *Harris v. North*, 78 W. Va. 76, 83 S. E. 603.

⁷ *Barwick v. Alderman*, — Fla. —, 35 So. 13.

⁸ *Brooks-Waterfield v. Jackson (Ky.)*, 53 S. W. 41.

¹ **United States.** *McGahan v. Bank*, 156 U. S. 219, 39 L. ed. 403.

whether before or after the contract is executed, makes them liable thereon, and acquiescence after the execution of the contract is ratification.² The ratification which makes members of a partnership liable upon unauthorized contracts is ratification in the true sense of the term,³ insofar that it is not a new contract, and accordingly no new consideration is necessary.⁴

§ 1710. Elements of ratification. In order to amount to ratification there must be an intent to ratify.¹

Ratification is possible only if the original transaction was entered into on behalf of the partnership.² A contract which is made by one partner on his separate and personal account can not subsequently be made a partnership contract by the ratification of the other partner.³

Arkansas. *Williams v. Carson*, 126 Ark. 618, 191 S. W. 401.

California. *Pacific, etc., Ins. Co. v. Fisher*, 109 Cal. 566, 42 Pac. 154.

Connecticut. *Samstag v. Oppenheimer*, 90 Conn. 475, 97 Atl. 865.

Georgia. *Sparks v. Flannery*, 104 Ga. 323, 30 S. E. 823.

Iowa. *Buettner v. Steinbrecher*, 91 Ia. 588, 60 N. W. 177.

Kansas. *Corbett v. Cannon*, 57 Kan. 127, 45 Pac. 80.

Massachusetts. *Burkhardt v. Yates*, 161 Mass. 591, 37 N. E. 759.

Michigan. *Koch v. Endriass*, 97 Mich. 444, 56 N. W. 847.

Mississippi. *Bank v. Etheridge*, 112 Miss. 208, 72 So. 902.

Montana. *Edwards v. Spalding*, 20 Mont. 54, 60; 49 Pac. 443, 591.

Nebraska. *Columbia National Bank v. Rice*, 48 Neb. 428, 67 N. W. 165; *Columbus State Bank v. Dole*, 56 Neb. 508, 76 N. W. 1054.

Ohio. *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731.

Pennsylvania. *Miller v. Glass Works*, 172 Pa. St. 70, 33 Atl. 350.

South Dakota. *Fillaus v. Greenfield*, 39 S. D. 226, 164 N. W. 63.

Utah. *Gutheil v. Gilmer*, 23 Utah 84, 63 Pac. 817.

Washington. *McDougall v. McDonald*, 86 Wash. 334, 150 Pac. 628.

² **Alabama.** *Lewis v. Isbell National Bank*, — Ala. —, 73 So. 655.

Connecticut. *Samstag v. Oppenheimer*, 90 Conn. 475, 97 Atl. 865.

Georgia. *Sparks v. Flannery*, 104 Ga. 323, 30 S. E. 823.

Kansas. *Corbett v. Cannon*, 57 Kan. 127, 45 Pac. 80.

Michigan. *Clippinger v. Starr*, 130 Mich. 463, 90 N. W. 280.

Nebraska. *Columbus State Bank v. Dole*, 56 Neb. 508, 76 N. W. 1054.

Wisconsin. *Rock v. Collins*, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426.

³ See for example §§ 354 et seq., §§ 1603 et seq., and §§ 1764 et seq.

⁴ *Foster v. Fifield*, 29 Me. 136; *Erdman v. Trustees of Eutaw Methodist Protestant Church*, 129 Md. 595, 99 Atl. 793.

¹ *Samstag v. Oppenheimer*, 90 Conn. 475, 97 Atl. 865.

² *Fraser v. Sweet*, 13 Manitoba 147, 2 B. R. C. 254.

³ *Fraser v. Sweet*, 13 Manitoba 147, 2 B. R. C. 254; *Stringer v. Stevenson*, 240 Fed. 892, 153 C. C. A. 578 [modifying decree, *In re Stringer*, 234 Fed. 454].

Failure to disaffirm an unauthorized act is, at least, a fact to be considered in determining whether such unauthorized act has been ratified.⁴ Taken by itself it is probably not conclusive that such transaction has been ratified,⁵ but if a partner fails to disaffirm, knowing that the adversary party relies upon such transaction, and such delay is prejudicial to the adversary party, such delay may justify a finding that the original transaction was ratified.⁶

Ratification can not exist unless the partners who are claimed to ratify the transaction have full knowledge of the material facts at the time that they ratify.⁷ If A has paid his personal debt with partnership property, his partner, B, does not ratify such transaction by his conduct prior to notice of such payment.⁸ Part payment by the firm's checks without the knowledge of the other partner, is not ratification.⁹ Ratification of a note under seal has been held invalid if the partner so ratifying did not know that it was under seal.¹⁰ A ratification has been held binding where the partner had not full knowledge, but knew facts enough to put him on inquiry which would have resulted in full knowledge.¹¹ Ratification is binding though made in ignorance of the legal effect of the contract.¹²

In order to amount to ratification, the benefit which is received must be received directly from the adversary party as a part of the transaction which the partnership is alleged to have ratified.¹³ The fact that a partnership leases property from one of its members and pays him rental therefor, does not amount to a ratification of his purchase of such property so as to make it a partnership debt.¹⁴

Partial ratification is impossible. Thus where a partner sold goods under an agreement that a part of the purchase price should

⁴ *Brown v. First National Bank*, 35 Okla. 726, 130 Pac. 140; *Ferguson v. Shepherd*, 33 Tenn. (1 Sneed) 254.

⁵ *Brown v. First National Bank*, 35 Okla. 726, 130 Pac. 140; *Ferguson v. Shepherd*, 33 Tenn. (1 Sneed) 254.

⁶ *Clippinger v. Starr*, 130 Mich. 463, 90 N. W. 280.

⁷ *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 571.

⁸ *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 571.

⁹ *Meyer v. Hegler*, 121 Cal. 682, 54 Pac. 271.

¹⁰ *Aycock Supply Co. v. Windley*, — N. Car. —, 96 S. E. 664; *Hull v. Young*, 30 S. Car. 121, 3 L. R. A. 521, 8 S. E. 695.

¹¹ *Sibley v. Bank*, 97 Ga. 126, 25 S. E. 470.

¹² *Miller v. Glass Works*, 172 Pa. St. 70, 33 Atl. 350 (as that the partners were individually liable on the contract).

¹³ *Werntz v. Wells*, 130 Md. 53, 99 Atl. 956.

¹⁴ *Werntz v. Wells*, 130 Md. 53, 99 Atl. 956.

be set off against his individual debt, the partnership can not recover such part and affirm the sale.¹⁵

The partner who made the contract can not ratify it.¹⁶

§ 1711. Illustrations of ratification. A chattel mortgage given by one partner without authority is valid if the rest acquiesce therein.¹ If a partner is authorized only to obtain an option on certain property, and he purchases it and gives the firm's note, subsequent acquiescence by the remaining partners makes such contract valid.² The failure of one partner to object to a renewal may amount to a ratification.³

Ratification is also effected by receiving the benefits of the transaction,⁴ as by using in the settlement of an account a credit derived from the unauthorized transaction.⁵ Receiving money obtained from notes is a ratification thereof.⁶ Executing as surety for the personal debt of the other partner, a renewal note, after the other partner has made a payment thereon out of partnership funds, is a ratification of such payment.⁷ Taking possession and paying rent under a lease is ratification by the lessee, and receiving such rent is ratification by the lessor.⁸ A sealed contract which is executed by one partner on behalf of the partnership may in some jurisdictions be ratified by parol;⁹ and when ratified it becomes the deed of the partnership as fully as if it were executed under seal by joint partners.¹⁰

§ 1712. Effect of ratification as against adversary party. If a partnership has ratified an unauthorized contract and if the adversary party seeks to avoid such contract on the ground that he could

¹⁵ *Grover v. Smith*, 165 Mass. 132, 52 Am. St. Rep. 506, 42 N. E. 555.

¹⁶ *Blake v. Third National Bank*, 219 Mo. 644, 118 S. W. 641; *Peterson v. Armstrong*, 24 Utah 96, 66 Pac. 767.

¹ *Columbus State Bank v. Dole*, 56 Neb. 508, 76 N. W. 1054; *Rock v. Collins*, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426.

² *Tyler v. Waddingham*, 58 Conn. 375, 8 L. R. A. 657, 20 Atl. 335.

³ *Lewis v. Isbell National Bank*, — Ala. —, 73 So. 655.

⁴ *Smith v. Packard*, 98 Fed. 793, 39 C. C. A. 294; *Williams v. Carson*, 126 Ark. 618, 191 S. W. 401; *McDougall v.*

McDonald, 86 Wash. 334, 150 Pac. 628.

⁵ *Fillaus v. Greenfield*, 39 S. D. 226, 164 N. W. 63.

⁶ *O'Connor v. Sherley*, 107 Ky. 70, 52 S. W. 1056; *Bank v. Etheridge*, 112 Miss. 208, 72 So. 902.

⁷ *Peabody Buggy Co. v. Cooper*, — Ia. —, 165 N. W. 1023.

⁸ *Golding v. Brennan*, 183 Mass. 286, 67 N. E. 239.

⁹ *National Citizens' Bank of Mankato v. McKinley*, 129 Minn. 481, 152 N. W. 879.

¹⁰ *National Citizens' Bank of Mankato v. McKinley*, 129 Minn. 481, 152 N. W. 879.

not have enforced it as against the partnership when such contract was entered into, the same question is presented as is presented when the adversary party to a contract made, through an unauthorized agent, attempts to avoid liability upon such contract in spite of the ratification thereof by the principal.¹ As in the case of the agent, it might be suggested that the adversary party could avoid the contract, at least before ratification, since the partnership was not bound, and accordingly his promise was without a binding promise in return as consideration; and it might even be urged that the adversary party might avoid the transaction even after ratification, for the reason suggested in the case of the contract of the unauthorized agent.² The courts, however, do not seem to have given much consideration to the right of the adversary party to avoid the transaction on the ground that it was in excess of the authority of the partner by whom it was made. In fact by far the greater number of cases involving the question of ratification are cases in which the adversary party is attempting to enforce the contract as against the partnership.

§ 1713. Effect of ratification—Third persons. If questions of priority and the like, as between two or more sets of competing creditors of the partnership are involved, it is held that ratification can not operate so as to destroy existing liens or other forms of security.¹ If a partner has made an assignment for the benefit of creditors in excess of his authority, it is said that the ratification of such assignment can not operate so as to destroy the priority of intervening liens;² and, accordingly, if such ratification is operative the assignment dates only from the time of ratification.³ On the other hand, it has been said that if a judgment is confessed by one partner against the partnership in excess of his authority, the validity of such judgment can not be attacked by a partnership creditor;⁴ and that accordingly if the partnership does not attempt to set such judgment aside, it operates from the time of its rendition and not from the time of its ratification.⁵

¹ See § 1769.

² See § 1769.

¹ *Mills v. Miller*, 109 Ia. 688, 81 N. W. 169; *Coleman v. Darling*, 66 Wis. 155, 57 Am. Rep. 253, 28 N. W. 367.

² *Mills v. Miller*, 109 Ia. 688, 81 N. W. 169; *Coleman v. Darling*, 66 Wis. 155, 57 Am. Rep. 253, 28 N. W. 367.

³ *Mills v. Miller*, 109 Ia. 688, 81 N.

W. 169; *Coleman v. Darling*, 66 Wis. 155, 57 Am. Rep. 253, 28 N. W. 367.

⁴ *Farwell v. Huston*, 151 Ill. 239, 42 Am. St. Rep. 237, 37 N. E. 864; *George W. McAlpin Co. v. Finsterwald*, 57 O. S. 524, 49 N. E. 784.

⁵ *Farwell v. Huston*, 151 Ill. 239, 42 Am. St. Rep. 237, 37 N. E. 864; *George W. McAlpin Co. v. Finsterwald*, 57 O. S. 524, 49 N. E. 784.

§ 1714. Dissolution. If the contract of partnership does not fix the time for which the partnership is to last, it may be terminated by any one of the partners at will.¹ A partnership may be dissolved by the agreement of the partners,² or by the act of either, even if before the time for which the contract was to last.³ Some courts, however, have expressed the view that such a partnership can not be dissolved without cause before the time limited,⁴ but where this proposition is advanced, the courts are speaking only of the rights of partners as between themselves. They are not denying the power of a partner to revoke the authority which he has granted to the other members of the firm to impose a personal liability upon him by their contracts. If a partnership is formed to last for a fixed time, but the right to dissolve the partnership by giving written notice is reserved, it may be dissolved at any time by such written notice.⁵

¹ England. *Crawshay v. Maul*, 1 Swanst. 495.

Arizona. *Costello v. Gleason*, 15 Ariz. 280, 138 Pac. 544.

Illinois. *Blake v. Sweeting*, 121 Ill. 67, 12 N. E. 67.

Kentucky. *Bowman v. Blanton*, 141 Ky. 407, 132 S. W. 1041.

Minnesota. *First International Bank v. Brown*, 130 Minn. 210, 163 N. W. 522.

Montana. *Freund v. Murray*, 39 Mont. 539, 104 Pac. 683.

² California. *Scudder v. Perce*, 159 Cal. 429, 114 Pac. 571.

Illinois. *Richardson v. Gregory*, 126 Ill. 166, 18 N. E. 777.

Iowa. *Howard v. Pratt*, 110 Ia. 533, 81 N. W. 722.

Kentucky. *Wood v. Fox*, 8 Ky. (1 A. K. Mar.) 451.

North Carolina. *Spencer v. Bynum*, 169 N. Car. 119, 85 S. E. 216.

³ *Lapenta v. Lattieri*, 72 Conn. 377, 77 Am. St. Rep. 315, 44 Atl. 730; *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; *Crossman v. Gibney*, 164 Wis. 395, 160 N. W. 172.

Undoubtedly either has the power to end the partnership whenever he pleases; though his exercise of that power without just cause may leave him liable in damages for such dissolution. See *Lapenta v. Lattieri*, 72 Conn. 377, 77 Am. St. Rep. 315, 44 Atl. 730.

⁴ *Hannaman v. Karrick*, 9 Utah 236, 38 Pac. 1039; *Cole v. Moxley*, 12 W. Va. 730; *Moore v. May*, 117 Wis. 192, 94 N. W. 45. *Hannaman v. Karrick*, 9 Utah 236, 33 Pac. 1039, was affirmed by the supreme court of the United States in *Karrick v. Hannaman*, 168 U. S. 326, 42 L. ed. 484, not on the ground that the rule of law there laid down was correct, for the supreme court was "not prepared to assent" to the proposition involved; but on the ground that the measure of damages given was exactly the same as would be allowed if the one partner could by his wrongful act dissolve the partnership before the expiration of the time limited.

⁵ *Swift v. Ward*, 80 Ia. 700, 11 L. R. A. 302, 45 N. W. 1044.

Dissolution by operation of law may be caused by efflux of the time fixed by the partnership agreement,⁸ or by death of a partner.⁷ Since a married woman could not enter into a binding contract at common law,⁶ the marriage of a feme sole who was a partner, operated as a dissolution of the partnership at common law.⁸ In the absence of specific statute this effect would not attach to the marriage of a woman who was a member of a partnership under statutes which give her the power to bind herself by her contract. If the partners are domiciled or carry on business in different countries, war between such countries operates as a dissolution of the partnership. This question will be discussed subsequently in connection with the general effect of war upon prior contracts.¹⁰

After dissolution there is still qualified existence of the partnership for purposes of settlement.¹¹

By contract it may be agreed that death will not cause dissolution.¹² A partnership formed by contract, as a joint stock company,

⁸ *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32.

⁷ *Alabama*. *Parker v. Parker*, 99 Ala. 239, 42 Am. St. Rep. 48, 13 So. 520.

California. *Cooley v. Miller*, 166 Cal. 120, 142 Pac. 83.

Colorado. *Watkins v. Adams*, 53 Colo. 290, 125 Pac. 122.

Illinois. *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138 [affirming, 61 Ill. App. 336].

Indiana. *Schmidt v. Archer*, 113 Ind. 365, 14 N. E. 543.

Kansas. *Big Four Implement Co. v. Keyser*, 99 Kan. 8, L. R. A. 1917C, 166, 161 Pac. 592.

Michigan. *Van Kleeck v. McCabe*, 87 Mich. 599, 24 Am. St. Rep. 182, 49 N. W. 872; *Murray v. Keeley Institute*, 190 Mich. 295, 157 N. W. 87.

New York. *Russell v. McCall*, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498; *Costello v. Costello*, 209 N. Y. 252, 103 N. E. 148.

Washington. *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553.

Wisconsin. *Stubbings v. O'Connor*, 102 Wis. 352, 78 N. W. 577.

Contra of mining partnerships, *Patrick v. Weston*, 22 Colo. 45, 43 Pac. 446; *Childers v. Neely*, 47 W. Va., 70, 81 Am. St. Rep. 777, 49 L. R. A. 468, 34 S. E. 828.

⁸ See § 1658.

⁹ *Burnand v. Nerat*, 2 Bligh (N. R.) 215; *Little v. Hazlett*, 197 Pa. St. 591, 47 Atl. 855.

¹⁰ See ch. LXXIX.

¹¹ *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138 [affirming, 61 Ill. App. 336]; *Johnson v. Jones*, 39 Okla. 323, 48 L. R. A. (N. S.) 547, 135 Pac. 12.

See § 1716.

¹² *United States*. *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793.

Alabama. *Vincent v. Martin*, 79 Ala. 540.

Indiana. *Rand v. Wright*, 141 Ind. 226, 39 N. E. 447.

Kansas. *Parnell v. Thompson*, 81 Kan. 119, 105 Pac. 502.

Massachusetts. *Stanwood v. Owen*, 80 Mass. (14 Gray) 195.

Missouri. *Exchange Bank v. Tracy*, 77 Mo. 594.

is not dissolved by the death of a member if such is the original agreement,¹³ or by a sale of the share of a partner to a person outside the company.¹⁴ The sale of transferable shares in a partnership organized as a joint stock company, if acquiesced in by other members, is not dissolution.¹⁵ In legal effect a provision that death shall not dissolve the partnership creates a new partnership.¹⁶

Conveyance of all the firm's property,¹⁷ sale of the entire business,¹⁸ ceasing to do business,¹⁹ and rescission by one partner because the other wrongfully refuses to pay in his share of the capital,²⁰ cause dissolution by operation of law. So a sale of one partner's interest is held to effect a dissolution,²¹ except in case of mining partnerships.²² So taking in a new partner is a new contract, and abrogates a provision that if either partner becomes intoxicated he shall pay a certain sum of money to the other.²³ But the mere delivery of a "trust mortgage,"²⁴ or an agreement to sell a partnership interest, do not effect dissolution.²⁵ A decree of court may effect a dissolution. Such a decree may be based on fraud,²⁶ or

Pennsylvania. Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080; Brew v. Hastings, 196 Pa. St. 222, 79 Am. St. Rep. 706, 46 Atl. 257.

Vermont. McNash v. Oat Co., 57 Vt. 316; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459.

Virginia. Davis v. Christian, 56 Va. (15 Gratt.) 11.

Wisconsin. Moore v. May, 117 Wis. 192, 94 N. W. 45.

Contra, Laney v. Laney, 6 Dem. (N. Y.) 241.

¹³ Carter v. McClure, 98 Tenn. 109, 60 Am. St. Rep. 842, 36 L. R. A. 282, 30 S. W. 585.

¹⁴ Machinists' National Bank v. Dean, 124 Mass. 81; McNeist v. Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668.

¹⁵ Carter v. McClure, 98 Tenn. 109, 60 Am. St. Rep. 842, 36 L. R. A. 282, 38 S. W. 585.

¹⁶ Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Exchange Bank v. Tracy, 77 Mo. 594; Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; McGrath v. Cowen, 57 O. S. 385, 49 N. E. 338.

¹⁷ Dellapiazza v. Foley, 112 Cal. 360, 44 Pac. 727.

¹⁸ Haerberly's Appeal, 191 Pa. St. 239, 43 Atl. 207.

¹⁹ Ligare v. Peacock, 109 Ill. 94; Bank v. Page, 98 Ill. 109; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Jones v. Jones, 18 Ohio C. C. 260, 10 Ohio C. D. 71.

²⁰ Lapenta v. Lettieri, 72 Conn. 377, 77 Am. St. Rep. 315, 44 Atl. 730.

²¹ Rowe v. Simmons, 113 Cal. 688, 45 Pac. 983; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448.

²² Kelley v. McNamee, 164 Fed. 369, 90 C. C. A. 357, 22 L. R. A. (N.S.) 851; Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 49 L. R. A. 468, 34 S. E. 828.

²³ Givens v. Berry (Ky.), 52 S. W. 942.

²⁴ Smith v. Smith, 93 Me. 253, 44 Atl. 905.

²⁵ Phelps v. State, 109 Ga. 115, 34 S. E. 210.

²⁶ White v. Smith, 63 Ark. 513, 39 S. W. 555.

exclusion from inspection of books,²⁷ or insanity,²⁸ or on the insolvency of a partner.²⁹ Thus the transfer of one partner's interest in partnership real estate made to his father without consideration to avoid paying debts of the firm is ground for dissolution.³⁰ Insanity is not of itself dissolution, but is merely the ground for a decree of dissolution,³¹ even after adjudication.³²

An adjudication that a partnership is bankrupt operates as a dissolution of such partnership.³³ An adjudication that one partner is a bankrupt is said to operate as a dissolution of the partnership;³⁴ and it is said that after such adjudication the solvent members and the trustees of the bankrupt partner are tenants in common.³⁵ On the other hand, it has been said in obiter that the bankruptcy of a partner does not operate as a dissolution of a mining partnership.³⁶ An adjudication that one partner is a bankrupt does not retroact to the time of his committing the act of bankruptcy so as to render invalid transactions entered into on behalf of the partnership by the solvent partner.³⁷ The bankruptcy of a partner does not operate as a dissolution of the partnership as far as concerns transactions in which the expense has already been incurred on the part of the partnership and in which the only thing to be done is to divide the profits of the transaction.³⁸

If a partnership is formed between husband and wife, a divorce does not of itself dissolve such partnership.³⁹ Lack of mutual trust is ground for a decree of dissolution.⁴⁰

The fact that a member had arranged to withdraw in the future, does not relieve him from liability for contracts made before he withdraws in fact.⁴¹

²⁷ *Moore v. Price*, 116 Ala. 247, 22 So. 531.

²⁸ *Walters v. McGreavy*, 111 Ia. 538, 82 N. W. 949.

²⁹ *Havner v. Stephens* (Ky.), 58 S. W. 372.

³⁰ *Hubbard v. Moore*, 67 Vt. 532, 32 Atl. 465.

³¹ *J. v. S.* [1894], 3 Ch. 72; *Raymond v. Vaughn*, 128 Ill. 256, 15 Am. St. Rep. 112, 4 L. R. A. 440, 21 N. E. 566; *Walters v. McGreavy*, 111 Ia. 538, 82 N. W. 949.

³² *Raymond v. Vaughn*, 128 Ill. 256, 15 Am. St. Rep. 112, 4 L. R. A. 440, 21 N. E. 566.

Contra, *Isler v. Baker*, 25 Tenn. (6 Humph.) 85.

³³ *In re Molschick*, 217 Fed. 492;

Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124; *McKelvey's Appeal*, 72 Pa. St. 409.

³⁴ *Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745; *Blackwell v. Claywell*, 75 N. Car. 213.

³⁵ *Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745.

³⁶ *Patrick v. Weston*, 22 Colo. 45, 43 Pac. 446.

³⁷ *Fox v. Hanbury*, Cowp. 445.

³⁸ *Smith v. De Silva*, Cowp. 469.

³⁹ *Snell v. Stone*, 23 Or. 327, 31 Pac. 663. Whether such partnership can be formed, see § 1680.

⁴⁰ *Breaux v. Le Blanc*, 50 La. Ann. 228, 69 Am. St. Rep. 403, 23 So. 281.

⁴¹ *Oakley v. Morrow*, 176 N. Car. 134, 95 S. E. 891.

§ 1715. Assumption of debts on change of firm. If a retiring partner sells his interest to his co-partners, it is an implied term of the contract that the purchasing partners assume the liabilities of the firm, and will protect the retiring partner against any liability by reason thereof, as between the retiring partner and the partners who remain.¹ An incoming partner does not assume any liability for pre-existing debts unless he agrees so to do.² A new firm, one member of which was a member of the old firm, is not liable for the debts of the old firm.³ If he buys a half interest, assumes half the debts, and forms a new partnership with the remaining partner, the debts of the old firm do not become partnership debts of the new firm.⁴ Evidence of an express contract must establish facts sufficient to amount to a valuable consideration.⁵

If one partner retires and the remaining partners or the members of the new firm agree with him to assume the partnership debts, a question is presented as to whether the retiring partner remains primarily liable to the creditors of the firm whose debts were incurred while he was a partner, or whether he is now a surety for the members who have assumed such debts. He clearly does not become a surety as to creditors who do not assent to such an arrangement,⁶ even if such creditors know of such arrangement.⁷

¹ Colorado. *Cobb v. Benedict*, 27 Colo. 342, 62 Pac. 222.

Illinois. *Edens v. Williams*, 36 Ill. 252.

Michigan. *Lambert v. Griffith*, 50 Mich. 286, 15 N. W. 458.

Nebraska. *Richards v. Hene*, 30 Neb. 259, 46 N. W. 477.

New Jersey. *Schlicher v. Vogel*, 61 N. J. Eq. 158, 47 Atl. 448.

² Alabama. *Webb v. Butler*, 192 Ala. 287, Ann. Cas. 1916D, 815, 68 So. 369.

California. *Smith v. Millard*, 77 Cal. 440.

Colorado. *Nix v. Bank*, 23 Colo. 511, 48 Pac. 522.

Idaho. *McGilvery v. McGilvery*, 23 Ida. 116, 128 Pac. 978.

Texas. *Freeman v. Huttig Sash & Door Co.*, 105 Tex. 560, 153 S. W. 122.

³ *Webb v. Butler*, 192 Ala. 287, 68 So. 369; *Ball v. Mashburn*, 110 Ga. 295, 34 S. E. 851.

⁴ *Hyer v. Norton*, 26 Ind. 269.

⁵ *Kling v. Tunstall*, 109 Ala. 606, 19 So. 907.

⁶ Alabama. *Hall v. Jones*, 56 Ala. 493.

Illinois. *Conwell v. McCowan*, 81 Ill. 285.

Kansas. *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657, 44 Am. Rep. 668.

North Dakota. *Dean v. Collins*, 15 N. D. 535, 9 L. R. A. (N.S.) 49, 108 N. W. 242.

Ohio. *Rawson v. Taylor*, 30 O. S. 389, 27 Am. Rep. 464.

Tennessee. *Clinchfield Fuel Co. v. Lundy*, 130 Tenn. 135, L. R. A. 1915B, 418, 169 S. W. 563.

Texas. *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. Rep. 783, 37 S. W. 411.

West Virginia. *Barnes v. Boyers*, 34 W. Va. 303, 12 S. E. 708; *McCoy v. Jack*, 47 W. Va. 201, 34 S. E. 991.

Wisconsin. *First National Bank v. Finck*, 100 Wis. 446, 76 N. W. 608.

⁷ Iowa. *McAreavy v. Magril*, 123 Ia. 605 [sub nomine, *McAreavy v. Magril*, 99 N. W. 193].

The sounder view is that he remains primarily liable, even as to assenting creditors,⁹ and as he does not become a surety he is not released by an extension of time for valuable consideration without his assent.⁹ There is some authority, however, for the proposition that such an arrangement makes the retiring partner a surety if the creditors assent,¹⁰ and if the creditors who know of such arrangement and consent thereto have permitted the partner who remains in the business to waste the partnership property on which they have a lien, the retiring partner is discharged to the extent that he is injured.¹¹ So he is held to be a surety released by extension of time,¹² and entitled to require the creditors of the partnership to sue promptly.¹³

Such an arrangement certainly does not release the retiring partner entirely unless the creditors specifically assent thereto.¹⁴ A retiring partner can be released from the prior debts of the partnership only by an express contract which is based upon valuable considerations.¹⁵ The fact that the partner who continues business

North Dakota. *Dean v. Collins*, 15 N. D. 535, 9 L. R. A. (N.S.) 49, 108 N. W. 242.

Ohio. *Rawson v. Taylor*, 30 O. S. 389, 27 Am. Rep. 464.

Pennsylvania. *Whittier v. Gould*, 8 Watts (Pa.) 485.

Texas. *White v. Boone*, 71 Tex. 712, 12 S. W. 51.

⁹*Brannum v. Wertheimer-Schwartz Shoe Co.*, 117 Ala. 601, 23 So. 639; *National Cash Register Co. v. Brown*, 19 Mont. 200, 61 Am. St. Rep. 498, 37 L. R. A. 515, 47 Pac. 995; *Chinchfield Fuel Co. v. Lundy*, 130 Tenn. 135, L. R. A. 1915B, 418, 169 S. W. 563.

Assent and consideration are said to be necessary to change the primary liability of the retiring partner into that of a surety. *First Nat. Bank v. Finck*, 100 Wis. 446, 76 N. W. 608.

See also, *A. F. Shapleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. Rep. 783, 37 S. W. 411.

This is a special instance of the general question of the right of two persons to impose a contractual obligation on a third person. See § 2411.

⁹*National Cash Register Co. v. Brown*, 19 Mont. 200, 61 Am. St. Rep. 498, 37 L. R. A. 515, 47 Pac. 995.

¹⁰*England. Rouse v. Bradford Banking Co.* [1894], A. C. 586.

Georgia. *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245.

Illinois. *Wiley v. Temple*, 85 Ill. App. 69.

Michigan. *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529.

New York. *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90.

Oklahoma. *Johnson v. Jones*, 39 Okla. 323, 48 L. R. A. (N.S.) 547, 135 Pac. 12.

Pennsylvania. *Campbell v. Floyd*, 153 Pa. St. 84, 25 Atl. 1033.

Wisconsin. *Stein v. Benedict*, 83 Wis. 603, 53 N. W. 891.

¹¹*Johnson v. Jones*, 39 Okla. 323, 48 L. R. A. (N.S.) 547, 135 Pac. 12.

¹²*Millerd v. Thorn*, 56 N. Y. 402.

¹³*Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90.

¹⁴*Andres v. Morgan*, 62 O. S. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

¹⁵*Bays v. Johnson*, 80 W. Va. 559, 92 S. E. 792.

has assumed partnership liability does not of itself operate as a discharge of the retiring partner.¹⁶

If a purchasing partner agrees to pay the debts of the firm, it has been held that the retiring partner has a cause of action as soon as the purchasing partner allows any bill of the original partnership to remain unpaid after it is due.¹⁷

By special arrangement the retiring partner may for value assume the outstanding debts of the firm.¹⁸

The entire question of the liability of an incoming partner to the creditors of the firm by reason of his agreement with the retiring partner to pay the firm debts and the question of the effect of such contract to confer the rights of a surety upon the partner who was originally liable for the partnership debts, is a branch of the general subject of the effect and operation of contracts for the benefit of third persons which is discussed elsewhere.¹⁹

§ 1716. Powers after dissolution. After dissolution either partner may settle outstanding accounts,¹ and he may compromise outstanding debts due to the partnership,² and may complete the performance of contracts previously entered into,³ but he can not bind his partners on new contracts,⁴ and he can not give notes,⁵ even in

¹⁶ *Bays v. Johnson*, 80 W. Va. 559, 92 S. E. 792.

¹⁷ *Alabama. Peacey v. Peacey*, 27 Ala. 683.

Georgia. Tucker v. Murphey, 114 Ga. 662, 40 S. E. 836.

Kansas. Gillen v. Peters, 39 Kan. 489, 18 Pac. 613.

Missouri. Ham v. Hill, 29 Mo. 275.

Oregon. Miller v. Bailey, 19 Or. 539, 25 Pac. 27.

¹⁸ *Stringer v. Stevenson*, 240 Fed. 892, 153 C. C. A. 578 [modifying decree, *In re Stringer*, 234 Fed. 454].

¹⁹ See §§ 2374 et seq.

¹ *Arkansas. Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171.

Iowa. Western Stage Co. v. Walker, 2 Ia. 504, 65 Am. Dec. 789.

Kentucky. Burns v. Treadway, 174 Ky. 123, 191 S. W. 868.

Massachusetts. Gordon v. Albert, 168 Mass. 150, 46 N. E. 423.

Oregon. Rikken v. Investment Co., 31 Or. 35, 47 Pac. 923. Either partner has a right to possession of assets.

Gray v. Green, 142 N. Y. 316, 40 Am. St. Rep. 596, 37 N. E. 124.

² *Burns v. Treadway*, 174 Ky. 123, 191 S. W. 868.

³ *Western Stage Co. v. Walker*, 2 Ia. 504, 65 Am. Dec. 789; *Page v. Wolcott*, 81 Mass. (15 Gray) 536.

⁴ *Georgia. Bass-Dry Goods Co. v. Mfg. Co.*, 116 Ga. 176, 42 S. E. 415.

Louisiana. Richard v. Moulton, 109 La. 465, 33 So. 563.

Minnesota. First International Bank v. Brown, 130 Minn. 210, 153 N. W. 522.

Missouri. Evangelical Synod v. Schoeneich, 143 Mo. 652, 45 S. W. 647.

Nebraska. Graves v. Bank, 49 Neb. 437, 68 N. W. 612. (Especially for individual debts.)

North Carolina. Jenkins Bros. Shoe Co. v. Renfrow, 151 N. Car. 323, 25 L. R. A. (N.S.) 231, 66 S. E. 212.

Ohio. Palmer v. Dodge, 4 O. S. 21, 62 Am. Dec. 271.

⁵ *Louisiana. Bank of Monroe v. Drew*, 126 La. 1028, 32 L. R. A. (N.S.) 255, 53 So. 129.

renewal of a pre-existing firm debt.⁶ If A renews a partnership note after dissolution and B assents thereto, B is liable upon such renewal note;⁷ or delivers a note previously signed;⁸ or binds his partners by a contract of indorsement,⁹ or extends limitations by a new promise.¹⁰

The dissolution of a partnership does not discharge prior contracts,¹¹ or debts.¹² Thus dissolution does not discharge liability on a lease.¹³ The dissolution of a firm terminates its existing contracts by which it was to act as agent.¹⁴

The managing partner after dissolution may incur debts for expenses necessary to winding up the business and he is entitled to be reimbursed therefor.¹⁵

If it is necessary to continue the partnership business or to borrow money, it is said by the English courts that the surviving partner has authority to perform any or all of such incidental accounts.¹⁶

Michigan. *Smith v. Shellon*, 35 Mich. 42, 24 Am. Rep. 529; *Potter v. Tolbert*, 113 Mich. 486, 71 N. W. 849.

Mississippi. *Boswell v. Lynchburg Shoe Co.*, 110 Miss. 553, 70 So. 689.

Missouri. *Seufert v. Gille*, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

West Virginia. *Bays v. Johnson*, 80 W. Va. 559, 92 S. E. 792.

Alabama. *Harwell v. Mfg. Co.*, 123 Ala. 460, 26 So. 501.

Louisiana. *Bank of Monroe v. Drew*, 126 La. 1028, 32 L. R. A. (N.S.) 255, 53 So. 129.

Maine. *Perrin v. Keene*, 19 Me. 355, 36 Am. Dec. 759.

Mississippi. *Boswell v. Lynchburg Shoe Co.*, 110 Miss. 553, 70 So. 689.

Texas. *White v. Tudor*, 24 Tex. 639, 76 Am. Dec. 126.

⁷ *Seufert v. Gille*, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

⁸ *Merrit v. Pollys*, 55 Ky. (16 B. Mon.) 355; *Robb v. Mudge*, 80 Mass. (14 Gray) 534; *Gale v. Miller*, 54 N. Y. 536; *Woodworth v. Downer*, 13 Vt. 522, 37 Am. Dec. 611.

Contra, he may renew notes. *Meyran v. Abel*, 189 Pa. St. 215, 69 Am. St. Rep. 806, 42 Atl. 122.

⁹ *Whitworth v. Ballard*, 56 Ind. 279; *Bryant v. Lord*, 19 Minn. 396; *Fellows v. Wyman*, 33 N. H. 351; *Dana v. Conant*, 30 Vt. 246.

¹⁰ *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Kerper v. Wood*, 48 O. S. 613, 15 L. R. A. 656, 29 N. E. 501; *Bush v. Stowell*, 71 Pa. St. 208, 10 Am. Rep. 694.

Contra, that he can extend limitation by a new promise. *Cody v. Shepard*, 28 Mass. (11 Pick.) 400, 22 Am. Dec. 379; *Vinal v. Burrill*, 33 Mass. (16 Pick.) 401; *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163; *Mills v. Hyde*, 19 Vt. 59, 46 Am. Dec. 177.

¹¹ *Burdett v. Greer*, 63 W. Va. 515, 60 S. E. 497 [sub nomine, *Burdett v. Hayman*, 15 L. R. A. (N.S.) 1019].

¹² *Barnes v. Trust Co.*, 169 Ill. 112, 48 N. E. 31; *In re Dunn*, 115 La. 1084, 40 So. 466; *Ely Walker Dry Goods Co. v. Blake*, — Okla. —, 158 Pac. 381.

¹³ *Barnes v. Trust Co.*, 169 Ill. 112, 48 N. E. 31.

¹⁴ *Schlau v. Enzenbacher*, 265 Ill. 626, L. R. A. 1915C, 576, 107 N. E. 107.

¹⁵ *Conrad v. Buck*, 21 W. Va. 396.

¹⁶ *In re Bourne* [1906], 2 Ch. 427.

It has been held that a surviving partner may mortgage partnership realty to secure an overdraft on a partnership account which was made after the death of the deceased partner.¹⁷

The express or implied assent of the remaining partners may render them liable upon contracts after dissolution.¹⁸

§ 1717. Notice necessary on dissolution. No notice of the dissolution of a partnership is necessary to protect the retiring partner from future liability as to those who have actual knowledge of the dissolution or, as a general rule, who have actual knowledge of facts which are sufficient to put a reasonable and prudent man upon inquiry as to the dissolution of the partnership.¹ A retiring partner of a mining partnership is liable to laborers who had begun work for the partnership while he was a member and who did not know that he had sold his interest or did not know facts which would have put a reasonably prudent person on inquiry; but he is not liable for the wages of laborers who began work after he had sold his interest.² The fact that the adversary party has the means of knowledge of dissolution is, however, said not to be sufficient to relieve from liability the partners who have retired from the firm, if he does not have actual knowledge.³

As against subsequent creditors of a partnership who do not actually know of the dissolution and have not knowledge of facts sufficient to put a reasonable man upon inquiry, a distinction must be made between those who had dealt with the firm before dissolution and who knew of the connection of the retiring partner with such firm and those who had not dealt with the firm before dissolution.

On dissolution of a partnership, personal notice should be given to those who have dealt with the firm before dissolution who knew of the connection of the retiring partner with such firm, and who do not know of such dissolution, and who do not have knowledge of facts which would put a reasonable and prudent man upon inquiry if the retiring partner wishes to avoid liability upon subsequent

¹⁷In re Bourne [1906], 2 Ch. 427.

¹⁸Big Four Implement Co. v. Keyser, 99 Kan. 8, 161 Pac. 592; Seufert v. Gille, 230 Mo. 453, 31 L. R. A. (N.S.) 471, 131 S. W. 102.

¹Bank v. Cannon, 133 Ga. 779, 67 S. E. 83; Nuller v. Pfeiffer, 168 Ind. 219, 80 N. E. 409; Seufert v. Gille, 230 Mo.

453, 31 L. R. A. (N.S.) 471, 131 S. W. 102; Youngs v. Tibbitts, 32 Wis. 79.

²Kelley v. McNamee, 164 Fed. 369, 90 C. C. A. 357, 22 L. R. A. (N.S.) 851.

³Smart v. Breckinridge Bank (Ky.) [sub nomine, Gross v. Breckinridge Bank, 4 L. R. A. (N.S.) 800, 90 S. W. 5].

contracts.⁴ Thus an attorney retained by the old firm,⁵ a person who has made one loan to the old firm,⁶ a bank where the firm cashed drafts⁷ or borrowed money,⁸ and a depositor with a dissolved banking firm,⁹ are each entitled to personal notice. Where personal notice should be given, a notice published but not known by the party dealing with the firm;¹⁰ or a notice mailed but not received,¹¹ even if a red line is drawn around the notice;¹² or a notice to two commercial agencies and a local item in one or two newspapers;¹³ or the general notoriety of the dissolution,¹⁴ is each insufficient. The contents of new letterheads of the firm showing a change of members is sufficient if such letterheads were sent to the customer in question, and he had been notified that the formation of certain contracts was delayed owing to a contemplated reorganization.¹⁵ A

⁴ England. *Court v. Berlin* [1897], 2 Q. B. 396.

United States. *Neal v. Smith*, 116 Fed. 20; *Birkhead v. De Forest*, 120 Fed. 645, 57 C. C. A. 107.

Georgia. *Camp v. Southern, etc., Co.*, 97 Ga. 582, 25 S. E. 362.

Illinois. *Arnold v. Hart*, 176 Ill. 442, 52 N. E. 936 [affirming, 75 Ill. App. 165]; *Huston v. Newgass*, 234 Ill. 285, 84 N. E. 910.

Iowa. *Stockhausen v. Johnson*, 173 Ia. 413, 155 N. W. 823.

Kentucky. *Smart v. Breckinridge Bank (Ky.)* [sub nomine, *Gross v. Breckinridge Bank*, 4 L. R. A. (N.S.) 800, 90 S. W. 51]; *Bowman v. Blanton*, 141 Ky. 407, 132 S. W. 1041.

Michigan. *Burgan v. Lyell*, 2 Mich. 102, 55 Am. Dec. 53.

Mississippi. *Batson v. Thompson Land & Lumber Co.*, 92 Miss. 199, 45 So. 985.

New York. *Elmira Iron & Steel Rolling Mill Co. v. Harris*, 124 N. Y. 280, 26 N. E. 541; *Second National Bank v. Weston*, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080; *Bank v. Weston*, 172 N. Y. 259, 64 N. E. 946.

North Carolina. *Ellison v. Sexton*, 105 N. Car. 356, 18 Am. St. Rep. 907, 11 S. E. 180; *Ring Furniture Co. v. Bussell*, 171 N. Car. 474, 88 S. E. 484; *Southern States Supply Co. v. Lyon*, 173 N. Car. 445, 92 S. E. 145.

South Dakota. *Tobin v. McKinney*, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228.

Vermont. *Amidown v. Osgood*, 24 Vt. 278, 58 Am. Dec. 171.

⁵ *Court v. Berlin* [1897], 2 Q. B. 396.

⁶ *Thayer v. Goss*, 91 Wis. 90, 64 N. W. 312.

⁷ *Camp v. Southern, etc., Co.*, 97 Ga. 582, 25 S. E. 362.

⁸ *Bank v. Weston*, 172 N. Y. 259, 64 N. E. 946.

⁹ *Arnold v. Hart*, 176 Ill. 442, 52 N. E. 936 [affirming, 75 Ill. App. 165]. Even one who has made only two such deposits. *Tobin v. McKinney*, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228.

¹⁰ *Nevens v. Bulger*, 93 Me. 502, 45 Atl. 503; *Rose v. Coffield*, 53 Md. 18, 36 Am. Rep. 389.

¹¹ *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246.

¹² *Haynes v. Carter*, 59 Tenn. (12 Heisk.) 7, 27 Am. Rep. 747.

¹³ *Citizens' National Bank v. Weston*, 162 N. Y. 113, 56 N. E. 494 [citing, *Bank v. Weston*, 159 N. Y. 201, 45 L. R. A. 547, 54 N. E. 40; *Mill Co. v. Harris*, 124 N. Y. 280, 26 N. E. 541].

¹⁴ *Pitcher v. Barrows*, 34 Mass. (17 Pick.) 361, 28 Am. Dec. 306.

¹⁵ *Edwards v. Wheeler's Estate*, 130 Mich. 219, 89 N. W. 679.

notice of a change in the partnership given to a traveling salesman as agent of the adversary party,¹⁶ is sufficient.

Notice by publication is sufficient as to all other persons,¹⁷ in order to free the retiring partners from liability for future contracts.

When a dormant partner withdraws, notice is not necessary to those who did not know he was a partner.¹⁸

Where dissolution takes place by operation of law, notice is not necessary.¹⁹ So where a firm is dissolved by bankruptcy proceedings instituted against one partner, such proceedings are notice to all creditors.²⁰ So on the death of one partner notice of dissolution is not necessary.²¹

In the absence of necessary notice a retiring partner is liable for contracts entered into after dissolution with those who are ignorant thereof,²² especially where the old firm name is re-

¹⁶ *Ach v. Barnes*, 107 Ky. 219, 53 S. W. 293; *Ring Furniture Co. v. Bussell*, 171 N. Car. 474, 88 S. E. 484.

¹⁷ *Ellison v. Sexton*, 105 N. Car. 356, 18 Am. St. Rep. 907, 11 S. E. 180; *Southern States Supply Co. v. Lyon*, 173 N. Car. 445, 92 S. E. 145; *Watkinson v. Bank*, 4 Whart. (Pa.) 482, 34 Am. Dec. 521; *New York, etc., Bank v. Crowell*, 177 Pa. St. 313, 35 Atl. 613; *Thayer v. Goss*, 91 Wis. 90, 64 N. W. 312.

¹⁸ *Gorman v. Davis, etc., Co.*, 118 N. Car. 370, 24 S. E. 770. To excuse a dormant partner from notice he must have been unknown or not generally known. *Rowland v. Estes*, 190 Pa. St. 111, 42 Atl. 528; *Pitkin v. Benfer*, 50 Kan. 108, 34 Am. St. Rep. 110, 31 Pac. 695; *Kelley v. Hurlburt*, 5 Cow. (N. Y.) 534.

¹⁹ *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176, 42 S. E. 415; *National Bank v. Hollingsworth*, 135 N. Car. 556, 47 S. E. 618; *Little v. Hazlett*, 197 Pa. St. 591, 47 Atl. 855.

²⁰ *Eustis v. Bolles*, 146 Mass. 413, 4 Am. St. Rep. 327, 16 N. E. 286.

²¹ *Bass Dry Goods Co. v. Mfg. Co.*, 116 Ga. 176, 42 S. E. 415; *Marlett v. Jackman*, 85 Mass. (3 All.) 287; *Little v. Hazlett*, 197 Pa. St. 591, 47 Atl. 855.

²² *United States. Bloch v. Price*, 32 Fed. 562.

Arkansas. Bluff City Lumber Co. v. Bank, 95 Ark. 1, 128 S. W. 58.

Illinois. Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

Indian Territory. Shapard Grocery v. Hynes, 3 Ind. Terr. 74, 53 S. W. 486.

Iowa. Dickson v. Dryden, 97 Ia. 122, 66 N. W. 148; *Stockhausen v. Johnson*, 173 Ia. 413, 155 N. W. 823.

Kentucky. Turner v. Gill, 105 Ky. 414, 49 S. W. 311; *Bowman v. Blanton*, 141 Ky. 407, 132 S. W. 1041.

Maine. Nevens v. Bulger, 93 Me. 502, 45 Atl. 503.

Massachusetts. Elkinton v. Booth, 143 Mass. 479, 10 N. E. 460; *Central National Bank v. Frye*, 148 Mass. 498, 20 N. E. 325.

Michigan. Culligan v. Alpern, 160 Mich. 241, 125 N. W. 20.

Minnesota. Compare Swigert v. Aspenden, 52 Minn. 565, 54 N. W. 738; *Green v. Bank*, 78 Tex. 2, 14 S. W. 253.

Missouri. Knaus v. Givens, 110 Mo. 58, 19 S. W. 535; *Seufert v. Gille*, 230 Mo. 453, 131 S. W. 102.

Nebraska. Stoddard Mfg. Co. v. Krause, 27 Neb. 83, 42 N. W. 913.

North Carolina. Ellison v. Sexton, 105 N. Car. 356, 18 Am. St. Rep. 907, 11 S. E. 180; *Alexander v. Harkins*,

tained,²⁵ or the retiring member holds himself out as a member of the firm.²⁴ It is said that, in order to relieve the retiring partner, notice must be given before the contract is made and contractual liability incurred thereunder.²⁵ Thus where notice of retirement was given after A made a contract with the old firm, and after such notice A shipped goods in performance of such contract, the retiring partner is held to be a surety.²⁶ If notice of dissolution and of the resulting lack of authority to bind the retiring partner is given before he has acted to his prejudice under the unauthorized contract, no reason appears for applying the principles of estoppel so as to hold the retiring partner; and in some cases it is held that such notice relieves him from liability.²⁷

The principles of estoppel which have been discussed elsewhere,²⁸ apply after dissolution as well as before dissolution;²⁹ and a partner who has retired from a firm and has given notice may, nevertheless, be liable upon subsequent contracts if after such dissolution and notice he holds himself out as a member of such partnership.³⁰

If the notice is given but the dissolution never took place,³¹ or if the retirement of the partner was merely ostensible to permit him to carry out an illegal scheme,³² none of the partners are thereby relieved from liability.

While dissolution with proper notice generally prevents further liability of a retiring partner, he is liable to the amount of money left in the business.³³

The same principles that apply to a dissolution of a partnership apply to the transfer of a business by an individual. If the business

120 N. Car. 452, 27 S. E. 120; Southern States Supply Co. v. Lyon, 173 N. Car. 445, 92 S. E. 145.

Pennsylvania. Robinson v. Floyd, 159 Pa. St. 165.

South Carolina. Brown v. Foster, 41 S. Car. 118, 19 S. E. 299.

²³ Thatcher v. Allen, 58 N. J. L. 240, 33 Atl. 284; Evans, etc., Co. v. Hadfield, 93 Wis. 665, 68 N. W. 468.

²⁴ Shapard Grocery Co. v. Hynes, 3 Ind. Terr. 74, 53 S. W. 486.

²⁵ Southern States Supply Co. v. Lyon, 173 N. Car. 445, 92 S. E. 145.

²⁶ Porter v. Baxter, 71 Minn. 195, 73 N. W. 844.

²⁷ Briaban v. Boyd, 4 Paige (N. Y.) 17; Jenkins Bros. Shoe Co. v. Renfrow, 151 N. Car. 323, 25 L. R. A. (N.S.) 231, 66 S. E. 212.

²⁸ See § 1706.

²⁹ Speer v. Bishop, 24 O. S. 598; First National Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

³⁰ Speer v. Bishop, 24 O. S. 598; First National Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

³¹ Spragans v. Lawson (Ky.), 60 S. W. 373.

³² Utley v. Clements, 79 Minn. 68, 81 N. W. 739.

³³ Adams v. Albert, 155 N. Y. 356, 63 Am. St. Rep. 675, 49 N. E. 929.

is conducted in the name under which it was conducted before such transfer, the original owner of such business is liable for obligations incurred in such business in case he fails to give notice that he has withdrawn therefrom,³⁴ even if the person to whom such obligations were incurred had never dealt with such former owner.³⁵

§ 1718. Powers of surviving partners. On the death of a partner, the surviving partner has, under the statutes of many states, the legal title to the partnership property, with power to liquidate the firm's business.¹ He may compel the executor of the deceased partner to surrender to him all the partnership assets which are in the possession of such executor.²

He can not bind the firm or the estate of his deceased partner,³ or the executor of his deceased partner,⁴ by a new contract as by purchasing goods,⁵ or by giving a note.⁶ He can not bind the heirs of decedent by renewing a lease, but their acceptance of rent for one year may ratify the lease for that year.⁷

The surviving partner may incur debts which are necessary to enable him to sell the partnership property in the most advantageous manner.⁸ If in good faith the surviving partner undertakes to sell

³⁴Hendley v. Bittinger, 249 Pa. St. 193, L. R. A. 1915F, 711, 94 Atl. 831.

³⁵Hendley v. Bittinger, 249 Pa. St. 193, L. R. A. 1915F, 711, 94 Atl. 831.

¹United States. McKinzie v. United States, 34 Ct. Cl. 278.

Alabama. Didlake v. Roden Grocery Co., 160 Ala. 484, 22 L. R. A. (N.S.) 907, 49 So. 384.

Illinois. Maynard v. Richards, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222; Bauer Grocery Co. v. Shoe Co., 87 Ill. App. 434.

Kansas. Big Four Implement Co. v. Keyser, 99 Kan. 8, L. R. A. 1917C, 166, 161 Pac. 592.

Massachusetts. Hewitt v. Hayes, 204 Mass. 586, 27 L. R. A. (N.S.) 154, 90 N. E. 985.

Michigan. Drueke v. Boylon, 160 Mich. 522, 125 N. W. 416.

Rhode Island. Ferrara v. Russo, 40 R. I. 533, L. R. A. 1918B, 905, 102 Atl.

86. The surviving partner of a firm of attorneys must account for fees for services rendered under the old contract. Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107.

²Hewitt v. Hayes, 204 Mass. 586, 27 L. R. A. (N.S.) 154, 90 N. E. 985.

³Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222; Durant v. Pierson, 124 N. Y. 444 21 Am. St. Rep. 686, 12 L. R. A. 146, 26 N. E. 1095; Oyster v. Short, 177 Pa. St. 594, 601, 35 Atl. 710, 711.

⁴Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347.

⁵Friend v. Young [1897], 2 Ch. 421.

⁶Bodey v. Cooper, 82 Md. 625, 34 Atl. 362.

⁷Oliver v. Olmstead, 112 Mich. 483, 70 N. W. 1036; Betts v. June, 51 N. Y. 274.

⁸Big Four Implement Co. v. Keyser, 99 Kan. 8, L. R. A. 1917C, 166, 161 Pac. 592.

the stock of partnership goods at retail he has power to buy goods to make such stock complete and salable; and the estate of the deceased partner will be liable for goods bought for this purpose.⁸

Even where decedent by will gives the surviving partner power to continue the business, he can not bind the estate of the deceased partner beyond the amount in the business,¹⁰ unless the will specifically provides that he may bind the estate for new debts.¹¹ A surviving partner can not give a cognovit note for a firm debt,¹² though he may confess judgment.¹³ Proper items of indebtedness incurred by a surviving partner after the death of the other partner will be allowed him by the court in settling accounts.¹⁴ He may be credited with expenses necessary to preserve the property, and even with expenses necessary to keep up its value. Thus the surviving partner of a horse-racing firm may be credited with the expenses of caring for and training horses after his partner's death and entering them for stakes.¹⁵ If the law requires him to settle his accounts with the partnership at a certain time, and he continues the business beyond such time, he must, in case subsequent losses occur, settle as of the date at which the settlement should have been made.¹⁶

If the surviving partner continues the business longer than is necessary and the representatives of the deceased partner acquiesce

⁸ *Big Four Implement Co. v. Keyser*, 99 Kan. 8, L. R. A. 1917C, 166, 161 Pac. 592.

¹⁰ *United States. Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955; *Burwell v. Ca-wood*, 43 U. S. (2 How.) 560, 11 L. ed. 378.

Alabama. Steiner v. Steiner, etc., Co., 120 Ala. 128, 26 So. 494.

Connecticut. Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111.

New York. Stewart v. Robinson, 115 N. Y. 328, 5 L. R. A. 410, 22 N. E. 160, 163.

Pennsylvania. Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080.

Contra, where a limited partner had become liable as a general partner by failure to comply with the statute, a provision in the will that the business was to continue was held to charge subsequent debts against the estate. *J. B. Wathan & Bro. Co. v. Carney*

(Tenn. Ch. App.), 47 S. W. 1115. So *Ussery v. Crusman* (Tenn. Ch. App.), 47 S. W. 567.

¹¹ *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347. Under such a will he can deed realty to secure debts. In this case the surviving partner was make executor. *Laughlin v. Lorenz*, 48 Pa. St. 275, 86 Am. Dec. 592; *Davis v. Christian*, 56 Va. (15 Gratt.) 11.

¹² *Bauer Grocery Co. v. Shoe Co.*, 67 Ill. App. 434.

¹³ *Evans v. Watts*, 192 Pa. St. 112, 43 Atl. 464.

¹⁴ *Wolford v. Reilly*, 133 Mo. 463, 34 S. W. 847. Even for borrowed money. *Herron v. Wampler*, 194 Pa. St. 277, 45 Atl. 81; *Kenney v. Howard*, 68 Vt. 194, 34 Atl. 700.

¹⁵ *Central, etc., Co. v. Respass*, 112 Ky. 606, 56 L. R. A. 479, 66 S. W. 421.

¹⁶ *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759.

in such continued business, they can not subsequently claim that such continuance was unauthorized.¹⁷ Creditors of the surviving partner are entitled to priority over the representatives of the deceased partner.¹⁸ The devisees and legatees of the deceased partner, who acquiesce in the continuance of the partnership business, are said to be estopped from claiming that obligations incurred after the death of such partner are not partnership liabilities.¹⁹

§ 1719. Peculiarities of enforcement of contract between partners—Accounting involved. At common law one partner could not sue another on matters arising out of the partnership which involve more than one transaction before an accounting was had between the partners,¹ and while the partnership was still in existence.² So an action could not be brought by the executor against the surviving partner,³ or by the surviving partner against the heirs of a deceased partner while the partnership accounts are unsettled.⁴ This objection is waived by failure to object at trial.⁵ If the partnership was

¹⁷ *Maynard v. Maynard*, 147 Ga. 178, L. R. A. 1918A, 81, 93 S. E. 289; *Big Four Implement Co. v. Keyser*, 99 Kan. 8, L. R. A. 1917C, 166, 161 Pac. 592.

¹⁸ *Big Four Implement Co. v. Keyser*, 99 Kan. 8, L. R. A. 1917C, 166, 161 Pac. 592.

¹⁹ *Maynard v. Maynard*, 147 Ga. 178, L. R. A. 1918A, 81, 93 S. E. 289.

¹ *California. Dukes v. Kellogg*, 127 Cal. 563, 60 Pac. 44.

Florida. Wills v. Andrews, 72 Fla. 596, 75 So. 618.

Georgia. Miller v. Freeman, 111 Ga. 654, 51 L. R. A. 504, 36 S. E. 961.

Illinois. Bowzer v. Stoughton, 119 Ill. 47, 9 N. E. 208; *Sindelare v. Walker*, 137 Ill. 43, 31 Am. St. Rep. 353, 27 N. E. 59; *Newman v. Tichenor*, 88 Ill. App. 1.

Kansas. O'Brien v. Smith, 42 Kan. 49, 21 Pac. 784.

Kentucky. Stone v. Mattingly (Ky.), 19 S. W. 402.

Missouri. Johnson v. Ewald, 82 Mo. App. 276.

Montana. Silver v. Eakins, 55 Mont. 210, 175 Pac. 876.

New Mexico. Willey v. Renner, 8 N. M. 641, 45 Pac. 1132.

North Dakota. Devore v. Woodruff, 1 N. D. 143, 45 N. W. 701; *Macfadden v. Jenkins*, — N. D. —, 169 N. W. 151.

Ohio. Oglesby v. Thompson, 59 O. S. 60, 51 N. E. 878; *Kunneke v. Mapel*, 60 O. S. 1, 53 N. E. 259.

Oregon. Armstrong v. Hollen, 58 Or. 534, 115 Pac. 423.

Oklahoma. Baughman v. Hebard, — Okla. —, 166 Pac. 88; *Nation v. Savely*, — Okla. —, 168 Pac. 805; *Dill v. Flesher*, — Okla. —, 175 Pac. 359.

Tennessee. Eddins v. Menefee (Tenn. Ch. App.), 54 S. W. 992.

West Virginia. Jones v. Rose, 81 W. Va. 177, 94 S. E. 41.

² *Miller v. Freeman*, 111 Ga. 654, 51 L. R. A. 504, 36 S. E. 961; *Sebastian v. Academy Co. (Ky.)*, 56 S. W. 810.

³ *Palm v. Poponoe*, 60 Kan. 297, 56 Pac. 480.

⁴ *Blakely v. Smock*, 96 Wis. 611, 71 N. W. 1052.

⁵ *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077 [rehearing denied, 83 N. W. 288].

still in existence or if there were mutual claims, the only remedy is an accounting in equity.⁶

§ 1720. Accounting not involved. An action at law would lie after the partnership was ended, if there were no partnership liabilities and no mutual claims,¹ or after an accounting.² An accounting in equity is necessary as a condition precedent to an action at law only where the partnership involves more than one transaction and where accordingly there are likely to be a series of mutual debits and credits to be adjusted.³ If the partnership involves a single transaction one partner may maintain an action against another to recover his proportionate share of the profits or to obtain contribution for his proportionate share of the losses, although there has been no accounting in equity.⁴ Equity will not grant an accounting with reference to a single matter in dispute between partners where no dissolution is sought.⁵ A partner may sue at law for contribution upon a matter outside the partnership,⁶ or where by express agreement a partnership item has been separated from the mass of partnership business,⁷ or where but a single item is involved,⁸ or, it is said, a very few items.⁹ One partner may maintain an action at law against another for breach of the contract of partnership.¹⁰

⁶ Macfadden v. Jenkins, — N. D. —, 169 N. W. 151; Baughman v. Hebard, — Okla. —, 166 Pac. 88; Dill v. Flesher, — Okla. —, 175 Pac. 359; Jones v. Rose, 61 W. Va. 177, 94 S. E. 41.

¹ Mills v. Gray, 50 Utah 224, 167 Pac. 358.

² Johnson v. Peck, 58 Ark. 580, 25 S. W. 865; Baughman v. Hebard, — Okla. —, 166 Pac. 88; Dill v. Flesher, — Okla. —, 175 Pac. 359.

³ Reiser v. Johnston, — Okla. —, L. R. A. 1918A, 924, 166 Pac. 723.

⁴ Reiser v. Johnston, — Okla. —, L. R. A. 1918A, 924, 166 Pac. 723.

⁵ Lord v. Hull, 178 N. Y. 9, 102 Am. St. Rep. 484, 70 N. E. 69.

⁶ California. Bull v. Coe, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

⁷ Iowa. Mullany v. Keenan, 10 Ia. 224.

⁸ Maine. Soule v. Frost, 76 Me. 119.
⁹ Michigan. Bates v. Lane, 62 Mich.

132, 28 N. W. 753; Carpenter v. Greenap, 74 Mich. 664, 16 Am. St. Rep. 662, 4 L. R. A. 241, 42 N. W. 276.

¹⁰ Nebraska. Halleck v. Streeter, 52 Neb. 827, 73 N. W. 219.

¹¹ New York. Bank v. Delafield, 126 N. Y. 410, 27 N. E. 797.

¹² Utah. Coffin v. McIntosh, 9 Utah 815, 34 Pac. 247; Jennings v. Pratt, 19 Utah 129, 56 Pac. 951.

¹³ Williams v. Henshaw, 28 Mass. (11 Pick.) 79, 22 Am. Dec. 366; George v. Benjamin, 100 Wis. 622, 69 Am. St. Rep. 963, 76 N. W. 619. Compare McMahon v. Rauhr, 47 N. Y. 67.

¹⁴ Wheeler v. Arnold, 30 Mich. 304; Reiser v. Johnston, — Okla. —, 166 Pac. 723; Dill v. Flesher, — Okla. —, 175 Pac. 359.

¹⁵ Clarke v. Mills, 36 Kan. 393, 13 Pac. 569.

¹⁶ Owen v. Meroney, 136 N. Car. 475, 103 Am. St. Rep. 952, 48 S. E. 821.

One partner may maintain an action at law for conversion against a co-partner who takes possession of the partnership assets under claim that he is the sole owner.¹¹ One partner may before final accounting maintain an action at law against another to recover money borrowed by the latter from the former to put into the partnership business,¹² or for money which he is to pay the former for an interest in a patent which they are to contribute to the partnership.¹³ One partner may maintain an action at law against his co-partner for breaking the contract of partnership and forcing a dissolution.¹⁴ Where a partnership is formed between physicians to carry out a contract to transfer the good will of one to the other, a suit can be brought for failure to transfer such good will.¹⁵ After an accounting and an adjustment of all rights and liabilities growing out of the partnership, one partner may maintain an action against the other for the balance due.¹⁶ One partner may sue another on a note given on sufficient consideration based on partnership accounts,¹⁷ or on an express agreement based on a mutual adjustment of their affairs,¹⁸ as to recover the balance on which the parties have agreed.¹⁹ After dissolution and a sale by one partner to the others the former may maintain an action against such others.²⁰ After a dissolution of a firm composed of A, B and C,

¹¹ *Frith v. Thomson*, 103 Kan. 395, L. R. A. 1918F, 1123, 173 Pac. 915.

¹² *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Crater v. Bininger*, 45 N. Y. 545.

¹³ *Cook v. Canny*, 96 Mich. 398, 55 N. W. 987.

¹⁴ *Farwell v. Wilcox*, — Okla. —, 175 Pac. 936.

¹⁵ *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826.

¹⁶ *England. Wray v. Milestone*, 2 H. & H. 32.

Indiana. Douthit v. Douthit, 133 Ind. 26.

Iowa. Thompson v. Smith, 82 Ia. 598, 48 N. W. 988.

Oklahoma. Dill v. Flesher, — Okla. —, 175 Pac. 359.

Wisconsin. Logan v. Trayser, 77 Wis. 579, 46 N. W. 877.

¹⁷ *Alabama. Scott v. Campbell*, 30 Ala. 728.

Illinois. Berry v. De Bruyn, 77 Ill. App. 359.

Kentucky. Hey v. Harding (Ky.), 53 S. W. 33.

Massachusetts. Chamberlain v. Walker, 92 Mass. (10 All.) 429.

Michigan. Mitchell v. Wells, 54 Mich. 127, 19 N. W. 777.

New York. Crater v. Bininger, 45 N. Y. 545; *Bank v. Wood*, 128 N. Y. 35, 27 N. E. 1020.

Ohio. Moore v. Gano, 12 Ohio 300.

Oregon. Wilson v. Wilson, 26 Or. 251, 38 Pac. 185.

¹⁸ *Douthit v. Douthit*, 133 Ind. 26, 32 N. E. 715; *Brown v. Carpenter*, 99 Wash. 227, 169 Pac. 331.

¹⁹ *Brown v. Carpenter*, 99 Wash. 227, 169 Pac. 331.

²⁰ *Huffman v. Huffman*, 63 S. Car. 1, 40 S. E. 963.

whereby A was to collect all claims and pay all debts, A may maintain an action on a debt due from B and C to the firm of A, B and C.¹ After dissolution of a firm composed of A and B, under an agreement whereby A owns all the accounts, A may maintain an action against B if B collects any of such accounts.²

§ 1721. Accounts involving three or more parties, or common member. The law can not settle accounts between three partners;¹ nor could two firms sue each other if they had a member in common.² However, if one of two firms having a common member gives a note to the other firm for a partnership debt, signed by the individual names of some of the partners, omitting the name of the member in common, the payee firm may sue the makers at law.³ Where the statute makes partnership contracts joint and several, one partner may sue the other at law on a joint and several note.⁴

By reason of its more flexible procedure, equity gives adequate relief in actions between partners growing out of partnership business,⁵ or in an action between two firms having a common member.⁶

§ 1722. Personal liability of partner on unauthorized contract. A partner who assumes to enter into a contract on behalf of the partnership is personally liable upon such contract in case the partnership is not bound thereby.¹ Such liability may exist where the partnership on behalf of which he assumes to act does not exist,²

¹ Beebe v. Frazer, 66 Vt. 114, 44 Am. St. Rep. 824, 28 Atl. 880.

² Glade v. White, 42 Neb. 336, 60 N. W. 556.

³ Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354.

⁴ Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526.

⁵ Jungk v. Reed, 9 Utah 49, 33 Pac. 236.

⁶ Kentucky. Morrison v. Stockwell, 39 Ky. (9 Dana) 172.

Mississippi. Sturges v. Swift, 32 Miss. 239.

Missouri. Willis v. Barron, 143 Mo. 450, 65 Am. St. Rep. 673, 45 S. W. 289.

New York. Merrill v. Green, 55 N. Y. 270.

Vermont. Walker v. Wait, 50 Vt. 668.

¹ Wills v. Andrews, 72 Fla. 596, 75 So. 618; Vieth v. Reas, 60 Neb. 52, 82 N. W. 116; Sanger v. French, 157 N. Y. 213, 51 N. E. 979.

² Schnebly v. Cutler, 22 Ill. App. 87; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Cole v. Reynolds, 18 N. Y. 74.

³ Massachusetts. Taft v. Church, 162 Mass. 527, 39 N. E. 283.

New Mexico. American National Bank v. Wood, — N. M. —, 171 Pac. 507.

Oregon. Schade v. Muller, 75 Or. 225, 146 Pac. 144.

Pennsylvania. York Bank's Appeal, 36 Pa. St. 458.

West Virginia. Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 S. E. 917.

⁴ American National Bank v. Wood, — N. M. —, 171 Pac. 507.

or where he is acting in excess of his authority to bind the firm.³ If he confesses judgment against the partnership without authority, the judgment is his personal obligation.⁴ Since the partner is assuming a personal liability even where his contract binds the firm in fact, his liability where he does not bind the firm in fact is ordinarily regarded as a liability arising upon the contract. In the case of the unauthorized contract of the partner, the considerations which make it difficult to hold an unauthorized agent liable personally upon the contract⁵ do not exist, since the agent does not purport to assume any personal liability upon the contract, while the partner does.

³ Taft v. Church, 162 Mass. 527, 39 N. E. 283; York Bank's Appeal, 36 Pa. St. 458.

⁴ York Bank's Appeal, 36 Pa. St. 458.

⁵ See §§ 1772 et seq.

CHAPTER LIV

AGENCY

- § 1723. Nature of agency.
- § 1724. Control as test of agency.
- § 1725. Public utility as agent.
- § 1726. Agency distinguished from other legal relations generally.
- § 1727. Agency distinguished from sale.
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- § 1773. Liability of agent—Contract not authorized—Adversary misled.
- § 1774. Liability of agent—Unauthorized contract ratified.
- § 1775. Liability of agent of undisclosed principal.
- § 1776. Election of adversary party to hold agent or undisclosed principal.
- § 1777. What constitutes election.
- § 1778. Liability of agent of non-existent principal.
- § 1779. Nature of liability of agent to adversary party.
- § 1780. Personal liability of agent by terms of contract.
- § 1781. Rights of principal on contract.

§ 1723. Nature of agency. An agent is one appointed to transact business and to make contracts with third persons in place of and on behalf of the person appointing him, known as the principal.¹ If the contract is ambiguous the test for determining whether an agency is created is the intent of the parties as deduced from the language used and from the surrounding circumstances, to give authority to one of the parties to represent the other party so as to make contracts on behalf of the latter and to bring him into legal relations with third persons.² As in the case of other contracts,³ a

¹Alabama. Echols v. State, 158 Ala. 48, 48 So. 347; Thompson v. Atchley, — Ala. —, 78 So. 196.

Arizona. Brutinel v. Nygren, 17 Ariz. 491, 154 Pac. 1042.

Arkansas. Parker v. Wilson, 99 Ark. 344, Ann. Cas. 1913B, 84, 137 S. W. 926.

Georgia. Central, etc., Co. v. Bank, 101 Ga. 345, 28 S. E. 863.

Idaho. Blackwell v. Kercheval, 27 Ida. 537, 149 Pac. 1060.

Illinois. Upham v. Richey, 163 Ill. 630, 45 N. E. 228; Barnard v. Springfield & N. E. Traction Co., 274 Ill. 148, 113 N. E. 89.

Indiana. Metzger v. Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235.

Kentucky. Simons v. Vaughn, 165 Ky. 167, 176 S. W. 995; Jeffrey Co. v. Lockridge, 173 Ky. 282, 190 S. W. 1103.

Michigan. Cutter v. Powers, 200 Mich. 375, 166 N. W. 1029.

Nebraska. Barbar v. Martin, 67 Neb. 445, 93 N. W. 722.

New Jersey. Elwell v. Coon (N. J. Eq.), 46 Atl. 530.

North Dakota. Odegard v. Haugland, — N. D. —, 169 N. W. 170.

²Gulf Cooperage Co. v. Poindexter, 111 Ark. 345, 163 S. W. 1145; Leonard v. Hallett, 57 Colo. 274, 141 Pac. 481; Paramore v. Campbell, 245 Mo. 287, 149 S. W. 6; Ross v. Northrup, 156 Wis. 327, 144 N. W. 1124.

³See §§ 87 et seq.

contract which creates the relation of principal and agent must be definite and certain;⁴ and the relationship can not be created by vague and indefinite statements.⁵

§ 1724. Control as test of agency. The right of the principal to control the conduct of the agent is the most accurate test of ordinary agency,¹ although it does not apply to agencies in which there is a power coupled with an interest.² The adversary party can not act as agent for the principal.³ An attorney employed by a mortgagor to secure a loan as the agent of the mortgagor is not the agent of the lender.⁴ If A applies to B for a loan to be paid to A's agent, X, C can not treat B as A's agent so as to hold A liable for money advanced by C to B for the purpose of lending it to A.⁵ A banker who agrees with a consignee of goods to issue a bank draft as payment of a bill of lading with a sight draft attached, is the agent of the consignee for the purpose of making payment;⁶ and if such bank draft is not paid, the consignee is liable as for default of his agent.⁷ If the surety delivers the instrument on which he is surety to the principal for the purpose of delivering such instrument to the obligee, the surety makes the principal upon such instrument the agent of the surety for the purpose of making such delivery.⁸ An automobile dealer who is instructing a prospective customer in the use of an automobile, is the agent of the automobile manufacturer whose automobile he handles rather than the agent of the prospective purchaser,⁹ at least to the extent that the automobile manufacturer can not recover from the prospective pur-

⁴ *Mtynarczyk v. Zyskowski*, 191 Mich. 213, 157 N. W. 566.

⁵ *Mtynarczyk v. Zyskowski*, 191 Mich. 213, 157 N. W. 566.

¹ *Connecticut. Ridgefield Savings Bank v. Sherwood*, 91 Conn. 648, 100 Atl. 1063.

Kentucky. Galbraith v. Shores-Mueller Co., 178 Ky. 688, 199 S. W. 779.

Missouri. Scott v. Cowen (Mo.), 195 S. W. 732.

Oklahoma. Maryland Casualty Co. v. Wellston, 47 Okla. 417, 148 Pac. 691.

South Dakota. Shade v. Barnes, 35 S. D. 142, L. R. A. 1915D, 271, 151 N. W. 42.

² See § 1741.

³ *Scott v. Cowen (Mo.)*, 195 S. W. 732.

⁴ *Ridgefield Savings Bank v. Sherwood*, 91 Conn. 648, 100 Atl. 1063.

⁵ *Shade v. Barnes*, 35 S. D. 142, L. R. A. 1915D, 271, 151 N. W. 42.

⁶ *Globe Express Co. v. Taylor*, 61 Colo. 430, 158 Pac. 717.

⁷ *Globe Express Co. v. Taylor*, 61 Colo. 430, 158 Pac. 717.

⁸ *Maryland Casualty Co. v. Wellston*, 47 Okla. 417, 148 Pac. 691.

⁹ *Bertrand v. Hunt*, 89 Wash. 476, 154 Pac. 804.

chaser for injuries which the car has received by reason of such instruction.¹⁰ The relation between A, a dentist, and B, another dentist, whom A employs at a weekly salary, is that of master and servant and not principal and agent.¹¹ A principal debtor does not act as the agent of the creditor in obtaining the signature of the guarantor.¹²

§ 1725. Public utility as agent. A public utility is regarded in some jurisdictions as the agent of the person who makes use thereof.¹ In some jurisdictions it is held that a telegraph company is not the agent of the sender; and accordingly the sender is not bound by an offer which is incorrectly transmitted by a telegraph company and which is accepted in good faith by the person to whom it is sent.² While it is probably incorrect to speak of the mail or of the telegraph as an agent, the general weight of authority holds the sender liable in such cases.³

§ 1726. Agency distinguished from other legal relations generally. The name by which the parties have agreed to call their relationship may be helpful in ascertaining their real intention, but it is not conclusive.¹ If the facts exist which in law create the relation of principal and agent, such relationship exists though the parties may not have intended such facts to have such legal effect,² or though they may have expressly agreed that such should not be the legal effect.³ Thus an ostensible lease of a mill, the lessee to conduct the business for a fixed salary and a certain per cent. of the

¹⁰ *Bertrand v. Hunt*, 89 Wash. 475, 154 Pac. 804.

¹¹ *Wightman v. Wightman*, 223 Mass. 398, 111 N. E. 881.

¹² *Galbraith v. Shores-Mueller Co.*, 178 Ky. 688, 199 S. W. 779.

¹ *Strong v. Western Union Telegraph Co.*, 18 Ida. 389, 30 L. R. A. (N.S.) 409, 109 Pac. 910.

² See § 267.

³ See § 267.

¹ *Alabama. Ferry v. Hall*, 188 Ala. 178, L. R. A. 1917B, 620, 66 So. 104.

Iowa. Trotter v. Grand Lodge, 132 Ia. 513; 7 L. R. A. (N.S.) 569, 109 N. W. 1099.

New York. Sternaman v. Metropoli-

tan Life Ins. Co., 170 N. Y. 13, 88 Am. St. Rep. 625, 57 L. R. A. 318, 62 N. E. 763.

North Dakota. Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558.

Washington. Boston Tow Boat Co. v. John J. Senson Co., 64 Wash. 375, 116 Pac. 1083.

² *McNeill v. Electric Storage Battery Co.*, — S. Car. —, 96 S. E. 134; *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768, 2 L. R. A. 405, 9 S. W. 753.

³ *McNeill v. Electric Storage Battery Co.*, — S. Car. —, 96 S. E. 134; *Hall v. Ins. Co.*, 23 Wash. 610, 83 Am. St. Rep. 844, 51 L. R. A. 288, 63 Pac. 505.

profits is a contract of agency.⁴ On the other hand, one who is really the adversary party can not change the nature of the transaction by stipulating that he is merely an agent.⁵

The desire of one party to a contract to throw certain risks and losses upon the adversary party leads to the insertion of terms in certain classes of contracts to the effect that the person through whom such contract is made is to be regarded as the agent of such adversary party. Provisions of this sort are found in contracts of insurance and contracts for lending money, more frequently perhaps than in other types of contract. Contracts of insurance frequently provide that the person who represents the insurance company in soliciting the insurance shall be regarded as the agent of the insured. This provision is usually inserted in order to cast upon the insured the consequences of any error on the part of the agent in making out the application for insurance. Such provisions are usually held to be inoperative; and if such agent is employed by the insurance company and is under the direction and control of the insurance company, he is to be regarded as the agent of the insurer in spite of such provision;⁶ and errors made by him do not render the policy invalid if the insured has made a truthful statement of the necessary facts.⁷ In contracts for lending money it is frequently provided that one who is an officer or representative of the lender shall be regarded as the agent of the borrower for the purpose of effecting the loan. Such provision is usually regarded as inoperative if such person is in fact employed by the lender and under his control; and under such circumstances he is regarded as the agent of the lender.⁸ Accordingly, payments to such agent by

⁴ *Petteway v. McIntyre*, 131 N. Car. 432, 42 S. E. 851.

⁵ *Ferry v. Hall*, 188 Ala. 178, L. R. A. 1917B, 620, 66 So. 104; *Rawleigh Medical Co. v. Holcomb*, 126 Ark. 597, 191 S. W. 215; *Scott v. Cowen* (Mo.), 195 S. W. 732.

So in gambling transaction. *Munns v. Commission Co.*, 117 Ia. 516, 91 N. W. 789.

⁶ *Georgia*. *Massachusetts Benefit Life Association v. Robinson*, 104 Ga. 256, 42 L. R. A. 261, 30 S. E. 918.

Illinois. *Lumberman's Mutual Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130.

Michigan. *Robinson v. U. S. Benev-*

olent Society, 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211.

Pennsylvania. *Kister v. Lebanon Mutual Ins. Co.*, 128 Pa. St. 553, 15 Am. St. Rep. 696, 5 L. R. A. 646, 18 Atl. 447.

North Dakota. *French v. State Farmers' Mutual Hail Insurance Co.*, 29 N. D. 426, L. R. A. 1915D, 766, 151 N. W. 7.

⁷ *French v. State Farmers' Hail Insurance Co.*, 29 N. D. 426, L. R. A. 1915D, 766, 151 N. W. 7.

⁸ *Commonwealth Farm Loan Co. v. Wall*, 122 Ark. 281, 183 S. W. 193; *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

the lender are not payments to the borrower;⁸ and, on the other hand, expenses incurred by such agent create a liability against the lender.¹⁰ If the representative or intermediary is under the control of the borrower, he is to be regarded as the agent of the borrower,¹¹ although his employment was suggested by the lender.¹² If the borrower authorizes the intermediary to receive money from the lender and to pay off liens upon the property upon which is to be given a mortgage to secure the loan, such intermediary is the agent of the borrower.¹³

§ 1727. Agency distinguished from sale. Under modern methods of doing business, contracts by which A delivers property to B, which B is to sell and for which B is to pay A, are often so drawn as to attempt to secure to one or both of the parties some of the advantages of a contract of agency and some of the advantages of a contract of sale; and for this reason it is often hard to ascertain which the relationship is. The fact that the relation between A and B is referred to as an agency or that B is referred to as an agent is not conclusive, since the transaction may really be a sale.¹ The fact that the transaction is referred to as a sale is not conclusive of its character if the context shows that the transaction was really the appointment of an agent.² A contract which provides that A "sells" certain claims to B when B shall sell them to other persons, may from its context show that B was A's agent to sell such claims to third persons and that B was not the purchaser of such claims from A.³

See also, *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

⁸ *Commonwealth Farm Loan Co. v. Wall*, 122 Ark. 281, 183 S. W. 193; *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

¹⁰ Expenses incurred by agent of lender in operating business of borrower as his trustee. *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

¹¹ *Globe Express Co. v. Taylor*, 61 Colo. 430, 158 Pac. 717; *Routh v. Fitzgibbon*, — Okla. — 162 Pac. 702; *Kirk-*

patrick v. Warden, 118 Va. 382, 87 S. E. 561.

¹² *Kirkpatrick v. Warden*, 118 Va. 382, 87 S. E. 561.

¹³ *Routh v. Fitzgibbon*, — Okla. —, 162 Pac. 702.

¹ *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851; *Ferry v. Hall*, 188 Ala. 178, L. R. A. 1917B, 620, 66 So. 104; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558.

² *Taylor v. Burns*, 203 U. S. 120, 51 L. ed. 116; *McNeill v. Electric Storage Battery Co.*, — S. Car. —, 96 S. E. 134.

³ *Taylor v. Burns*, 203 U. S. 120, 51 L. ed. 116.

While the real intention of the parties determines their legal relation without regard to the name by which they have chosen to call their relationship, it is difficult to pick out any single element which will be the decisive test for determining whether the relationship is one of principal and agent or one of buyer and seller. It has been said that if A sends property to B, which B is to sell, and if the contract imposes upon B the duty of paying A for such property without regard to the disposition there which B is able to make, the contract is to be regarded as a sale and not an agency;⁴ while if B is not obliged to pay for such property unless he is able to sell it, the transaction is an agency and not a sale.⁵ This test has not been applied uniformly, however; and in some cases the transaction has been held to be an agency although B is bound to pay on demand,⁶ or although B is bound to pay eventually, without regard to his success in reselling the goods.⁷ The fact that the proceeds of the sale are, by the terms of the contract, to be regarded as the property of A, tends strongly to show that the transaction creates the relation of principal and agent and that it is not a contract of sale.⁸ Under a contract by which B is to plat lands which belong to A, to sell such land on commission, and to take as compensation in addition to the commission all the land which remains unsold after A has received a certain amount of money from the transaction, B is A's agent.⁹ It has been suggested that if A fixes the price and terms upon which B is to sell the property, and if B's compensation is fixed by agreement between A and B, the transaction is one of agency.¹⁰ The fact that by the terms of the contract

⁴ *Banker Brothers Co. v. Pennsylvania*, 222 U. S. 210, 56 L. ed. 168; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558.

⁵ *Norris v. Boston Music Co.*, 129 Minn. 198, L. R. A. 1917B, 615, 151 N. W. 971.

⁶ *Sioux Remedy Co. v. Lindgren*, 27 S. D. 123, 130 N. W. 49.

⁷ *Baskerville v. Bates*, 123 Minn. 339, 143 N. W. 909; *Baskerville v. Culver*, 33 S. D. 424, 146 N. W. 595; *Davis v. Woolsey*, 34 S. D. 236, 147 N. W. 977.

⁸ *United States. Ludvigh v. American Woolen Co.*, 231 U. S. 522, 58 L. ed. 345.

Illinois. Fleet v. Hertz, 201 Ill. 594, 94 Am. St. Rep. 192, 66 N. E. 858.

Iowa. Holbert v. Keller, 161 Ia. 723, 142 N. W. 962.

Kansas. McKinney v. Grant, 76 Kan. 779, 93 Pac. 180.

Oklahoma. Barteldes Seed Co. v. Border Queen Mill & Elevator Co., 23 Okla. 675, 101 Pac. 1130.

⁹ *Rusco v. Ryan (Okla.)*, 153 Pac. 1162.

¹⁰ *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284; *National Cordage Co. v. Sims*, 44 Neb. 148, 62 N. W. 514.

the price at which B is to sell the goods is fixed in advance is not conclusive that the transaction is a contract of agency,¹¹ since in jurisdictions in which a contract between the manufacturer and the retail dealer, by which the retail price of the article is fixed, is held to be invalid,¹² the attempt is made to evade such rule by making contracts of sale which purport to be contracts of agency. If A delivers goods to B to be resold by B, and B is to pay A for the goods and to fix the price at which they are to be resold, the contract is one of sale and not of agency;¹³ and the fact that A agrees to take back all unsold goods does not make the contract one of agency.¹⁴ A contract by which A, who owns an automobile, employs B to repair it and authorizes B to sell it and agrees to give to B a bill of sale to transfer title thereto, is a contract of agency and not a contract of sale.¹⁵ A retail dealer who orders goods from the manufacturer or producer to fill orders of his customers, does not become the agent of the manufacturer or producer by reason of the fact that the manufacturer or producer in his advertisements requested prospective customers in asking for catalogs to fill in the name of the local dealer.¹⁶ If A transfers title to personalty to B with instructions to sell such personalty and to apply the proceeds to paying certain specific debts the transaction is a trust and not an agency.¹⁷

While the relation between principal and agent has some points of resemblance to the relation between partners, the points of difference, especially with reference to the personal liability of the party who makes the contract, are such that it is necessary to distinguish between the two relations.¹⁸

§ 1728. Agent distinguished from independent contractor. The relationship of principal and agent is sometimes confused with the relation that exists between one who contracts for the benefit of work and labor and the independent contractor with whom he makes his contract. If A makes a contract with B, by which B is to do

¹¹ *Rawleigh Medical Co. v. Hokcomb*, 126 Ark. 597, 191 S. W. 215.

¹² See §§ 812 et seq.

¹³ *Ferry v. Hall*, 188 Ala. 178, L. R. A. 1917B, 620, 66 So. 104; *Roach v. Whitfield*, 94 Ark. 448, 140 Am. St. Rep. 131, 127 S. W. 722.

¹⁴ *Ferry v. Hall*, 188 Ala. 178, L. R. A. 1917B, 620, 66 So. 104.

¹⁵ *Ransom v. Wickstrom*, 84 Wash. 419, L. R. A. 1916A, 588, 146 Pac. 1041.

¹⁶ *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

¹⁷ *First National Bank v. Hinkle*, — Okla. —, 162 Pac. 1092.

¹⁸ See § 1694.

certain work for A, and A is to retain control over the work as it is done, B is A's agent in doing such work.¹ If A, the owner of realty, enters into a contract with B, by which B is to complete A's building and A is to pay for the labor and materials, B is A's agent and not an independent contractor.² If A employs B, an architect, to supervise the construction of A's buildings, and to approve vouchers, B is A's agent and not an independent contractor.³

If, on the other hand, B is to retain control over the method of performing the contract, and if his contract with A binds B only to produce certain specified results, B is an independent contractor and not an agent.⁴ If the state enters into a contract with a publishing company by which the publishing company agrees to print and prepare certain volumes of reports of supreme court decisions and by which the stereotyped plates are to become the property of the state, the publishing company is an independent contractor and not the agent of the state.⁵ It is possible that the relationship may be one of principal and agent for some purposes, while for other purposes the party may be an independent contractor.⁶ The fact that A agrees to pay B's employees is not conclusive of the fact that B is A's agent.⁷

If A employs B to remove from the railway station to A's store, goods which are sent to A by rail, B is an independent contractor for most purposes; but he is A's agent for the purpose of receiving notice from the railway company with reference to the goods which are shipped to B.⁸

§ 1729. Place of agency in contract law. Agency has therefore a two-fold aspect. It is, on the one hand, a contract between principal and agent, which does not differ as to its fundamental prin-

¹ *Claffy v. Chicago Dock & Canal Co.*, 249 Ill. 210, 94 N. E. 551; *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45; *Carolina Hardware Co. v. Raleigh Banking & Trust Co.*, 169 N. Car. 744, 86 S. E. 706.

² *Carolina Hardware Co. v. Raleigh Banking & Trust Co.*, 169 N. Car. 744, 86 S. E. 706.

³ *Claffy v. Chicago Dock & Canal Co.*, 249 Ill. 210, 94 N. E. 551.

⁴ *State v. State Journal Co.*, 75 Neb. 275, 9 L. R. A. (N.S.) 174, 13 Am. &

Eng. Ann. Cas. 254, 106 N. W. 434; *Scales v. First State Bank*, 88 Or. 490, 172 Pac. 499.

⁵ *State v. State Journal Co.*, 75 Neb. 275, 9 L. R. A. (N.S.) 174, 13 Am. & Eng. Ann. Cas. 254, 106 N. W. 434.

⁶ *Rothchild v. Northern P. R. Co.*, 68 Wash. 527, 40 L. R. A. (N.S.) 773, 123 Pac. 1011.

⁷ *Scales v. First State Bank*, 88 Or. 490, 172 Pac. 499.

⁸ *Rothchild v. Northern P. R. Co.*, 68 Wash. 527, 40 L. R. A. (N.S.) 773, 123 Pac. 1011.

ciples from other contracts; on the other hand, it is a means of bringing the principal into contractual relations with persons with whom in point of fact he has had no personal dealings. In this chapter there will be presented only the general principles of the law of agency affecting the rights and liabilities of parties dealing with the principal through the agent. The question of the rights of principal and agent between themselves is a special branch of contract law, and is out of place in a general work on contract, except insofar as they illustrate general principles of contract law.

§ 1730. Appointment of agent—Necessity of contract. As between the principal and the agent, omitting for the present considerations for liability to third persons growing out of ratification and estoppel, the relation of principal and agent originates in contract.¹ Genuine agency is not created by law in the absence of the assent of the parties to the relation.² Agency does not exist in the absence of intent on the part of the principal to appoint the agent to enter into transactions on his behalf.³ The fact that A has employed B as a notary public to take an acknowledgment, does not make B the agent of A, so as to bind A by B's representations as to the nature of such instrument.⁴ The fact that B induces X to sign a contract of guaranty so as to protect A, does not make B the agent of A;⁵ and, accordingly, he is not, as a matter of law, charged with knowledge of facts which are known to B.⁶ If A's agent, B, employs C to assist him,⁷ or permits C to assist him,⁸ C does not become the agent of A.

¹ *Alabama*. *Western Union Telegraph Co. v. Northcutt*, 158 Ala. 539, 132 Am. St. Rep. 38, 48 So. 553; *Thompson v. Atchley*, — Ala. —, 78 So. 196.

Arizona. *Mo Yaen v. State*, 18 Ariz. 491, L. R. A. 1917D, 1014, 163 Pac. 135.

Idaho. *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

Illinois. *Booker v. Booker*, 206 Ill. 529, 100 Am. St. Rep. 250, 70 N. E. 709; *Barnard v. Springfield & N. E. Traction Co.*, 274 Ill. 148, 113 N. E. 89.

Kentucky. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144; *Jeffrey Co. v. Lockridge*, 173 Ky. 282, 190 S. W. 1103.

Oklahoma. *Missouri, K. & T. Ry. Co. v. Hudson*, — Okla. —, 175 Pac. 743.

² *Bierkamp v. Benthien*, 173 Ia. 436, 155 N. W. 819; *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144; *Francis v. Reevēs*, 137 N. Car. 269, 49 S. E. 213.

³ *Boston v. Southern Pacific Co.*, 175 Ky. 641, 194 S. W. 814; *Ely Walker Dry Goods Co. v. Smith*, — Okla. —, 160 Pac. 898.

⁴ *Ely Walker Dry Goods Co. v. Smith*, — Okla. —, 160 Pac. 898.

⁵ *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

⁶ *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

⁷ *Ely Walker Dry Goods Co. v. Smith*, — Okla. —, 160 Pac. 898.

⁸ *Boston v. Southern Pacific Co.*, 175 Ky. 641, 194 S. W. 814.

As between the principal and third persons, the facts may be such that the principal is estopped to deny the existence of an agency which is in fact non-existent, or to deny that it extends beyond its actual scope.⁹

§ 1731. Agency between persons in domestic relations. The fact that parties are related closely does not make one of them the agent of the other as a matter of law.¹

The parent is not by law the agent of the child;² and the husband is not by law the agent of his wife.³ Wherever agency exists between persons in such domestic relations, it exists because of the actual agreement of the parties.⁴ The wife is frequently the agent of the husband for the purpose of purchasing necessities to be used in the household.⁵ The husband may act as agent of the wife.⁶ The son may act as agent of the father.⁷

§ 1732. Agency by necessity. It is sometimes said that there is such a thing as agency of necessity.¹ It is said that a wife is the agent of her husband by necessity when he is absent from home and his whereabouts is unknown;² but under these circumstances the presumption of her appointment as his agent is probably true in fact, and her authority is limited to that which is usually conferred upon a wife under similar circumstances.³ The theory of agency

⁹ See § 1760.

¹ *Fulton Bank v. Mathers*, — Ia. —, 166 N. W. 1050; *Garth v. Dickinson*, 175 Ky. 22, 193 S. W. 644; *Allen v. Jessup* (Mo.), 192 S. W. 720; *True v. Cudd*, 106 S. Car. 478, 91 S. E. 856.

² *Cain v. Garner*, 169 Ky. 633, 185 S. W. 122.

³ *Iowa*. *Bierkamp v. Beuthien*, 173 Ia. 436, 155 N. W. 819; *Fulton Bank v. Mathers*, — Ia. —, 166 N. W. 1050.

Kentucky. *Garth v. Dickinson*, 175 Ky. 22, 193 S. W. 644.

Minnesota. *Klein v. Frerichs*, 127 Minn. 177, 149 N. W. 2.

Missouri. *Allen v. Jessup* (Mo.), 192 S. W. 720.

Nebraska. *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 83 Am. St. Rep. 512, 82 N. W. 112.

North Carolina. *Francis v. Reeves*, 137 N. Car. 269, 49 S. E. 213.

South Carolina. *True v. Cudd*, 106 S. Car. 478, 91 S. E. 856.

⁴ *Williams v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S. W. 899; *Alderman v. New Haven*, 81 Conn. 137, 18 L. R. A. (N.S.) 74, 70 Atl. 626; *True v. Cudd*, 106 S. Car. 478, 91 S. E. 856; *Bishop v. Readsboro Chair Mfg. Co.*, 85 Vt. 141, 36 L. R. A. (N.S.) 1171, 81 Atl. 454.

⁵ *Jolly v. Rees*, 15 C. B. (N.S.) 628; *Mettler v. Snow*, 90 Conn. 690, 98 Atl. 322; *Noel v. O'Neill*, 128 Md. 202, 97 Atl. 513; *Keller v. Phillips*, 39 N. Y. 351.

⁶ *True v. Cudd*, 106 S. Car. 478, 91 S. E. 856; *Bishop v. Readsboro Chair Mfg. Co.*, 85 Vt. 141, 36 L. R. A. (N.S.) 1171, 81 Atl. 454.

⁷ *Alderman v. New Haven*, 81 Conn. 137, 18 L. R. A. (N.S.) 74, 70 Atl. 626.

¹ *Benjamin v. Dockhan*, 134 Mass. 418.

² *Evans v. Crawford County Ins. Co.*, 130 Wis. 189, 118 Am. St. Rep. 1009, 9 L. R. A. (N.S.) 465, 109 N. W. 952.

³ *Evans v. Crawford County Ins. Co.*, 130 Wis. 189, 118 Am. St. Rep. 1009, 9 L. R. A. (N.S.) 465, 109 N. W. 952.

of necessity is sometimes resorted to as a fiction to explain the quasi-contractual liability of a husband for his wife's necessities,⁴ or of a parent for the necessities of a minor child.⁵ That this explanation of this liability is a fiction is evident from the fact that the person who is subject to such quasi-contractual liability can not exempt himself from liability by giving notice in advance that he is not liable for such necessities.⁶

§ 1733. Express and implied appointment. The contract by which an agent is appointed may be express,¹ and it may be informal.² Thus the statement of the principal that whatever the agent did "went," is sufficient to show express, though informal, authority.³ Authority to a bank to collect,⁴ or to make a payment,⁵ may make the bank the agent of the party who confers such authority.

The contract by which an agent is appointed may be implied,⁶ as by acquiescence in the assumption of such authority by the agent.⁷

⁴ See § 1523.

⁵ See § 1524.

⁶ See §§ 1623 et seq.

¹ *United States*. *Western Union Telegraph Co. v. Lange*, 248 Fed. 656.

Michigan. *Remer v. Goul*, 185 Mich. 371, 152 N. W. 91; *Cutter v. Powers*, 200 Mich. 375, 166 N. W. 1029.

Minnesota. *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

Missouri. *Staroske v. Pulitzer Publishing Co.*, 235 Mo. 67, 138 S. W. 36.

New York. *Hermann v. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; *Baldwin's Bank v. Smith*, 215 N. Y. 76, L. R. A. 1918F, 1089, 109 N. E. 138.

Oregon. *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746, 27 Pac. 1046.

Tennessee. *Bank v. Chester*, 25 Tenn. (6 Humph.) 458, 44 Am. Dec. 318.

West Virginia. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, Ann. Cas. 1912B, 148, 69 S. E. 845.

² *Schneider v. Schneider*, 125 Ia. 1, 98 N. W. 159; *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880.

³ *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880.

⁴ *Baldwin's Bank v. Smith*, 215 N. Y. 76, L. R. A. 1918F, 1089, 109 N. E. 138.

⁵ *Western Union Telegraph Co. v. Lange*, 248 Fed. 656.

⁶ *Alabama*. *Thompson v. Atchley*, — Ala. —, 78 So. 196.

Colorado. *Halliwill v. Weible*, — Colo. —, 171 Pac. 372.

Kansas. *Wilson v. Haun*, 97 Kan. 445, 155 Pac. 798.

Maryland. *Heise & Bruns Mill & Lumber Co. v. Goldman*, 125 Md. 554, 94 Atl. 159.

Massachusetts. *Arnold v. Spurr*, 130 Mass. 347.

Michigan. *Reeves v. Kelley*, 30 Mich. 132; *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445.

Minnesota. *Neibles v. Ry. Co.*, 37 Minn. 151, 33 N. W. 332.

Tennessee. *Cline v. Stradlee* (Tenn. Ch. App.), 48 S. W. 272.

Utah. *Campbell v. Gowans*, 35 Utah 268, 23 L. R. A. (N.S.) 414, 100 Pac. 397.

Washington. *Bertrand v. Hunt*, 89 Wash. 475, 154 Pac. 804.

Wisconsin. *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Sheanon v. Ins. Co.*, 83 Wis. 507, 53 N. W. 878.

⁷ *California*. *Bank v. Mohr*, 130 Cal. 268, 62 Pac. 511.

Express authority may be broadened by subsequent acquiescence on the part of the principal in the assumption, by the agent, of greater authority.⁸ The fact that the lender permits a broker to take charge of the execution of the securities for the loan, to pay the amount of the loan over to the borrower, to collect interest, and to give receipts therefor, is sufficient to show that the lender had appointed the broker as his agent.⁹ Implied appointment of this sort is analogous to estoppel, as far as the rights of third persons are concerned;¹⁰ but it differs from estoppel in the fact that as between the principal and the agent there is a real intention to appoint an agent.

§ 1734. Form of appointment to make sealed instrument. The chief rule as to form of appointment is that it must be of as high a nature as the act to be done by the agent. At common law the classes of contracts as to dignity were the formal and the simple, there being no distinction in rank between the oral and the written. The authority of an agent to act under seal must at common law be given by an instrument under seal,¹ including authority to fill a blank in a sealed instrument.² An agent can not assign a tax certificate where an acknowledgment thereto is necessary.³

Illinois. *Sammis v. Poole*, 188 Ill. 396, 56 N. E. 934 [affirming, 89 Ill. App. 118].

Iowa. *Leonard v. Omstead*, 141 Ia. 485, 119 N. W. 973.

Kansas. *Wilson v. Haun*, 97 Kan. 445, 155 Pac. 798.

Minnesota. *Lindquist v. Dickson*, 98 Minn. 369, 6 L. R. A. (N.S.) 729, 8 Am. & Eng. Ann. Cas. 1024, 107 N. W. 958.

Nebraska. *Martin v. Hutton*, 90 Neb. 34, 36 L. R. A. (N.S.) 602, 132 N. W. 727.

West Virginia. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, Ann. Cas. 1912B, 148, 69 S. E. 845.

⁸ *Keyes v. Union Pacific Tea Co.*, 81 Vt. 420, 71 Atl. 201.

⁹ *Campbell v. Gowans*, 35 Utah 268, 23 L. R. A. (N.S.) 414, 100 Pac. 397.

¹⁰ See § 1760.

¹ *Georgia.* *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758; *Brandon v. Pritchett*, 126 Ga. 286, 7 Am. & Eng.

Ann. Cas. 1093, 55 S. E. 241; *Neely v. Stevens*, 138 Ga. 306, 75 S. E. 159.

Illinois. *Watson v. Sherman*, 84 Ill. 263.

Kentucky. *Jackson v. Murray*, 21 Ky. (5 T. B. Mon.) 184, 17 Am. Dec. 53.

Massachusetts. *Emerson v. Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

New York. *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Peterson v. New York*, 194 N. Y. 437, 87 N. E. 772.

Ohio. *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731.

Tennessee. *Smith v. Dickinson*, 25 Tenn. (6 Humph.) 261, 44 Am. Dec. 306.

² *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

³ *Wilson v. Wood*, 10 Okla. 279, 61 Pac. 1045.

If, however, an agent who executes a sealed instrument acts in the presence of his principal, his act is regarded as the act of the principal in person and sealed authority is not necessary.⁴ If an agent of a partnership signs the name of the partnership to a promissory note under seal in the presence of one of the partners, this is in legal effect an execution by the partner who was present.⁵ It has been said, however, that if the principal takes advantage of a sealed instrument which has been executed by his agent without authority under seal,⁶ such as an injunction bond,⁷ the principal can not thereafter take advantage of the agent's lack of sealed authority. If a blank has been filled in the presence of the principal and with his authority, oral authority to deliver the instrument is sufficient.⁸

Where seals are abolished and no specific statutory provision exists, authority to execute a deed or bond may be conferred orally, or by an instrument not under seal;⁹ and authority to fill blanks in a sealed instrument may thus be conferred by parol.¹⁰

§ 1735. Form of appointment to make simple contract—Common law. In the absence of some specific statutory provision any form of authority is sufficient to confer upon an agent authority to make a simple contract.¹ In the absence of a specific statutory provision to the contrary, oral authority is sufficient to authorize an agent to make a contract which by the Statute of Frauds must

⁴ England. *Ball v. Dunsterville*, 4 T. R. 314.

California. *Jansen v. Cahill*, 22 Cal. 563, 83 Am. Dec. 84.

Georgia. *Merchants' & F. Bank v. Johnston*, 130 Ga. 661, 17 L. R. A. (N.S.) 969, 61 S. E. 543; *Winn v. Bridges*, 144 Ga. 497, 87 S. E. 665.

Indiana. *Croy v. Busenbark*, 72 Ind. 48.

Massachusetts. *Gardner v. Gardner*, 59 Mass. (5 Cush.) 483, 52 Am. Dec. 740; *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

New Hampshire. *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

⁸ *Merchants' & F. Bank v. Johnston*, 130 Ga. 661, 17 L. R. A. (N.S.) 969, 61 S. E. 543.

⁶ *Harris v. Woodard*, 144 Ga. 211, 86 S. E. 1097.

⁷ *Harris v. Woodard*, 144 Ga. 211, 86 S. E. 1097.

⁸ *Maourda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

⁹ *Mullins v. Commonwealth*, 179 Ky. 71, 200 S. W. 9; *J. B. Streeter Co. v. Janu*, 90 Minn. 393, 96 N. W. 1128.

¹⁰ *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac. 328; *Halliwill v. Weible*, — Colo. —, 171 Pac. 372 [citing, *Palacios v. Brasher*, 18 Colo. 593, 36 Am. St. Rep. 305, 34 Pac. 251]; *Swartz v. Ballou*, 47 Ia. 188, 29 Am. Rep. 470; *Montgomery v. Dresher*, 90 Neb. 633, 38 L. R. A. (N.S.) 423, 134 N. W. 251.

¹ Arizona. *Murphey v. Brown*, 12 Ariz. 268, 100 Pac. 801.

be proved by writing,² such as a contract or sale of lands, tenements, and hereditaments, or any interest in or concerning the same,³ or a sale of goods, wares and merchandise, in excess of the value fixed by the Statute of Frauds.⁴

The parol evidence rule⁵ does not apply to instruments which confer authority;⁶ and the authority conferred by a written instrument may be modified by oral instructions.⁷

Connecticut. *Jacobson v. Hendricks*, 83 Conn. 120, 75 Atl. 85.

Michigan. *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102; *Antrim Iron Co. v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434, 104 N. W. 319.

Montana. *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

North Carolina. *Smith v. Browne*, 132 N. Car. 365, 43 S. E. 915; *Wellman v. Horn*, 157 N. Car. 170, 72 S. E. 1010.

North Dakota. *Merchants' National Bank v. Brastrup*, — N. D. —, 168 N. W. 42. (Authority to fill blanks.)

Pennsylvania. *Brodhead v. Reinbold*, 200 Pa. St. 618, 86 Am. St. Rep. 735, 50 Atl. 229.

West Virginia. *Mustard v. Big Creek Development Co.*, 69 W. Va. 713, 72 S. E. 1021.

Wisconsin. *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887.

²**England.** *Wilson v. Hart*, 7 Taunt. 295.

Arizona. *Murphey v. Brown*, 12 Ariz. 268, 100 Pac. 801.

Arkansas. *Fordyce v. Seaver*, 74 Ark. 395, 4 Am. & Eng. Ann. Cas. 892, 85 S. W. 1126.

Connecticut. *Jacobson v. Hendricks*, 83 Conn. 120, 75 Atl. 85.

Georgia. *Kaigler v. Brannon*, 137 Ga. 36, 72 S. E. 400.

Michigan. *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102; *Antrim Iron Co. v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434, 104 N. W. 319.

North Carolina. *Wellman v. Horn*, 157 N. Car. 170, 72 S. E. 1010.

West Virginia. *Mustard v. Big Creek Development Co.*, 69 W. Va. 713, 72 S. E. 1021.

Wisconsin. *Tufts v. Brace*, 103 Wis. 341, 79 N. W. 414; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887.

³**Arizona.** *Murphey v. Brown*, 12 Ariz. 268, 100 Pac. 801.

Connecticut. *Jacobson v. Hendricks*, 83 Conn. 120, 75 Atl. 85.

Michigan. *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102; *Antrim Iron Co. v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434, 104 N. W. 319.

Montana. *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

North Carolina. *Smith v. Browne*, 132 N. Car. 365, 43 S. E. 915; *Wellman v. Horn*, 157 N. Car. 170, 72 S. E. 1010.

Pennsylvania. *Brodhead v. Reinbold*, 200 Pa. St. 618, 86 Am. St. Rep. 735, 50 Atl. 229.

West Virginia. *Mustard v. Big Creek Development Co.*, 69 W. Va. 713, 72 S. E. 1021.

Wisconsin. *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887. See §§ 1329 et seq.

⁴*Wilson v. Hart*, 7 Taunt. 295; *Fordyce v. Seaver*, 74 Ark. 395, 4 Am. & Eng. Ann. Cas. 892, 85 S. W. 1126; *Kaigler v. Brannon*, 137 Ga. 36, 72 S. E. 400; *Tufts v. Brace*, 103 Wis. 341, 79 N. W. 414.

⁵See ch. LXIX.

⁶*Ziebarth v. Donaldson*, — Minn. —, 169 N. W. 253.

⁷*Ziebarth v. Donaldson*, — Minn. —, 169 N. W. 253.

§ 1736. Form of appointment to make simple contracts—Statutory regulations. By the express provisions of some statutes, the authority of the agent to make contracts of certain classes,¹ such as a contract or sale of lands, tenements, and hereditaments, or any interest in or concerning the same,² or a negotiable instrument,³ must be in writing. Statutes of this sort are not extended by construction.⁴ A statute which requires written authority to execute a negotiable instrument does not require written authority to execute a non-negotiable instrument.⁵ Such a statute is enacted for the protection of the principal.⁶ If a check has been altered and the bank has paid it as altered, the liability of the bank to its depositor for the amount of such overpayment is not affected by the fact that the agent of the payee who endorsed such check was not authorized in writing to make such endorsement.⁷

§ 1737. Termination of agent's authority—Intent of parties to terminate. The power of the agent to bind his principal by entering into contracts with third persons on behalf of the principal is

¹ **Alabama.** *Elliott v. Bankston* (Ala.), 45 So. 173.

California. *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88.

Illinois. *Koenig v. Dohm*, 209 Ill. 468, 70 N. E. 1061.

Kentucky. *Finley v. Smith*, 165 Ky. 445, L. R. A. 1915F, 777, 177 S. W. 262.

Minnesota. *Matteson v. United States & Canada Land Co.*, 112 Minn. 190, 127 N. W. 629, 997.

Nebraska. *Ross v. Craven*, 84 Neb. 520, 121 N. W. 451.

South Dakota. *Shumway v. Kitman*, 28 S. D. 577, 134 N. W. 325.

Wisconsin. *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019.

² **Alabama.** *Elliott v. Bankston* (Ala.), 45 So. 173.

Illinois. *Koenig v. Dohm*, 209 Ill. 468, 70 N. E. 1061.

Minnesota. *Matteson v. United States Land Co.*, 112 Minn. 190, 127 N. W. 629.

Nebraska. *Ross v. Craven*, 84 Neb. 520, 121 N. W. 451.

South Dakota. *Shumway v. Kitman*, 28 S. D. 577, 134 N. W. 325.

Wisconsin. *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019.

³ *Finley v. Smith*, 165 Ky. 445, L. R. A. 1915F, 777, 177 S. W. 262.

⁴ *Finley v. Smith*, 165 Ky. 445, L. R. A. 1915F, 777, 177 S. W. 262; *Pierson v. Union Bank & Trust Co.*, 181 Ky. 749, 2 A. L. R. 172, 205 S. W. 906.

⁵ *Finley v. Smith*, 165 Ky. 445, L. R. A. 1915F, 777, 177 S. W. 262.

It does not render invalid A's oral authority to a bank to pay, out of his deposit, checks drawn by B. *Pierson v. Union Bank & Trust Co.*, 181 Ky. 749, 2 A. L. R. 172, 205 S. W. 906.

⁶ *Commercial Bank v. Arden*, 177 Ky. 520, L. R. A. 1918B, 320, 197 S. W. 951.

⁷ *Commercial Bank v. Arden*, 177 Ky. 520, L. R. A. 1918B, 320, 197 S. W. 951.

always at the will of the principal,¹ except in the case of the so-called power coupled with an interest.² Subject to such exception, the principal may revoke the power of the agent, even though his act in revoking such power is wrongful and even though the period for which the agency was to last has not expired.³ If the principal revokes the power of the agent wrongfully and in violation of the contract between principal and agent, he is liable to the agent for the damage caused by such wrongful act;⁴ but such liability to damages does not affect his power to withdraw the authority of the agent so as to prevent the principal from being bound by contracts which the agent made on his behalf thereafter.

If the contract gives the agent the right to terminate the relationship at will, the principal may revoke the agent's authority

¹ **United States.** *Taylor v. Burns*, 203 U. S. 120, 51 L. ed. 116 [affirming, *Taylor v. Burns*, 8 Ariz. 463, 76 Pac. 623].

Colorado. *Briggs v. Chamberlain*, 47 Colo. 382, 135 Am. St. Rep. 223, 107 Pac. 1082.

Iowa. *Mitchell v. Hagge*, 178 Ia. 926, 160 N. W. 287.

Michigan. *Garlock v. Motz Tire & Rubber Co.*, 192 Mich. 665, 159 N. W. 344.

Minnesota. *Johnson v. Evans*, 134 Minn. 43, 158 N. W. 823.

Missouri. *Beheret v. Myers*, 240 Mo. 58, 144 S. W. 824.

Oklahoma. *American Investment Co. v. Alexander*, 46 Okla. 284, 148 Pac. 99.

South Carolina. *Fass v. Atlantic Life Insurance Co.*, 105 S. Car. 107, 89 S. E. 558.

² See § 1741

³ **England.** *Vynior's Case*, 8 Coke 80a; *Turner v. Sawdon* [1901], 2 K. B. 653, 2 B. R. C. 751.

Minnesota. *Buffalo Land & Exploration Co. v. Strong*, 91 Minn. 84, 97 N. W. 575.

New Jersey. *Walker v. Hancock Mutual Life Insurance Co.*, 80 N. J. L. 342, 35 L. R. A. (N.S.) 153, Ann. Cas. 1912A, 526, 79 Atl. 354.

Oklahoma. *Rusco v. Ryan*, 54 Okla. 641, 153 Pac. 1162.

Pennsylvania. *McMahan v. Burns*, 216 Pa. St. 448, 65 Atl. 806.

South Carolina. *McCallum v. Grier*, 86 S. Car. 162, 138 Am. St. Rep. 1037, 68 S. E. 466.

⁴ **United States.** *Davis v. Cotton States Life Insurance Co.*, 232 Fed. 343, 146 C. C. A. 391.

Michigan. *Feldman v. Wear-U-Well Shoe Co.*, 191 Mich. 73, 157 N. W. 395.

New Jersey. *Walker v. Hancock Mutual Life Insurance Co.*, 80 N. J. L. 342, 35 L. R. A. (N.S.) 153, 79 Atl. 354.

Oklahoma. *Cloe v. Rogers*, 31 Okla. 255, 38 L. R. A. (N.S.) 366, 121 Pac. 201; *McKellop v. Dewitz*, 42 Okla. 220, 52 L. R. A. (N.S.) 255, 140 Pac. 1161; *American Investment Co. v. Alexander*, 46 Okla. 284, 148 Pac. 99; *Rusco v. Ryan*, 54 Okla. 641, 153 Pac. 1162.

Oregon. *McGinnis v. Studebaker Corporation of America*, 75 Or. 519, 147 Pac. 525 [denying rehearing, 75 Or. 519, 146 Pac. 825].

Pennsylvania. *Keller v. Gomery-Schwartz Motor Car Co.*, 253 Pa. St. 507, 98 Atl. 690.

Virginia. *Eastern Motor Sales Corporation v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

whenever he pleases.⁶ If the agent has failed to comply with the express or implied terms of the contract of employment, his power may be revoked and he may be discharged without liability on the part of the principal for damages.⁶

The revocation of the authority of the agent may be express,⁷ or it may be an implied revocation arising out of facts which show that the principal intends to revoke the authority of the agent.⁸

§ 1738. Termination by operation of law—Performance. The authority of the agent may also be terminated by operation of law without regard to the intention of the principal to revoke such authority. The performance of the original contract of agency, such as the expiration of the time for which the authority was conferred,¹ or the accomplishment of the purpose for which the agent was appointed,² operate as a termination of the authority of the agent.

⁶ *Willcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. ed. 882; *Garlock v. Motz Tire & Rubber Co.*, 192 Mich. 665, 159 N. W. 344; *Newhall v. Journal Printing Co.*, 105 Minn. 44, 20 L. R. A. (N.S.) 899, 117 N. W. 228.

⁶ *Willis v. Lowery*, 101 Miss. 118, 38 L. R. A. (N.S.) 339, 57 So. 418; *Walker v. Hancock Mutual Life Insurance Co.*, 80 N. J. L. 342, 35 L. R. A. (N.S.) 153, 79 Atl. 354.

⁷ *United States. Sheahan v. Steamship Co.*, 87 Fed. 167; *Duffield v. Michaels*, 97 Fed. 825.

Georgia. Linder v. Adams, 95 Ga. 668, 22 S. E. 687.

Minnesota. Johnson v. Evans, 134 Minn. 43, 158 N. W. 823.

North Carolina. Ballard v. Ins. Co., 119 N. Car. 187, 25 S. E. 956.

Ohio. Hitchcock v. Kelley, 18 Ohio C. C. 808, 4 Ohio C. D. 180.

Rhode Island. Flaherty v. O'Connor, 24 R. I. 587, 54 Atl. 376.

As by demand for a power of attorney and surrender thereof. *Kelly v. Brennan*, 55 N. J. Eq. 423, 37 Atl. 137.

Washington. Waterman v. Robertson, 103 Wash. 553, 175 Pac. 177.

⁸ *Colorado. Lowell v. Hessey*, 46 Colo. 517, 105 Pac. 870.

Illinois. Walker v. Denison, 86 Ill. 142.

Iowa. Mitchell v. Hagge, 178 Ia. 926, 160 N. W. 287.

Kentucky. Chenault v. Quisenberry (Ky.), 56 S. W. 410, 57 S. W. 234.

Massachusetts. Elliott v. Barrett, 144 Mass. 256, 10 N. E. 820; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730.

Michigan. Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N. W. 344. A power of attorney to convey realty is revoked by a conveyance to the agent as trustee. *Chenault v. Quisenberry (Ky.)*, 56 S. W. 410, 57 S. W. 234.

¹ *Gundlach v. Fischer*, 59 Ill. 172.

² *Short v. Millard*, 68 Ill. 292; *Moore v. Stone*, 40 Ia. 259; *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341; *Hermann v. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341.

§ 1739. Termination by operation of law—Death and insanity.

The authority of an agent may also be terminated by operation of law regardless of the intention of the principal, except in the case of the power coupled with an interest,¹ the death of either the principal or the agent operates as a revocation of the authority of the agent.² The fact that a contract by which an agent is appointed provides expressly that the death of the principal shall not operate as a revocation does not prevent revocation by the death of the principal.³ The fact that a contract by which an agent is appointed contains an express provision to the effect that the covenant shall be binding upon the respective heirs, executors, administrators and assigns of the parties thereto, does not prevent the death of the principal from operating as a revocation of the authority of the agent.⁴ If the principal has disappeared, the finding of the probate court that he died in less than the period of time within which his death would be presumed, is conclusive in an action involving the authority of the agent,⁵ at least if the evidence on which the probate court acted, is not before the court in the second action.⁶

It has been said that the death of the principal does not always, as a matter of law, revoke the authority of the agent.⁷ The cases

¹ See § 1741.

² **England.** In re Overweg [1900], 1 Ch. 209; Hovey v. Blakeman, 4 Ves. Jr. 596.

United States. Pacific Bank v. Hannah, 90 Fed. 72; Long v. Thayer, 150 U. S. 520, 38 L. ed. 1167; Crowe v. Trickey, 204 U. S. 228, 51 L. ed. 454 [affirming, Trickey v. Crowe, 8 Ariz. 176, 71 Pac. 965].

California. Krumdich v. White, 107 Cal. 37, 39 Pac. 1066.

Louisiana. Lanaux's Succession, 46 La. Ann. 1036, 25 L. R. A. 577, 15 So. 708.

Massachusetts. Brown v. Cushman, 173 Mass. 368, 53 N. E. 860; Mills v. Smith, 193 Mass. 11, 6 L. R. A. (N.S.) 865, 78 N. E. 765.

Michigan. Weaver v. Richards, 144 Mich. 395, 6 L. R. A. (N.S.) 855, 108 N. W. 382.

Mississippi. Mills v. Ins. Co., 77 Miss. 327, 78 Am. St. Rep. 522, 28 So. 954.

Nebraska. Homan v. Redick, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782.

New York. Martine v. Ins. Co., 53 N. Y. 339, 13 Am. Rep. 529.

North Carolina. Duckworth v. Orr, 126 N. Car. 674, 36 S. E. 150.

Ohio. McDonald v. Black, 20 Ohio 185, 55 Am. Dec. 448.

Pennsylvania. Kern's Estate, 176 Pa. St. 373, 35 Atl. 231.

South Carolina. Bunch v. Dunning, 106 S. Car. 300, 91 S. E. 331.

Virginia. Triplett v. Woodward, 98 Va. 187, 35 S. E. 455.

Washington. Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

³ Weaver v. Richards, 144 Mich. 395, 6 L. R. A. (N.S.) 855, 108 N. W. 382.

⁴ Homan v. Redick, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782.

⁵ Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

⁶ Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

⁷ Meinhardt v. Newman, 71 Neb. 532, 99 N. W. 261; Deweese v. Muff, 57 Neb.

cited, however, are those in which payment has been made to an agent after the death of the principal; such payment has been transmitted to the legal representatives of the principal, and accordingly as they have received and retained the benefits of the transaction they are estopped to deny the authority of the agent.

Insanity operates as a revocation of the authority of the agent,⁸ as where the principal is known to have become a lunatic, although he has not been adjudged a lunatic.⁹

§ 1740. Termination by operation of law—Bankruptcy, dissolution, etc. The bankruptcy of the principal,¹ or an assignment for the benefit of creditors,² operates as a revocation of the power of the agent. However, the appointment of a receiver for the principal does not revoke the agency, where the receiver accepts the services of the agent.³ Authority which is conferred upon a partnership as an agent, terminates upon the dissolution of the partnership.⁴ The question of the effect of war upon contracts whereby an alien enemy is appointed as agent is considered elsewhere.⁵

§ 1741. Power coupled with interest. A power conferred upon an agent to act in his own name coupled with an interest in the subject-matter as distinguished from the result of the performance of the contract of agency, is the exception to the general rules as to revocation; and such power is irrevocable either by the act of the principal or by his death.¹ Thus power to collect rents and apply

17, 73 Am. St. Rep. 488, 42 L. R. A. 789, 77 N. W. 361; Ish v. Crane, 8 O. S. 520, s. c., 13 O. S. 574.

² Blake v. Garwood, 42 N. J. Eq. 276, 10 Atl. 874.

³ Matthessen, etc., Co. v. McMahon, 38 N. J. L. 536.

⁴ In re Daniels, 6 Biss. (U. S.) 405.

⁵ Elwell v. Coon (N. J. Eq.), 46 Atl. 580.

⁶ Leupold v. Weeks, 96 Md. 280, 53 Atl. 937.

See also, Missouri, K. & T. Ry. Co. v. Hudson, — Okla. —, 175 Pac. 743.

⁷ Schlau v. Enzenbacher, 265 Ill. 626, L. R. A. 1915C, 576, 107 N. E. 107.

⁸ See ch. LXXIX.

¹ England. In re Hannan's, etc., Co. [1896], 2 Ch. 643.

United States. Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 5 L. ed. 589. California. Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154.

Illinois. Walker v. Denison, 86 Ill. 142.

Louisiana. Union Garment Co. v. Newburger, 124 La. 820, 50 So. 740.

Michigan. Baker v. Baird, 79 Mich. 255, 44 N. W. 604.

Minnesota. Citizens' State Bank v. Tessman, 121 Minn. 34, 45 L. R. A. (N. S.) 606, 140 N. W. 178.

New Jersey. Durbrow v. Eppens, 65 N. J. L. 10, 46 Atl. 582.

proceeds on a mortgage,² or power to sell and apply the proceeds,³ or an assignment of a life insurance policy with power to the assignee to collect it,⁴ is not revoked by the death of the principal. If the principal has placed in the agent's hands a certificate of deposit with authority to use it in the purchase of stock, the principal can not revoke his authority after the agent has entered into a binding contract with the owner of such stock by which the agent has agreed to buy it.⁵

The rule that a power coupled with an interest is irrevocable or at least a rule analogous thereto, renders irrevocable a power which is conferred by a debtor upon a creditor to dispose of property belonging to the debtor as security for the debt which is owing to the creditor.⁶

The right of the agent to commissions or other compensation upon performance of the contract by which he was appointed is not such an interest in the subject-matter as renders his authority irrevocable.⁷ A contract between the owner of a certain number of lots, and an agent, by which the agent is to sell the lots upon commission, and by the terms of which the agent is to pay one-half of the expenses incurred in selling the lots and one-half of the mortgage indebtedness, does not create a power coupled with an interest and the principal has power to revoke such agency, although if he revokes it wrongfully he is liable to the agent.⁸

Ohio. *Wheeler v. Knaggs*, 8 Ohio 169.

Oklahoma. *Cloe v. Rogers*, 31 Okla. 255, 38 L. R. A. (N.S.) 366, 121 Pac. 201.

Utah. *Montague v. McCarroll*, 15 Utah 318, 49 Pac. 418 (power to sell land in consideration of \$5.00).

Wisconsin. *Wiger v. Carr*, 131 Wis. 584, 11 L. R. A. (N.S.) 650, 111 N. W. 657.

² *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836.

³ *Terwilliger v. R. R. Co.*, 149 N. Y. 86, 43 N. E. 432.

⁴ *Supreme Assembly Good Fellows v. Campbell*, 17 R. I. 402, 13 L. R. A. 601, 22 Atl. 307.

⁵ *Wiger v. Carr*, 131 Wis. 584, 11 L. R. A. (N.S.) 650, 111 N. W. 657.

⁶ *Spooner v. Sandilands*, 1 Y. & C. Ch. 390; *Kelly v. Bowerman*, 113 Mich.

446, 71 N. W. 836; *Miller v. Home Ins. Co.*, 71 N. J. L. 175, 58 Atl. 98.

⁷ **England.** *Frith v. Frith* [1906], A. C. 254.

United States. *Crowe v. Trickey*, 204 U. S. 228, 51 L. ed. 454 [affirming, *Trickey v. Crowe*, 8 Ariz. 176, 71 Pac. 965].

Colorado. *Lowell v. Hessey*, 46 Colo. 517, 105 Pac. 870.

Oklahoma. *State, ex rel., v. McCafferty*, 25 Okla. 2, L. R. A. 1915A, 639, 105 Pac. 992; *McKellop v. Dewitz*, 42 Okla. 220, 52 L. R. A. (N.S.) 255, 140 Pac. 1161; *Rusco v. Ryan*, 54 Okla. 641, 153 Pac. 1162.

Pennsylvania. *McMahan v. Burns*, 216 Pa. St. 448, 65 Atl. 806.

⁸ *McKellop v. Dewitz*, 42 Okla. 220, 52 L. R. A. (N.S.) 255, 140 Pac. 1161.

§ 1742. Effect of termination of authority. Upon termination of his authority the power of the agent to bind his principal ceases as to all who did not know of his authority in the first instance, or who have actual or constructive notice of the revocation of his authority in cases in which such notice is necessary.¹ An agent originally authorized to sell realty, can not bind his principal by accepting money from a vendee and putting him in possession, after such vendee knows that the principal has already sold the realty to another.²

Termination of authority is not retroactive,³ and it does not render invalid contracts which are already entered into by an agent on behalf of his principal.⁴

§ 1743. Notice of termination of authority—Termination by act of parties. In determining the necessity of giving notice of revocation of authority the common law has drawn a clear though not a very logical line between revocation of authority by the voluntary act of the principal and revocation of authority by operation of law, such as takes place upon the death of the principal. As between the principal and agent it is necessary that the principal should give to the agent notice of revocation of authority by the principal's voluntary act if the agent does not in fact know of such revocation; and unless the agent has such knowledge or has received such notice, he is protected as to the principal and as to third persons against liability for acts done by him within the scope of the original authority.¹ A statute which provides that the recording of the

¹ England. *Vynior's Case*, 8 Coke 80a.

United States. *Taylor v. Burns*, 203 U. S. 120, 51 L. ed. 116 [affirming, *Taylor v. Burns*, 8 Ariz. 463, 76 Pac. 623].

Florida. *Florida, etc., R. R. v. Ashmore*, 43 Fla. 272, 32 So. 832.

Iowa. *Mitchell v. Hagge*, 178 Ia. 926, 160 N. W. 287.

Michigan. *Garlock v. Motz Tire & Rubber Co.*, 192 Mich. 665, 159 N. W. 344.

Minnesota. *Johnson v. Evans*, 134 Minn. 43, 156 N. W. 823.

Oklahoma. *American Investment Co. v. Alexander*, 46 Okla. 284, 148 Pac. 99 (obiter).

Pennsylvania. *McMahan v. Burns*, 216 Pa. St. 448, 65 Atl. 806.

South Carolina. *McCallum v. Grier*, 86 S. Car. 162, 138 Am. St. Rep. 1037, 68 S. E. 466.

² *Chandler v. Franklin*, 65 S. Car. 544, 44 S. E. 70.

³ *Ziebarth v. Donaldson*, — Minn. —, 169 N. W. 253.

⁴ *Ziebarth v. Donaldson*, — Minn. —, 169 N. W. 253.

¹ Colorado. *Lowell v. Hessey*, 46 Colo. 517, 105 Pac. 870.

Florida. *Jacksonville Terminal Co. v. Smith*, 67 Fla. 10, 64 So. 354.

Iowa. *Mosnat v. Berkheimer*, 158 Ia. 177, 139 N. W. 469.

revocation of a power of attorney is essential to the operation of such revocation does not dispense with the necessity of notifying the agent of such revocation in addition to recording such revocation.²

As to third persons who knew of the original appointment and authority of the agent and who would be misled if notice of the revocation of his authority were not given, notice of such revocation is necessary.³ If the principal by his conduct has estopped himself from denying the agent's authority, the principal must give notice of revocation of authority or of want of authority in order to relieve himself from liability upon subsequent contract.⁴ Formal notice is not necessary.⁵ It is sufficient if such person has knowledge of facts which are sufficient to put an ordinary man upon inquiry.⁶

§ 1744. Notice of termination of authority—Termination by operation of law. If the authority of the agent is revoked by the death of the principal, it is held by the great weight of common-law authority that notice of such revocation is not necessary, and that transactions of third persons with the agent have no legal effect as against the estate of the principal.¹ The unjust results which have been reached in some cases by the application of this principle, have given rise to severe criticism; and there is some authority for hold-

Washington. Brittain v. Pioneer State Bank, 45 Wash. 41, 87 Pac. 1051.

Wisconsin. Best v. Gunther, 125 Wis. 518, 110 Am. St. Rep. 851, 1 L. R. A. (N.S.) 577, 104 N. W. 82, 918.

² Best v. Gunther, 125 Wis. 518, 110 Am. St. Rep. 851, 1 L. R. A. (N.S.) 577, 104 N. W. 82.

³ **England.** Trueman v. Loder, 11 Ad. & El. 589.

United States. Insurance Co. v. McCain, 96 U. S. 84, 24 L. ed. 653.

Georgia. Burch v. Americus Grocery Co., 125 Ga. 153, 53 S. E. 1008.

Iowa. Mosnat v. Berkheimer, 158 Ia. 177, 139 N. W. 469.

Kentucky. Howard v. Strawbridge, 165 Ky. 88, 176 S. W. 977.

Ohio. Aetna Insurance Co. v. Staumbaugh-Thompson Co., 76 O. S. 138, 118 Am. St. Rep. 834, 81 N. E. 173.

West Virginia. Union Bank & Trust

Co. v. Long Pole Lumber Co., 70 W. Va. 568, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

Wisconsin. Johnson v. Youngs, 82 Wis. 107, 51 N. W. 1095.

⁴ Valiquette v. Clark Bros. Coal Min. Co., 83 Vt. 538, 34 L. R. A. (N.S.) 440, 77 Atl. 869.

⁵ Jacksonville Terminal Co. v. Smith, 67 Fla. 10, 64 So. 354.

⁶ Jacksonville Terminal Co. v. Smith, 67 Fla. 10, 64 So. 354.

¹ **United States.** Galt v. Galloway, 29 U. S. (4 Pet.) 332, 7 L. ed. 876; Long v. Thayer, 150 U. S. 520, 38 L. ed. 1167.

California. Travers v. Crane, 15 Cal. 12.

Iowa. Lewis v. Kerr, 17 Ia. 73.

Maine. Harper v. Little, 2 Me. 14, 11 Am. Dec. 25.

Vermont. Davis v. Windsor Savings Bank, 46 Vt. 728.

ing that notice in such case is necessary.² An attempt has been made to distinguish cases in which the agent need not act in the name of the principal and to hold that in such cases notice to third persons is necessary in order that the death of the principal may operate as a revocation of the authority of the agent.³ No reason can be suggested for making this distinction, and if it is adopted, it will only add another illustration of the adoption of an irrational distinction as an escape from the uniform application of an objectionable principle of law. The rule itself should be applied uniformly or it should be discarded. The results which are frequently reached by the application of the rule make it clear that the rule itself is not in accordance with our ideas of justice, although it may have been in accordance with the more formal ideas of an earlier condition of law. It is probably too well settled to be overthrown by judicial authority, and legislation will be probably necessary to change the rule. If the estate of the principal has taken the benefit of the transaction which the agent has entered into after the death of the principal, there appears to be no reason why those who take such benefit should not be held to have adopted the entire transaction; and this result has been reached in a number of cases,⁴ including cases which seek to justify the result which is reached upon the ground that the act was one which need not be done in the name of the principal, rather than on the theory of the effect of conferring benefits on the estate of the principal.

Notice is held necessary where the authority of the agent of a corporation is revoked by the dissolution of the corporation.⁵

§ 1745. Scope of agent's authority—General principles. As between the principal and the agent, leaving out of consideration questions of the liability of the principal to third persons growing out of ratification or estoppel, the extent of the agent's authority is primarily a question of fact.¹ The construction of the language

² *Cassiday v. McKenzie*, 4 Watts & S. 282.

³ *Deweese v. Muff*, 57 Neb. 17, 73 Am. St. Rep. 488, 77 N. W. 361; *Ish v. Crane*, 8 O. S. 520; *Ish v. Crane*, 13 O. S. 574; *Lenz v. Brown*, 41 Wis. 172.

⁴ *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Meinhardt v. Newman*, 71 Neb. 532, 99 N. W. 261; *Deweese v. Muff*, 57 Neb. 17, 73 Am. St. Rep. 488,

42 L. R. A. 789, 77 N. W. 361; *Ish v. Crane*, 8 O. S. 520; *Ish v. Crane*, 13 O. S. 574; *Lenz v. Brown*, 41 Wis. 172. ⁵ *Salton v. New Beeston Cycle Co.* [1900], 1 Ch. 43.

¹ *Thompson v. Atchley*, — Ala. —, 78 So. 196; *War Fork Land Co. v. Marcum*, 180 Ky. 352, 202 S. W. 688; *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761, 45 S. W. 781.

creating the authority or the inferences admissible from the facts from which authority may be inferred are questions of law.² The surrounding circumstances may be considered in construing a power of attorney.³ The usages and customs of the business in which the agent is authorized to represent his principal are to be regarded as forming a part of the authority conferred upon him by his principal in the absence of express provisions in the contract to the contrary.⁴ A power of attorney which confers special authority is to be construed strictly.⁵ If the authority which the principal gives to the agent is expressed in language which is so ambiguous that either one of two meanings may fairly be given thereto, the principal is bound by either of such meanings which the agent in good faith understands to be intended by the principal.⁶ While a power of attorney is frequently given, especially in transactions which involve the transfer of property, such a power of attorney is ordinarily given for the purpose of furnishing to third persons evidence of the authority of the agent and not for the purpose of conferring power upon the agent or restricting his power as between himself and his principal.⁷

An attempt is occasionally made to distinguish between the general agent who has authority to represent his principal in all matters which concern a specific business,⁸ or a business of a specific kind at a specific place,⁹ and a special agent who has power to act for his principal only in one specific transaction and in the manner indicated by his specific instructions.¹⁰ While this distinction is occasionally insisted upon, it seems to be of but little practical value, since the actual scope and extent of the authority conferred upon the agent in that particular case must be ascertained before it can be determined whether he is a general or a special agent. The fact

² War Fork Land Co. v. Marcum, 180 Ky. 352, 202 S. W. 668; Warner v. Brown, 231 Mass. 333, 121 N. E. 69; Seehorn v. Hall, 130 Mo. 257, 51 Am. St. Rep. 562, 32 S. W. 643; Powell v. Old Hickory Building & Loan Association, 252 Pa. St. 587, 97 Atl. 1023.

³ Warner v. Brown, 231 Mass. 333, 121 N. E. 69.

⁴ Taylor v. Bailey, 169 Ill. 181, 48 N. E. 200; Hall v. Paine, 224 Mass. 62, 112 N. E. 153; Powell v. Old Hickory Building & Loan Association, 252 Pa. St. 587, 97 Atl. 1023.

⁵ Bolton v. Rouss, — La. —, 80 So. 226.

⁶ Maidment v. Frazier, 90 Vt. 520, 98 Atl. 987.

⁷ Keyes v. Metropolitan Trust Co., 220 N. Y. 237, 115 N. E. 455.

⁸ Southern States Fire Insurance Co. v. Kronenberg, — Ala. —, 74 So. 63; Scherer v. Post Office Building & Loan Association, 91 N. J. L. 666, 103 Atl. 202; Powell v. King Lumber Co., 168 N. Car. 632, 84 S. E. 1032.

⁹ Southern States Fire Insurance Co. v. Kronenberg, — Ala. —, 74 So. 63.

¹⁰ Southern States Fire Insurance Co. v. Kronenberg, — Ala. —, 74 So. 63; Scherer v. Post Office Building & Loan Association, 91 N. J. L. 666, 103 Atl.

that one is known as a "representative" of his principal does not of itself indicate the scope and extent of his authority.¹¹ Accordingly, it can not be assumed that a "representative" has authority to bind his principal by contracts of employment or to bind him by discharging those who are already under contracts of employment.¹²

A principal can not confer upon his agent powers in excess of those which the principal himself possesses.¹³ In its literal sense this proposition is axiomatic. Cases arise, however, in which an agent has authority to employ others on behalf of his principal for services which the agent who has authority to make such contracts of employment would himself have no authority to perform.

Authority which is conferred by the principal upon the agent may be conferred expressly,¹⁴ or by implication.¹⁵ The courts, however, are not in accord as to the exact meaning of the expression "implied power." "Implied authority is that which the principal intends his agent to possess and which is proper, usual and necessary to the exercise of the authority actually granted."¹⁶ Implied authority which the principal can fairly be regarded as conferring upon the agent must be distinguished from the liability of the principal to third persons growing out of circumstances of estoppel.¹⁷ While it is frequently difficult to determine which is the true basis of liability, the two forms of liability should be distinguished.¹⁸ The confusion between the two ideas is due in part to the practice of referring to estoppel as "apparent authority," which is not actually granted by the principal to the agent, but which the principal knowingly permits the agent to exercise or which he holds him out as possessing.¹⁹ Implied authority is said to exist when a reasonably

202; *Winkel v. Atlas Lumber Co.*, 36 N. D. 542, 162 N. W. 364; *Columbia Security Co. v. Aetna Accident & Liability Co.* (Wash.), 183 Pac. 137; *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

¹¹ *Amann v. Pantages*, 90 Wash. 271, 155 Pac. 1070.

¹² *Amann v. Pantages*, 90 Wash. 271, 155 Pac. 1070.

¹³ *Schorman v. McIntyre*, 92 Wash. 116, 158 Pac. 993.

¹⁴ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

¹⁵ *Johnson v. Evans*, 134 Minn. 43, 158 N. W. 823; *First National Bank v. Schirmer*, 134 Minn. 387, 159 N. W. 800;

Powell v. King Lumber Co., 168 N. Car. 632, 84 S. E. 1032.

¹⁶ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

See to the same effect, *Johnson v. Evans*, 134 Minn. 43, 158 N. W. 823; *First National Bank v. Schirmer*, 134 Minn. 387, 159 N. W. 800; *Powell v. King Lumber Co.*, 168 N. Car. 632, 84 S. E. 1032.

¹⁷ See § 1760.

¹⁸ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

¹⁹ *Columbia Mill Co. v. National Bank*, 52 Minn. 224, 53 N. W. 1061; *Dispatch Printing Co. v. National Bank*

prudent person having knowledge of the nature and usages of the business in question would have been justified in supposing that the agent was authorized to represent his principal in the particular transaction.²⁰

It has been suggested that the distinction between genuine implied authority and estoppel is to be emphasized especially in rules of pleading, and that estoppel must be pleaded;²¹ while in the case of genuine implied authority it is sufficient to allege that the principal entered into the contract,²² but in the absence of motion it is sufficient to allege that he entered into such contract through his agent duly authorized.²³ The liability of the principal arising out of estoppel will be discussed subsequently.²⁴

In construing the grant of power to the agent it will be assumed in the absence of evident intent to the contrary that the agent is authorized in unusual emergencies and in the absence of his principal, to exercise unusual incidents to the power actually granted to him which could not be exercised under ordinary circumstances.²⁵ An agent has no implied authority to represent his principal in transactions in which the interests of the agent are adverse to those of the principal; and those who deal with the principal through the agent, with knowledge of such facts, are charged with knowledge of his want of authority.²⁶ An agent has ordinarily no authority to appoint a subagent with discretionary powers.²⁷

of Commerce, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236; Johnson v. Evans, 134 Minn. 43, 158 N. W. 823; Connell v. McLoughlin, 28 Or. 230, 42 Pac. 218; Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 Pac. 390.

²⁰ *McAdow v. Kansas City Western Ry. Co.*, 100 Kan. 309, L. R. A. 1917E, 539, 164 Pac. 177.

²¹ *McAdow v. Kansas City Western Ry. Co.*, 100 Kan. 309, L. R. A. 1917E, 539, 164 Pac. 177.

²² *Metropolis Bank v. Gutschlick*, 39 U. S. (14 Pet.) 19, 10 L. ed. 335; *Kitchen v. Holmes*, 42 Or. 252, 70 Pac. 830; *Black Lick Lumber Co. v. Camp Construction Co.*, 83 W. Va. 477, 80 S. E. 409.

See also, as to a contract of a public corporation, *Burnham v. Milwaukee*, 69 Wis. 379, 34 N. W. 389.

²³ *Childrese v. Emory*, 21 U. S. (8

Wheat.) 642, 5 L. ed. 705; *McAdow v. Kansas City Western Ry. Co.*, 100 Kan. 309, L. R. A. 1917E, 539, 164 Pac. 177.

²⁴ See § 1760.

²⁵ *Brownell v. Moorehead*, — Okla. —, 165 Pac. 408.

²⁶ *Colorado. DeBaca v. Higgins*, 58 Colo. 75, L. R. A. 1915B, 1091, 143 Pac. 832.

Iowa. Harvey v. Mason City & Ft. D. R. Co., 129 Ia. 465, 3 L. R. A. (N.S.) 973, 105 N. W. 958.

Louisiana. Langlois v. Gragnon, 123 La. 453, 22 L. R. A. (N.S.) 414, 49 So. 18.

Missouri. State v. Aikins (Mo.), L. R. A. 1910C, 1101, 180 S. W. 848.

Washington. Bowles Co. v. Clark, 59 Wash. 336, 31 L. R. A. (N.S.) 613, 109 Pac. 812.

²⁷ *Gaar Scott & Co. v. Rogers*, 46 Okla. 67, 148 Pac. 161.

§ 1746. Scope of agent's authority—Power to manage business.

As illustrating what powers have been held to be implied and what have not been so held, general power to manage a business includes power to do whatever is customary and necessary in such business.¹ Thus it includes power to lease,² to vacate leased realty without surrendering the lease,³ to employ an attorney,⁴ to borrow money,⁵ to give a note,⁶ to endorse checks of his principal for goods bought on credit in pursuance of his authority,⁷ to reduce contracts of employment to writing if such contracts are within the general scope of the business,⁸ and to rescind contracts.⁹

A general manager has no power to bind his principal by contracts which are not customary and necessary in the business which he is managing.¹⁰ General power to manage a business does not include power to loan the principal's credit,¹¹ unless the debt for which the principal becomes surety is really the principal's own debt.¹² An agent who has charge of the business of a contractor may have authority to make a contract by which the contractor agrees to pay

¹Arkansas. *Co-operative Stores Co. v. Marianna Hotel Co.*, 128 Ark. 196, 193 S. W. 529.

Kentucky. *Todd v. First National Bank*, 173 Ky. 60, 190 S. W. 468.

New Hampshire. *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

New York. *Rathbun v. Snow*, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379.

North Carolina. *Powell v. King Lumber Co.*, 168 N. Car. 632, 84 S. E. 1032; *Ferguson v. Majestic Amusement Co.*, 171 N. Car. 663, 89 S. E. 45.

²Phillips, etc., *Co. v. Whitney*, 109 Ala. 645, 20 So. 333; *Co-operative Stores Co. v. Marianna Hotel Co.*, 128 Ark. 196, 193 S. W. 529.

³*Byrbee v. Blake*, 74 Conn. 607, 57 L. R. A. 222, 51 Atl. 535 (the agent's conduct after the term ended being considered as a renewal).

⁴*Davis v. Matthews*, 8 S. D. 300, 66 N. W. 456.

⁵*Todd v. First National Bank*, 173 Ky. 60, 190 S. W. 468; *Helena National Bank v. Telegraph Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Mc-*

Dermott v. Jackson, 97 Wis. 64, 72 N. W. 375.

⁶*Whitten v. Bank*, 100 Va. 546, 42 S. E. 300.

⁷*Graton, etc., Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879.

⁸*Ferguson v. Majestic Amusement Co.*, 171 N. Car. 663, 89 S. E. 45.

⁹*Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642.

¹⁰*Thiel Detective Service Co. v. McClure*, 142 Fed. 952, 74 C. C. A. 122, 4 L. R. A. (N.S.) 843; *Stephens v. Roper Lumber Co.*, 160 N. Car. 107, 41 L. R. A. (N.S.) 1141, 75 S. E. 933; *Chesson v. Richmond Cedar Works*, 172 N. Car. 32, 89 S. E. 800.

¹¹*Boord v. Strauss*, 39 Fla. 381, 22 So. 713; *Todd v. First National Bank*, 173 Ky. 60, 190 S. W. 468; *Kelly Handle Co. v. Crawford Plumbing & Mill Supply Co.*, 171 N. Car. 495, 88 S. E. 514.

¹²*Andres v. Morgan*, 62 O. S. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

See also, *Kelly Handle Co. v. Crawford Plumbing & Mill Supply Co.*, 171 N. Car. 495, 88 S. E. 514.

one who has furnished material to a subcontractor.¹³ One who has general charge of the business of getting out lumber has authority to guarantee that the employes of one who has agreed to haul such lumber to the mills shall receive their compensation therefor if such contract of guarantee is a reasonable means of securing performance of such contract.¹⁴ One who is employed as a superintendent of a lumber camp has no power to agree to pay compensation to an employe for whom no work is then provided in consideration of his promise not to accept employment elsewhere and to be ready to work when required.¹⁵ One who is employed as a field manager in a lumber business has no implied authority to make a contract to cut timber which will involve a large amount of capital and which will extend over many years.¹⁶ A power to manage and control all the personal property of the donor of such power and to execute and deliver all papers which the donor himself could execute with reference to his personalty, does not carry with it the power to employ a detective to make an investigation as to the business of a corporation in which the donor of such power owns stock.¹⁷ A general manager has no implied power to execute a mortgage.¹⁸ Power to sell and control realty, to execute deeds therefor, to collect and discharge mortgages, to effect insurance, and to pay taxes, is said not to carry with it the power to borrow money upon the credit of the principal for the purpose of paying taxes if the agent has in his hands money belonging to the principal sufficient to pay the taxes.¹⁹

§ 1747. Scope of agent's authority—Power to sell generally. Power to sell is not power to employ an attorney,¹ or to buy,² or to dedicate realty for a street,³ or to indemnify against loss in

¹³ *Powell v. King Lumber Co.*, 168 N. Car. 632, 84 S. E. 1032.

¹⁴ *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

¹⁵ *Stephens v. Roper Lumber Co.*, 160 N. Car. 107, 41 L. R. A. (N.S.) 1141, 75 S. E. 933.

¹⁶ *Chesson v. Richmond Cedar Works*, 172 N. Car. 32, 89 S. E. 800.

¹⁷ *Thiel Detective Service Co. v. McClure*, 142 Fed. 952, 74 C. C. A. 122, 4 L. R. A. (N.S.) 843.

¹⁸ *First National Bank v. Kirkby*, 43 Fla. 376, 32 So. 881.

¹⁹ *Williams v. Dugan*, 217 Mass. 526, L. R. A. 1916C, 110, 105 N. E. 615.

¹ *Kirby v. Scraper Co.*, 9 S. D. 623, 70 N. W. 1052.

² *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358; *Quint v. O'Connell*, 89 Conn. 353, 94 Atl. 288; *Finance Co. v. Coal Co.*, 65 Minn. 442, 68 N. W. 70; *Hopkins v. Buckley*, 111 Miss. 621, 71 So. 877.

³ *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426.

business,⁴ nor to sell on credit,⁵ or to sell on credit, 'taking a note payable to the agent,'⁶ or to rescind a sale already made,⁷ or to endorse checks which are payable to the principal.⁸

§ 1748. Scope of agent's authority—Power to sell realty. Power to sell or convey realty is construed strictly in favor of the principal.¹ However, a power of attorney given by husband and wife jointly, to convey realty "which we now own," is not limited to property owned jointly;² and under such power the agent may convey the wife's separate realty.³ Authority to secure a purchaser does not confer authority to make a contract of sale which will bind the principal.⁴ Power to sell land does not confer power to borrow money,⁵ or to give a mortgage,⁶ or to exchange.⁷ Power to sell realty subject to such conditions and restrictions as the principal may authorize, does not confer power to enter into unusual covenants on behalf of the principal,⁸ such as a covenant to the effect that no liquor shall be sold on any of the lots which such agent has

⁴ *Kinser v. Clay Co.*, 165 Ill. 505, 46 N. E. 372 [affirming, 64 Ill. App. 437]; *Braun v. Hess*, 187 Ill. 283, 58 N. E. 371 [affirming, 86 Ill. App. 544].

⁵ *Sale of realty. Burks v. Hubbard*, 69 Ala. 379; *Dresden School Dist. v. Ins. Co.*, 62 Me. 330; *Lumpkin v. Wilson*, 52 Tenn. (5 Heisk.) 555.

⁶ *McGrath v. Vanaman*, 53 N. J. Eq. 459, 32 Atl. 686.

⁷ *Diversay v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *West End, etc., Co. v. Crawford*, 120 N. Car. 347, 27 S. E. 31; *Fletcher v. Nelson*, 6 N. D. 94, 69 N. W. 53.

Contra, Palmer v. Roath, 86 Mich. 602, 49 N. W. 590.

But a state agent to sell machines has power to agree to take a machine back if unsatisfactory. *Marion Mfg. Co. v. Harding*, 155 Ind. 648, 58 N. E. 194.

⁸ *Hamilton National Bank v. Nye*, 37 Ind. App. 464, 117 Am. St. Rep. 333, 77 N. E. 295.

¹ *Ayers v. Southern Pacific Railroad Co.*, 173 Cal. 74, L. R. A. 1917F, 949, 159 Pac. 144; *Springer v. City Bank &*

Trust Co., 59 Colo. 376, 149 Pac. 253; *Gund Brewing Co. v. Tourtelotte*, 106 Minn. 71, 29 L. R. A. (N.S.) 210, 121 N. W. 417; *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

² *Cousino v. Western Shore Lumber Co.*, — Cal. —, 175 Pac. 406.

³ *Cousino v. Western Shore Lumber Co.*, — Cal. —, 175 Pac. 406.

⁴ *Springer v. City Bank & Trust Co.*, 59 Colo. 376, 149 Pac. 253; *Larson v. O'Hara*, 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821.

⁵ *Lindenberger Cold Storage & Canning Co. v. Lindenberger, Inc.*, 235 Fed. 542.

⁶ *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; *Salem National Bank v. White*, 159 Ill. 136, 42 N. E. 312; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019.

⁷ *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

⁸ *Ayers v. Southern Pacific Railroad Co.*, 173 Cal. 74, L. R. A. 1917F, 949, 159 Pac. 144.

authority to convey.⁹ One who is authorized to act as a "sales solicitor" to obtain purchasers and who is forbidden by the contract to call himself an agent, has no authority to bind his principal by representations as to the quality or value of the land.¹⁰ Power to sell land does not infer implied authority to assign to a prospective purchaser the rent which will become due to his principal at any time prior to the performance of the contract.¹¹ An agent who is authorized to sell realty is authorized to sell to one who is acting as an agent for an undisclosed principal;¹² and his failure to disclose to his principal the fact that the purchaser is an undisclosed agent does not prevent the contract from binding the principal.¹³ Oral authority to sell realty does not confer implied authority to collect the purchase price.¹⁴ Whether power to sell realty in part on credit implies power to collect the unpaid installments of the purchase price after the deed has been delivered is said to be a question upon which no arbitrary rule of law can be laid down, but which depends upon the surrounding facts and circumstances.¹⁵

Title to land is usually warranted. Accordingly, power to sell land includes power to warrant the title.¹⁶

§ 1749. Scope of agent's authority—Power to sell personally.

Power to sell implies power to fix the price,¹ especially if the property which is sold is in the possession of the agent.² An agent authorized to sell stock has authority to bind his principal by a

⁹ *Ayers v. Southern Pacific Railroad Co.*, 173 Cal. 74, L. R. A. 1917F, 949, 159 Pac. 144.

¹⁰ *Hodson v. Wells & Dickey Co.*, 31 N. D. 395, L. R. A. 1917F, 958, 154 N. W. 193.

¹¹ *Gund Brewing Co. v. Tourtelotte*, 108 Minn. 71, 29 L. R. A. (N.S.) 210, 121 N. W. 417.

¹² *Nicholson v. Dover*, 145 N. Car. 18,

13 L. R. A. (N.S.) 167, 58 S. E. 444.

¹³ *Nicholson v. Dover*, 145 N. Car. 18,

13 L. R. A. (N.S.) 167, 58 S. E. 444.

¹⁴ *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

¹⁵ *First National Bank v. Henry*, 30 N. D. 324, 152 N. W. 668.

¹⁶ *United States. LeRoy v. Beard*, 49 U. S. (8 How.) 451, 12 L. ed. 1151.

Kentucky. Vanada v. Hopkins, 24 Ky. (1 J. J. Mar.) 285, 19 Am. Dec. 92.

Massachusetts. Bronson v. Coffin, 118 Mass. 156.

New Hampshire. Backman v. Charlestown, 42 N. H. 125.

New York. Schultz v. Griffin, 121 N. Y. 294, 18 Am. St. Rep. 825, 24 N. E. 480.

Vermont. Peters v. Farnsworth, 15 Vt. 55, 40 Am. Dec. 671.

Contra, see *Howe v. Harrington*, 18 N. J. Eq. 495.

¹ *Bass-Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. 980.

² *Galbraith v. Weber*, 58 Wash. 132, 28 L. R. A. (N.S.) 341, 107 Pac. 1056.

See also, *Mid-Continent Life Ins. Co. v. Beasley*, — Ala. —, 79 So. 373.

statement that a certain portion of the purchase price would be paid by dividends thereon.³ A traveling salesman empowered to sell may make contracts for future delivery.⁴ Power to sell property which is in the possession of the agent does not imply power to exchange,⁵ even if such exchange is made for other property and money.⁶ Power to sell does not imply power to compromise a claim for damages for breach of such contract.⁷

General power to act as manager of a sales agency does not imply power to borrow money,⁸ even if the principal is a corporation.⁹ Power to sell goods at retail is not power to mortgage the entire stock.¹⁰

One who has power to sell has no implied power to modify the purchase price under a prior contract of sale,¹¹ even if the goods which were sold did not conform to the specifications of the original contract.¹² One who is authorized to sell and deliver personal property which is in his possession has implied authority to collect the purchase price.¹³ Authority to sell on credit does not confer authority to collect the purchase price thereafter;¹⁴ and a payment to such agent is not of itself a payment to the principal,¹⁵ even if such agent has in his possession the bill for such goods.¹⁶

Power to sell usually includes power to make such warranties as are customary in that place and business. Thus in sales of personalty power to warrant quality is implied from power to sell as to such warranties as are customary.¹⁷ Whether the warranty is

³ *Mid-Continent Life Ins. Co. v. Beasley*, — Ala. —, 79 So. 373.

⁴ *Falletti v. Carrano*, 92 Conn. 636, 103 Atl. 753.

⁵ *Kearns v. Nickse*, 80 Conn. 23, 10 L. R. A. (N.S.) 1118, 66 Atl. 779.

⁶ *Kearns v. Nickse*, 80 Conn. 23, 10 L. R. A. (N.S.) 1118, 66 Atl. 779.

⁷ *Dahnke-Walker Milling Co. v. Phillips*, 117 Miss. 204, 78 So. 6.

⁸ *Merchants' National Bank v. Nichols & S. Co.*, 223 Ill. 41, 7 L. R. A. (N.S.) 752, 79 N. E. 38.

⁹ *Merchants' National Bank v. Nichols & S. Co.*, 223 Ill. 41, 7 L. R. A. (N.S.) 752, 79 N. E. 38.

¹⁰ *Kiefer v. Klinsick*, 144 Ind. 46, 42 N. E. 447.

¹¹ *Fruit Dispatch Co. v. Manos*, 145 Ga. 635, 89 S. E. 717.

¹² *Fruit Dispatch Co. v. Manos*, 145 Ga. 635, 89 S. E. 717.

¹³ *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265; *Petersen v. Pacific-American Fisheries*, — Wash. —, 183 Pac. 79.

¹⁴ *Woodworth v. School District No. 2, Stevens County*, 92 Wash. 456, 159 Pac. 757.

¹⁵ *Woodworth v. School District No. 2, Stevens County*, 92 Wash. 456, 159 Pac. 757.

¹⁶ *Woodworth v. School District No. 2, Stevens County*, 92 Wash. 456, 159 Pac. 757..

¹⁷ *Kansas, Dreyfus v. Goss*, 67 Kan. 57, 72 Pac. 537.

customary or not is a question of fact.¹⁸ Power to sell a new brand of fertilizer has been held to include power to warrant its quality.¹⁹ Power to sell as general agent has been held to include power to warrant,²⁰ even as to one who knows that local agents are unauthorized to warrant.²¹ Power given by a mortgagee to a mortgagor of chattels to sell and apply the proceeds to the mortgage debt is held to include power to warrant.²² If the warranty is not customary the agent has no implied authority to make it.²³ Authority to sell a beverage as non-alcoholic implies authority to warrant that it is free from alcohol and to make the seller liable to the purchaser for the amount of federal license tax which the purchaser is obliged to pay by reason of dealing in such beverage.²⁴ An agent who sells an article under an express warranty may waive a provision as to notice of breach of such warranty,²⁵ even if the contract contains a provision that no person has authority to change such warranty.²⁶ An agent who has authority to sell under an express written warranty has no authority to add a verbal warranty.²⁷ An agent who is authorized to sell has authority to bind his principal by a contract to the effect that if the article does not conform to the specifications it may be returned and another article may be purchased.²⁸ An agent who has authority to sell motor trucks has no authority

Nebraska. McCormick Harvesting Machinery Co. v. Hiatt, — Neb. —, 95 N. W. 627.

New York. Bierman v. Mills Co., 151 N. Y. 482, 56 Am. St. Rep. 636, 37 L. R. A. 799, 45 N. E. 856.

North Carolina. Haynor Mfg. Co. v. Davis, 147 N. Car. 267, 17 L. R. A. (N.S.) 193, 61 S. E. 54.

Virginia. Reese v. Bates, 94 Va. 321, 26 S. E. 865.

Wisconsin. Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876, 32 N. W. 550. [overruling, Boothby v. Scales, 27 Wis. 626]; Westurn v. Page, 94 Wis. 251, 68 N. W. 1003.

¹⁸ Reese v. Bates, 94 Va. 321, 26 S. E. 865; Westurn v. Page, 94 Wis. 251, 68 N. W. 1003; Larson v. Taylor Co., 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915.

¹⁹ Hille v. Adair (Ky.), 58 S. W. 697; Reese v. Bates, 94 Va. 321, 26 S. E. 865.

²⁰ Hille v. Adair (Ky.), 58 S. W. 697.

²¹ J. I. Case, etc., Co. v. McKinnon, 82 Minn. 75, 84 N. W. 646.

²² National Citizens' Bank v. Ertz, 83 Minn. 12, 53 L. R. A. 174, 85 N. W. 321.

²³ Smith v. Tracy, 36 N. Y. 79; Wait v. Bourne, 123 N. Y. 592, 25 N. E. 1053; Nixon Mining Drill Co. v. Burke, 132 Tenn. 481, L. R. A. 1916C, 411, 178 S. W. 1116; Jones v. Jaycox, 67 Wash. 403, 39 L. R. A. (N.S.) 1151, 121 Pac. 854.

²⁴ Haynor Mfg. Co. v. Davis, 147 N. Car. 267, 17 L. R. A. (N.S.) 193, 61 S. E. 54.

²⁵ First National Bank v. Dutcher, 128 Ia. 413, 1 L. R. A. (N.S.) 142, 104 N. W. 497.

²⁶ First National Bank v. Dutcher, 128 Ia. 413, 1 L. R. A. (N.S.) 142, 104 N. W. 497.

²⁷ Somerville v. Gullett Gin Co., 137 Tenn. 509, 194 S. W. 576.

²⁸ Holbert v. Weber, 36 N. D. 106, 161 N. W. 560.

to warrant on behalf of his principal that the tires will furnish a certain amount of mileage if the truck is loaded in excess of the capacity at which it is rated.²⁸ An agent who is authorized to sell phonographs has no authority to warrant to a purchaser who is buying phonographs to be given away as an advertisement that a certain number of records will be purchased for each machine within a specified time.²⁹

Title to personalty is usually warranted, and power to sell personalty implies power to make a customary warranty of title.³¹ Power to sell guaranteed goods to be tested is power to fix the method of testing the goods,³² or to extend the time of the trial.³³ It is presumed that the principal intends that the custom of the market shall determine the agent's power to sell therein.³⁴ Under a contract which provides that no alteration shall be valid unless it is endorsed thereon by the president of the promisor corporation, the agent who makes such contract has no power to agree on behalf of his principal that it shall be performed within a certain time if the contract itself made no provision as to the time of performance.³⁵ One who has authority to sell goods has no authority to make a contract on behalf of his principal for placing upon billboards posters which the vendor sends to its customers for advertising purposes.³⁶

§ 1750. Scope of agent's authority—Power to solicit orders.

Power to solicit orders is not power to make a binding contract of sale;¹ nor has such an agent power to collect.² He has no authority

²⁸ *Nixon Mining Drill Co. v. Burk*, 132 Tenn. 481, L. R. A. 1910C, 411, 178 S. W. 1116.

²⁹ *Johns v. Jaycox*, 67 Wash. 403, 39 L. R. A. (N.S.) 1151, 121 Pac. 854.

³¹ *Nelson v. Cowing*, 6 Hill (N. Y.) 336 [overruling, *Gibson v. Colt*, 7 Johns. (N. Y.) 390; *Nixon v. Hyseratt*, 5 Johns. (N. Y.) 58].

³² *Smith v. Mfg. Co.*, 58 N. J. L. 242, 33 Atl. 244.

³³ *Reeves v. Cress*, 80 Minn. 466, 83 N. W. 443.

³⁴ *Taylor v. Bailey*, 169 Ill. 181, 48 N. E. 200 [affirming, 68 Ill. App. 622]; *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153.

³⁵ *Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266.

³⁶ *United States Bedding Co. v. Andre*, 105 Ark. 111, 41 L. R. A. (N.S.) 1019, 150 S. W. 413.

¹ *John Matthews, etc., Co. v. Renz* (Ky.), 61 S. W. 9.

² *Alabama. Simon v. Johnson*, 105 Ala. 344, 53 Am. St. Rep. 125, 16 So. 884.

Illinois. Jackson Paper Mfg. Co. v. Bank, 199 Ill. 151, 59 L. R. A. 657, 65 N. E. 136.

Kansas. Dreyfus v. Goss, 67 Kan. 57, 72 Pac. 537.

Massachusetts. Clark v. Murphy, 164 Mass. 490, 41 N. E. 674.

Minnesota. Brown v. Lally, 79 Minn. 38, 81 N. W. 538.

North Carolina. Smith v. Browne, 132 N. Car. 365, 43 S. E. 915.

to rescind a contract already entered into,³ even though the goods are not satisfactory to the customer to whom they have been sold.⁴ Such an agent has no implied authority to grant an extension of time,⁵ although such power may be granted expressly.⁶ Such an agent has no authority to bind his principal for his expenses,⁷ or to bind his principal by drafts drawn upon the principal for such expenses.⁸ An agent who is authorized to employ agents to sell the goods of the principal upon commissions and who by the terms of his contract is to furnish a store for the purpose of making such sales has no power to bind his principal by a lease of a store-room.⁹

An agent who has authority to solicit orders has authority to bind his principal by his receipt and transmission of orders delivered to him;¹⁰ and if such agent alters such order,¹¹ as by removing therefrom written conditions which were attached thereto,¹² and the principal accepts the order in the form in which it is transmitted to him, the principal is bound by the contract which is made by the original offer together with his acceptance.¹³ A factor has power to sell in his own name;¹⁴ and to maintain an action in his own name for the purchase price.¹⁵

§ 1751. Scope of agent's authority—Power to collect. Power to collect part or all of the purchase price at the time of the sale implies power to collect an unpaid installment of the purchase price after the sale is made,¹ even if the written account which the seller has sent to the purchaser contains a notice to the purchaser not to pay money to agents.² Power to collect is not power to

³ American Sales Book Co. v. Whitaker, 100 Ark. 360, 37 L. R. A. (N.S.) 91, 140 S. W. 132; Bingham v. Hibbard, 28 Or. 386, 43 Pac. 383.

⁴ American Sales Book Co. v. Whitaker, 100 Ark. 360, 37 L. R. A. (N.S.) 91, 140 S. W. 132.

⁵ Rice & Hutchins' Cincinnati Co. v. Croghan, 169 Ky. 450, 184 S. W. 374.

⁶ Rice & Hutchins' Cincinnati Co. v. Croghan, 169 Ky. 450, 184 S. W. 374.

⁷ Oxweld Acetylene Co. v. Hughes, 126 Md. 437, L. R. A. 1916B, 751, 95 Atl. 45.

⁸ Seattle Shoe Co. v. Packard, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

⁹ Hosteter v. Wear-U-Well Shoe Co., 171 Ia. 346, 152 N. W. 1.

¹⁰ White Sewing Machine Co. v. Atkinson (Ark.), 190 S. W. 111.

¹¹ White Sewing Machine Co. v. Atkinson (Ark.), 190 S. W. 111.

¹² White Sewing Machine Co. v. Atkinson (Ark.), 190 S. W. 111.

¹³ White Sewing Machine Co. v. Atkinson (Ark.), 190 S. W. 111.

¹⁴ Beardsley v. Schmidt, 120 Wis. 405, 102 Am. St. Rep. 991, 98 N. W. 235.

¹⁵ Beardsley v. Schmidt, 120 Wis. 405, 102 Am. St. Rep. 991, 98 N. W. 235.

¹ American Sales Book Co. v. Cowdrey, 100 Ark. 325, 38 L. R. A. (N.S.) 700, 140 S. W. 134.

² American Sales Book Co. v. Cowdrey, 100 Ark. 325, 38 L. R. A. (N.S.) 700, 140 S. W. 134.

modify the contract,³ as to extend the time for which the adversary party may remain in possession of realty,⁴ or to extend the time of payment,⁵ or to waive the principal's right in property,⁶ as to waive the lien of a chattel mortgage,⁷ or to endorse negotiable instruments received by him on behalf of the principal, even if such negotiable instruments are received in payment of the acts which such agent is authorized to collect,⁸ or to set off the debt to be collected against a debt owed by the principal,⁹ or to indorse checks received,¹⁰ and power to foreclose is not power to extend time of payment.¹¹ Power to collect interest is not power to collect the principal,¹² at least before maturity,¹³ unless by custom,¹⁴ or by

³ *Rogers v. College*, 64 Ark. 627, 39 L. R. A. 636, 44 S. W. 454; *Mead v. Owen*, 80 Vt. 273, 12 L. R. A. (N.S.) 655, 67 Atl. 722; *Bernstein v. Schwartz*, — Wash. —, 183 Pac. 105.

⁴ *Mead v. Owen*, 80 Vt. 273, 12 L. R. A. (N.S.) 655, 67 Atl. 722.

⁵ *Van Vechten v. Jones*, 104 Ia. 436, 73 N. W. 1032.

⁶ *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52, 34 So. 392; *National Bank v. Elkins*, 37 S. D. 479, 159 N. W. 60.

⁷ *National Bank v. Elkins*, 39 S. D. 479, 159 N. W. 60.

⁸ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236; *McFadden v. Follrath*, 114 Minn. 85, 37 L. R. A. (N.S.) 201, 130 N. W. 542.

⁹ *Hill v. Van Duzer*, 111 Ga. 867, 36 S. E. 966.

An agent to collect can not set off his own debt to the debtor of the principal in payment of his principal's debt, leaving himself indebted to his principal. *Western, etc., Co. v. Portrey*, 50 Neb. 801, 70 N. W. 383. (It is not a good novation, as the principal's consent is lacking. See § 2488.

¹⁰ *Deering v. Kelso*, 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236; *McFadden v. Follrath*, 114 Minn. 85, 37 L. R. A. (N.S.) 201, 130 N. W. 542; *Jack-*

son v. Bank, 92 Tenn. 154, 36 Am. St. Rep. 81, 18 L. R. A. 663, 20 S. W. 802.

Contra, if the agent collecting security of a loan association is to pay the money received therefrom to the treasurer he has authority to indorse. *Gate City, etc., Association v. Bank*, 126 Mo. 82, 47 Am. St. Rep. 633, 27 L. R. A. 401, 28 S. W. 633.

¹¹ *Karcher v. Gans*, 13 S. D. 383, 83 N. W. 431.

¹² *Arkansas. Calhoun v. Ainsworth*, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316.

Michigan. Joy v. Vance, 104 Mich. 97, 62 N. W. 140.

Minnesota. State v. Lawrence, 130 Minn. 10, 153 N. W. 123.

Nebraska. Frey v. Curtis, 52 Neb. 406, 72 N. W. 478; *Walsh v. Peterson*, 59 Neb. 645, 81 N. W. 863.

New Jersey. Lawson v. Nicholson, 52 N. J. Eq. 821, 31 Atl. 386; *Dorman v. West Jersey Title & Guaranty Co.*, — N. J. —, 105 Atl. 195.

New York. Brewster v. Carnea, 103 N. Y. 556, 9 N. E. 323.

Washington. Kucher v. Scott, 96 Wash. 317, 165 Pac. 82.

¹³ *Little Rock, etc., Co. v. Wiggins*, 65 Ark. 385, 46 S. W. 731; *Dilenbeck v. Rehse*, 105 Ia. 749, 73 N. W. 1072; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

¹⁴ *Thornton v. Lawther*, 169 Ill. 228, 48 N. E. 412 [reversing, 67 Ill. App. 214].

the principal's acquiescence in such conduct,¹⁶ or if the note is in the possession of the agent.¹⁶ Power to collect is not power to give a receipt in full unless the entire debt is discharged.¹⁷ The possession of a negotiable instrument by the agent who is authorized to collect it is so usual that an agent who does not have possession of such instrument must be shown to have such authority by clear evidence.¹⁸ An agent who does not have possession of a note and the mortgage which secures it, has no implied authority to collect the principal by reason of the fact that he acted as agent of the principal in making the loan and in collecting interest.¹⁹ The fact that a mortgage note is made payable at the office of a mortgage brokerage company does not authorize such company to collect the principal if it does not have possession of the note.²⁰ If the creditor has acquiesced in the payment of mortgage coupon notes through a certain broker, the debtor is justified in assuming the authority of such broker, although the broker does not produce such notes or surrender them when payment is made.²¹

Power to collect installments when due is not power to collect before they are due.²² Power to collect and reinvest is power to collect before maturity.²³

Power to collect is power to accept cash only therefor;²⁴ not merchandise,²⁵ or a savings deposit book,²⁶ or a new obligation from

¹⁶ *Springfield Savings Bank v. Kjaer*, 82 Minn. 180, 84 N. W. 752; *Northwest Thresher Co. v. Dahlgren*, 50 Wash. 325, 19 L. R. A. (N.S.) 324, 97 Pac. 228.

¹⁸ *Ambrose v. Barrett*, 121 Cal. 297, 53 Pac. 805, 54 Pac. 264; *Hitchcock v. Kelley*, 18 Ohio C. C. 808, 4 Ohio C. D. 180.

See also, *Northwest Thresher Co. v. Dahlgren*, 50 Wash. 325, 19 L. R. A. (N.S.) 324, 97 Pac. 228.

Contra, *Dorman v. West Jersey Title & Guaranty Co.*, — N. J. —, 105 Atl. 195.

¹⁷ *Brunswick-Balke-Collander Co. v. Faulkner*, 131 Ark. 594, 199 S. W. 904.

¹⁹ *Kucher v. Scott*, 96 Wash. 317, 165 Pac. 82; *Connell v. Kaukauna*, 164 Wis. 471, 159 N. W. 927 [rehearing denied, *Connell v. Kaukauna*, 164 Wis. 471, 160 N. W. 1035].

¹⁸ *State v. Lawrence*, 130 Minn. 10, 153 N. W. 123.

²⁰ *Kucher v. Scott*, 96 Wash. 317, 165 Pac. 82.

²¹ *Easton v. Littooy*, 91 Wash. 648, 158 Pac. 531.

²² *Park v. Cross*, 76 Minn. 187, 77 Am. St. Rep. 630, 78 N. W. 1107; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

²³ *Thornton v. Lawther*, 169 Ill. 228, 48 N. E. 412 [reversing, 67 Ill. App. 214]; *Connell v. Kaukauna*, 164 Wis. 471, 159 N. W. 927 [rehearing denied, *Connell v. Kaukauna*, 164 Wis. 471, 160 N. W. 1035].

²⁴ *United States National Bank v. Shupak*, 54 Mont. 542, 172 Pac. 324; *First State Bank v. Lang*, 55 Mont. 146, 174 Pac. 597; *Fidelity & Deposit Co. v. Brock's Garage*, — N. J. —, 104 Atl. 132.

²⁵ *Fidelity & Deposit Co. v. Brock's Garage*, — N. J. —, 104 Atl. 132.

²⁶ *Dixon v. Guay*, 70 N. H. 161, 46 Atl. 456. To the same effect is *Cram*

the debtor.¹⁷ An agent who is authorized to collect a debt from a public corporation has authority, however, to accept the warrants of such corporation issued in conformity to law.¹⁸

Authority to collect a debt implies authority to make proper demand for its collection.¹⁹ Authority to collect rent for the use of a farm implies authority to demand the value of the crops raised upon such farm from persons who have purchased such crop.²⁰ The fact that B has received money to the use of A does not authorize B to apply such money upon a debt which is due to him from A.²¹

Power to collect by litigation includes power to collect without litigation.²² A sales agent who conducts the foreclosure proceedings has authority to receive property in satisfaction of such notes.²³

Power to collect is not power to accept service of summons.²⁴

§ 1752. Power to settle compromise, etc. Power to settle a debt is power to accept the note of a third person,¹ or personal property.² A collecting agency has power to employ an attorney for its principal.³ Authority to settle accounts includes authority to agree that the principal will correct any mistakes in such accounts which may be discovered thereafter.⁴ Authority to settle accounts of another agent does not confer authority to institute criminal proceedings against such other agent for embezzlement,⁵ and the principal is accordingly not liable for malicious prosecution by reason of the institution of such criminal proceedings.⁶ Authority to settle a claim for damages does not authorize the agent to expend any of the principal's money.⁷

v. Sickel, 51 Neb. 828, 66 Am. St. Rep. 478, 71 N. W. 724.

¹⁷ Hopkins v. Jordan, — Ala. —, 77 So. 710.

¹⁸ Woodworth v. School District No. 2, Stevens County, 92 Wash. 456, 159 Pac. 757.

¹⁹ Beck v. Minnesota & W. Grain Co., 131 Ia. 62, 7 L. R. A. (N.S.) 930, 107 N. W. 1032.

²⁰ Beck v. Minnesota & W. Grain Co., 131 Ia. 62, 7 L. R. A. (N.S.) 930, 107 N. W. 1032.

²¹ Ulbrand v. Bennett, 83 Or. 557, 163 Pac. 445.

²² Northwest Thresher Co. v. Dahlgren, 50 Wash. 325, 19 L. R. A. (N.S.) 324, 97 Pac. 228.

²³ Northwest Thresher Co. v. Dahl-

gren, 50 Wash. 325, 19 L. R. A. (N.S.) 324, 97 Pac. 228.

²⁴ Bolton v. Rouss, — La. —, 80 So. 228.

¹ Nichols & Shepard Co. v. Hackney, 78 Minn. 461, 81 N. W. 322.

² Oliver v. Sterling, 20 O. S. 391.

³ Strong v. West, 110 Ga. 382, 35 S. E. 693.

⁴ Home Fertilizer & Chemical Co. v. Strickland, 145 Ga. 197, 88 S. E. 820.

⁵ Russell v. Palatine Insurance Co., 106 Miss. 290, 51 L. R. A. (N.S.) 471, 63 So. 644.

⁶ Russell v. Palatine Insurance Co., 106 Miss. 290, 51 L. R. A. (N.S.) 471, 63 So. 644.

⁷ Ulbrand v. Bennett, 83 Or. 557, 163 Pac. 445.

Power to settle a claim secured by a chattel mortgage is power to foreclose such mortgage,⁸ and to take possession of such mortgaged property,⁹ but not to sell such property thereafter.¹⁰

§ 1753. Scope of agent's authority—Power to borrow money and to execute negotiable instruments, mortgages, etc. Power to borrow money or to execute negotiable instruments on behalf of the principal is a power which is not implied readily.¹ Such power must either be granted expressly or it must be a necessary incident to the powers which are granted expressly.² Power to execute promissory notes and other evidences of indebtedness includes power to execute and deliver a note for property which the agent has purchased for the principal.³ Power to execute a note for a certain amount at a certain rate of interest due on or before a year from date, does not authorize the execution of a number of notes, the total amount of which is the amount specified which bear interest semi-annually, which contain provisions to the effect that the entire debt is to become due at the option of the holder if default is made in payment of interest, and which contain a provision that the debtor shall pay attorneys' fees in case of an action.⁴ Authority to borrow money does not include authority to borrow for any one but the principal.⁵

The power of an agent to endorse negotiable instruments on behalf of his principal is a power which is not implied readily.⁶ Such power must either be granted expressly or it must be a necessary incident of the powers which are granted expressly.⁷ Authority to make a restricted endorsement is not authority to make a general endorsement.⁸

⁸ *Larson v. Hodge*, 100 Wash. 419, 171 Pac. 251.

⁹ *Larson v. Hodge*, 100 Wash. 419, 171 Pac. 251.

¹⁰ *Larson v. Hodge*, 100 Wash. 419, 171 Pac. 251.

¹ *Williams v. Dugan*, 217 Mass. 526, L. R. A. 1916C, 110, 105 N. E. 615.

² *Williams v. Dugan*, 217 Mass. 526, L. R. A. 1916C, 110, 105 N. E. 615.

³ *Keyes v. Metropolitan Trust Co.*, 220 N. Y. 237, 115 N. E. 455.

⁴ *United States National Bank v. Herron*, 73 Or. 391, L. R. A. 1916C, 125, 144 Pac. 661.

⁵ *Lindenberger Cold Storage & Canning Co. v. Lindenberger, Inc.*, 235 Fed. 542.

⁶ *Riggs v. Blythe*, 123 Ark. 619, 185 S. W. 438; *Wilson v. Johnson*, 98 Kan. 66, 157 Pac. 413; *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, 116 N. E. 386.

⁷ *Wilson v. Johnson*, 98 Kan. 66, 157 Pac. 413.

⁸ *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, 116 N. E. 386.

Power given by a wife to her husband to mortgage her realty is not power to release her dower in his realty.⁹ Power to pledge includes power to pledge again to raise money to pay the first loan.¹⁰

§ 1754. Scope of agent's authority—Power to lend money. Power to lend includes only such incidental powers as are reasonably necessary, proper and customary in making such contracts.¹ Power to accept mortgage notes as security for a loan made by the principal does not confer authority to agree to pay the mortgage registry tax upon such collateral security.² Power to lend money does not authorize the agent to lend it at usurious interest.³ Power to lend money is not power to negotiate,⁴ or to collect, unless the note is in the possession of the agent.⁵ But general power to handle money for investment is power to extend payment or to collect notes.⁶

§ 1755. Scope of agent's authority—Power to buy. Power to buy is not power to buy at a price many times that of the market price.¹ Authority to purchase on the approval of the principal confers no authority to make a binding contract of sale;² and such sale does not impose liability upon the principal until he ratifies it.³ Power to buy for cash does not include power to buy on credit.⁴

⁹ *Security Savings Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756, 62 Pac. 794.

¹⁰ *Hayes' Appeal*, 195 Pa. St. 177, 45 Atl. 1007.

¹ *First National Bank v. Schirmer*, 134 Minn. 387, 159 N. W. 800; *Brown v. Johnson*, 43 Utah 1, 46 L. R. A. (N.S.) 1157, 134 Pac. 590.

² *First National Bank v. Schirmer*, 134 Minn. 387, 159 N. W. 800.

³ *Brown v. Johnson*, 43 Utah 1, 46 L. R. A. (N.S.) 1157, 134 Pac. 590.

⁴ *Fortune v. Stockton*, 182 Ill. 454, 55 N. E. 367 [affirming, 82 Ill. App. 272].

⁵ *Bromley v. Lathrop*, 105 Mich. 492, 63 N. W. 510; *Church Association v. Walton*, 114 Mich. 677, 72 N. W. 998; *Bacon v. Pomeroy*, 118 Mich. 146, 76 N. W. 324; *Smith v. Kidd*, 68 N. Y.

130, 23 Am. Rep. 157; *Hollinshead v. Stuart*, 8 N. D. 35, 42 L. R. A. 659, 77 N. W. 89; *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849, 50 L. R. A. 600, 83 N. W. 657.

⁶ *Harrison National Bank v. Austin*, 65 Neb. 632, 91 N. W. 540.

¹ *Marshall v. Kirschbraun*, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

² *Toledo Scale Co. v. Bailey*, 78 W. Va. 797, 90 S. E. 345.

³ *Toledo Scale Co. v. Bailey*, 78 W. Va. 797, 90 S. E. 345.

⁴ *United States. Fradley v. Hyland*, 37 Fed. 49, 2 L. R. A. 749.

Alabama. *Wheeler v. McGuire*, 86 Ala. 398, 2 L. R. A. 808, 5 So. 190.

Georgia. *Chapman v. Oil Co.*, 117 Ga. 881, 45 S. E. 268.

It does include power to deposit the purchase price in the bank,⁵ and to check against such deposit.⁶ One of two purchasers of goods who has placed his note for his share of the purchase price in the hands of the other purchaser as agent authorizes the delivery of such note only if such other purchaser pays the balance of the purchase price when he delivers the note.⁷ Power to buy realty includes power to pay therefor,⁸ as by assuming a mortgage debt upon such realty.⁹ Power to buy things of slight value when actually needed is not power to modify the terms of a contract of considerable importance which had been made by authorized agents of the common principal.¹⁰

§ 1756. Scope of agent's authority—Power to lease. Power to lease is not power to covenant to irrigate;¹ but such agent may bind his principal by a representation that a wall of the building to be leased is fireproof.² Power to lease does not confer power to construct a drainage ditch upon the leased land in order to benefit the agent's lands.³

§ 1757. Scope of agent's authority—Other illustrations. Authority to employ does not of itself imply authority to discharge.¹ Authority to employ includes authority to agree to pay for services rendered.² Authority to employ singers for recitals in connection with a demonstration of phonograph records implies authority to pay such singers for their services.³ Authority by one title insurance company to another to examine titles, to insure them, and to

Massachusetts. *Cheney v. Taber*, 221 Mass. 332, 106 N. E. 1072.

North Carolina. *Swindell v. Latham*, 145 N. Car. 144, 122 Am. St. Rep. 430, 58 S. E. 1010.

⁵ *Bass v. Green*, — Ala. —, 78 So. 869.

⁶ *Bass v. Green*, — Ala. —, 78 So. 869.

⁷ *Cheney v. Taber*, 221 Mass. 332, 106 N. E. 1072.

⁸ *Eppes v. Thompson*, — Ala. —, 79 So. 611.

⁹ *Eppes v. Thompson*, — Ala. —, 79 So. 611.

¹⁰ *Kelly Construction Co. v. Hacken-*

sack Brick Co., 91 N. J. L. 585, 103 Atl. 417.

¹ *Durkee v. Carr*, 38 Or. 189, 63 Pac. 117.

² *Matteson v. Rice*, 116 Wis. 328, 92 N. W. 1109.

³ *Harvey v. Mason City & Ft. D. R. Co.*, 129 Ia. 465, 3 L. R. A. (N.S.) 973, 105 N. W. 958.

¹ *Amann v. Pantages*, 90 Wash. 271, 155 Pac. 1070.

² *Kidd v. Edison, Inc.*, 239 Fed. 405 [judgment affirmed, *Edison, Inc. v. Kidd*, 242 Fed. 923].

³ *Kidd v. Edison, Inc.*, 239 Fed. 405 [judgment affirmed, *Edison, Inc. v. Kidd*, 242 Fed. 923].

issue guaranteed certificates of examination of records, does not imply authority to compromise claims for damages for errors in searches which the principal had furnished.⁴ Authority to examine titles is not authority to receive money to discharge liens on such realty.⁵ Power to deliver goods to a common carrier includes power to declare the value of such goods so as to obtain the rate proper for such value.⁶

Power to deliver goods to a common carrier for transportation is said in some jurisdictions to confer authority to bind the shipper by accepting a bill of lading which limits the carrier's common-law liability;⁷ but in other jurisdictions it is said that such an agent has authority to make delivery but not authority to bind the shipper by a special contract.⁸ Power to forward or transport goods is not power to contract generally,⁹ or to incur expenses to recover lost articles,¹⁰ or to accept or reject property tendered to the principal under a contract of sale.¹¹

Power to write insurance within certain territorial limits is not power to write insurance outside such limits.¹² Power to insure is not power to insure on credit, taking a promissory note for the premium.¹³ An attorney has no implied authority to consent to a compromise judgment against his client.¹⁴ Power to pay includes power to promise to pay so as to avoid limitations.¹⁵

§ 1758. Nature of liability of principal. A principal is liable upon the contracts made by the agent on behalf of the principal if

⁴ *Lockwood v. Title Insurance Co.*, 220 N. Y. 410, 115 N. E. 981.

⁵ *Scherer v. Post Office Building & Loan Association*, 91 N. J. L. 585, 103 Atl. 202.

⁶ *American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.*, 223 Fed. 1018.

⁷ *California, etc., Works v. R. R. Co.*, 113 Cal. 329, 36 L. R. A. 648, 45 Pac. 691; *Boynton v. American Express Co.*, 221 Mass. 237, 108 N. E. 942; *Grice v. Oregon-Washington R. & Navigation Co.*, 78 Or. 17, 150 Pac. 862 [judgment affirmed on rehearing, *Grice v. Oregon-Washington R. & Navigation Co.*, 78 Or. 17, 152 Pac. 569].

But a vendor delivering live stock to the railroad is not the agent of the purchaser. *Norfolk, etc., R. R.*

Co. v. Harman, 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490.

⁸ *Grice v. Oregon-Washington R. & Navigation Co.*, 78 Or. 17, 150 Pac. 862 [judgment affirmed on rehearing, *Grice v. Oregon-Washington R. & Navigation Co.*, 78 Or. 17, 152 Pac. 509].

⁹ *Commercial Credit Co. v. United Divers' Supply Co.*, 253 Fed. 255.

¹⁰ *Wales Riggs Plantations v. Grooms*, 132 Ark. 135, 200 S. W. 804.

¹¹ *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

¹² *Ins. Co. v. Thornton*, 130 Ala. 222, 55 L. R. A. 547, 30 So. 614.

¹³ *Mutual Life Ins. Co. v. Logan*, 87 Fed. 637, 31 C. C. A. 172.

¹⁴ *Kilmer v. Gallaher*, 112 Ia. 583, 84 Am. St. Rep. 358, 84 N. W. 697.

¹⁵ *In re Hale* [1899], 2 Ch. 107.

the principal has conferred authority upon the agent to make such contract, or if he has held the agent out to the world as having power to make such contract on behalf of the principal or if he has ratified a contract made by the agent in excess of his authority.¹ The doctrine of authority as against third persons by construction which obtains in some jurisdictions in the law of partnership,² is not recognized by the courts in the law of agency. Unless one of these grounds of liability is shown to exist the principal can not be held upon the contracts of his agent.³ It has been said that the principal's liability does not depend upon his consent or upon questions of estoppel, but that it is a survival from the earlier notion of status which is preserved in our law as a matter of policy.⁴ This is, no doubt, true of the liability of a master for torts committed by his servant for which the master is liable without regard to his consent or ratification and without any element of estoppel; but as between principal and agent with reference to the liability of the principal upon contracts made by the agent, it does not seem to be justified. The test of the liability of the principal is the authority which a reasonable man exercising due care and diligence would believe from the acts and omissions of the principal that the principal had conferred upon his agent.⁵ Such authority has been spoken of as apparent authority;⁶ but it has also been suggested that the principal's liability may exceed the apparent authority of the agent.⁷ The liability of the principal for the acts of the agent within his apparent authority is generally regarded as liability growing out of estoppel.⁸ An attempt has been made to distinguish between liability for the acts of the agent within his apparent authority and liability by reason of estoppel; and it has been said that apparent authority of the agent is based upon the conscious permission by the principal to the agent to perform acts outside of the powers which are granted actually, while estoppel has been

¹ *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144; *Hall v. Passaic Water Co.*, 83 N. J. L. 771, 43 L. R. A. (N.S.) 750, 85 Atl. 349.

² See § 1694.

³ *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144; *Hall v. Passaic Water Co.*, 83 N. J. L. 771, 43 L. R. A. (N.S.) 750, 85 Atl. 349.

⁴ *Kidd v. Edison, Inc.*, 239 Fed. 405 [judgment affirmed, *Edison, Inc. v. Kidd*, 242 Fed. 923].

⁵ *Oxweld Acetylene Co. v. Hughes*, 126 Md. 437, 95 Atl. 45; *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

⁶ *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

⁷ *Oxweld Acetylene Co. v. Hughes*, 126 Md. 437, 95 Atl. 45.

⁸ *Union Bank & T. Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

said to be based upon the negligence of the principal in failing properly to advise and control the conduct of the agent.⁹ It is admitted, however, that the doctrines of apparent authority and estoppel merge into each other.¹⁰

§ 1759. Liability of principal—Agent acting within authority.

If the contract of the agent is in fact within his authority, the principal is liable thereon, without reference to any facts creating estoppel, or to the knowledge possessed by the adversary party of the facts that make the principal liable.¹ If an agent is authorized to accept offers on behalf of his principal his acceptance of an offer binds his principal.² Payment to an authorized agent discharges the debt paid,³ even if the agent appropriates such payment wrongfully.⁴ Payment to an agent who is authorized to borrow renders his principal liable,⁵ even if the agent appropriates the money.⁶ An extension of time which is granted by an agent who is acting within

⁹Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

¹⁰Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

¹United States. Purdom Naval Stores Co. v. Western Union Telegraph Co., 153 Fed. 327.

Arkansas. Williams v. Moore, 117 Ark. 535, 175 S. W. 1198; Mitchell v. Coleman, 127 Ark. 373, 192 S. W. 231.

Georgia. Finch v. Hill, 146 Ga. 687, 92 S. E. 63.

Kansas. Kramer v. Walters, 103 Kan. 135, 172 Pac. 1013.

Kentucky. Mullins v. Commonwealth, 179 Ky. 71, 200 S. W. 9.

Massachusetts. Garfield, etc., Co. v. Lime Co., 184 Mass. 60, 61 L. R. A. 946, 67 N. E. 863.

Michigan. Martindale v. Lobdell-Emery Manufacturing Co., 189 Mich. 477, L. R. A. 1918F, 1, 155 N. W. 559.

Minnesota. International Harvester Co. v. Swenson, 135 Minn. 141, 160 N. W. 255.

Nebraska. Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 76 Am. St. Rep.

111, 78 N. W. 936; Dworak v. Dobson, — Neb. —, 169 N. W. 259.

New Jersey. Bogart v. Stevens, 69 N. J. Eq. 800, 115 Am. St. Rep. 627, 63 Atl. 246.

Utah. Nichols v. Oregon Short Line R. R. Co., 24 Utah 83, 91 Am. St. Rep. 778, 66 Pac. 768.

West Virginia. Nutter v. Brown, 51 W. Va. 598, 42 S. E. 661.

²Purdom Naval Stores Co. v. Western Union Telegraph Co., 153 Fed. 327; Williams v. Moore, 117 Ark. 535, 175 S. W. 1198.

³Mills v. Hurley Hardware & Furniture Co., 129 Ark. 350, 196 S. W. 121; Henken v. Schwicker, 174 N. Y. 298, 66 N. E. 971; McLeod v. Despaign, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492; Golden v. O'Connell, 76 W. Va. 282, 85 S. E. 533.

⁴Mills v. Hurley Hardware & Furniture Co., 129 Ark. 350, 196 S. W. 121; McLeod v. Despaign, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492.

⁵Bogart v. Stevens, 69 N. J. Eq. 800, 115 Am. St. Rep. 627, 63 Atl. 246.

⁶Bogart v. Stevens, 69 N. J. Eq. 800, 115 Am. St. Rep. 627, 63 Atl. 246.

the scope of his authority is binding upon his principal.⁷ If an agent is authorized to make a payment his act in making such payment will be regarded as the act of his principal,⁸ and if such payment is made voluntarily it can not be recovered.⁹ If an agent has authority to guarantee that the employes of one who has a contract with his principal will be paid, the failure of the agent to retain money which is due from his principal to such contractor to pay such employes does not discharge the principal.¹⁰ A railway is bound by the contract of its station agent to furnish cars.¹¹ A principal is bound by the fraud of his agent within the scope of the agent's authority.¹²

The principal is liable for the acts of his agent within the scope of his authority even if the existence of the principal is not disclosed.¹³ Thus payment to the agent of an undisclosed principal discharges the debt.¹⁴ So if the contract does not purport to bind

⁷ *Rice & Hutchins' Cincinnati Co. v. Croghan*, 169 Ky. 450, 184 S. W. 574.

⁸ *Petty v. United Fuel Gas Co.*, 76 W. Va. 268, 85 S. E. 523.

⁹ See § 1519.

¹⁰ *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

¹¹ *Clark v. Ulster & Delaware R. R. Co.*, 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 81 N. E. 766.

¹² *Mitchell v. Coleman*, 127 Ark. 373, 192 S. W. 231; *Finch v. Hill*, 146 Ga. 687, 92 S. E. 63.

¹³ *Arkansas. Williams v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S. W. 899.

California. Bergholdt v. Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Georgia. Allison v. Sutlive, 99 Ga. 151, 25 S. E. 11; *Simpson v. Guano Co.*, 99 Ga. 168, 25 S. E. 94; *Baldwin v. Garrett*, 111 Ga. 876, 36 S. E. 966.

Indiana. Woodford v. Hamilton, 139 Ind. 81, 39 N. E. 47.

Iowa. Steele-Smith Grocery Co. v. Potthast, 109 Ia. 413, 80 N. W. 517.

Kentucky. Jones v. Johnson, 86 Ky. 530, 6 S. W. 582.

Maine. Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436, 36 Atl. 1003.

Massachusetts. Schendel v. Stevenson, 153 Mass. 351, 26 N. E. 689; *Gavin v. Durden Coleman Lumber Co.*, 229 Mass. 576, 118 N. E. 897.

Mississippi. Simmons Hardware Co. v. Todd, 79 Miss. 163, 29 So. 851.

Missouri. Weber v. Collins, 139 Mo. 501, 41 S. W. 249.

Nebraska. Dworak v. Dobson, 102 Neb. 696, 160 N. W. 259.

New Jersey. Yates v. Repetto, 65 N. J. L. 294, 47 Atl. 632.

North Dakota. Lake Grocery Co. v. Chiostrri, 34 N. D. 386, 158 N. W. 998.

Oklahoma. Shenners v. Adams, 46 Okla. 368, 148 Pac. 1023.

Washington. Belt v. Water Power Co., 24 Wash. 387, 64 Pac. 525. An undisclosed principal is not liable on a conveyance of realty. *Sanger v. Warren*, 91 Tex. 472, 66 Am. St. Rep. 913, 44 S. W. 477.

¹⁴ *Cheshire Provident Institution v. Gibson* (Neb.), 89 N. W. 243.

the real principal, but the agent,¹⁵ or a third party who does not consent thereto,¹⁶ the real principal is liable thereon.

§ 1760. Liability of principal—Estoppel. Outside of the class of public agents the actual authority conferred by a principal upon his agent is practically inaccessible to the public at large. Accordingly, persons who do not know what the agent's authority really is, are justified in dealing with him upon the assumption that he has the authority which the principal indicates by his conduct that the agent possesses. Thus dealing with the agent, such persons may hold the principal on contracts outside the real authority of the agent but inside his apparent authority.¹ Facts which operate as estoppel are sometimes said to amount to a conclusive presump-

¹⁵ *Great Lakes Towing Co. v. Mills Transportation Co.*, 155 Fed. 11, 83 C. A. 607, 22 L. R. A. (N.S.) 769; *Crawford v. Moran*, 168 Mass. 446, 47 N. E. 132; *Shenners v. Adams*, 46 Okla. 368, 148 Pac. 1023.

¹⁶ *Simmons Hardware Co. v. Todd*, 79 Miss. 163, 29 So. 851.

¹ *United States. Lucas v. Brooks*, 85 U. S. (18 Wall.) 436, 21 L. ed. 779; *Post v. Pearson*, 108 U. S. 418, 27 L. ed. 774; *Stark Electric R. Co. v. McGinty Contracting Co.*, 238 Fed. 657, 151 C. C. A. 507; *Associated Press v. International News Service*, 240 Fed. 983 [order modified, *Associated Press v. International News Service*, 245 Fed. 244].

Alabama. *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318; *Phillips, etc., Co. v. Whitney*, 109 Ala. 645, 20 So. 333; *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Crandall Pettie Co. v. Jebeles & Colias Confectionery Co.*, 195 Ala. 152, 69 So. 964; *Roberts v. Williams*, — Ala. —, 73 So. 502; *Southern States Fire Insurance Co. v. Kronenberg*, — Ala. —, 74 So. 63; *People's Bank & Trust Co. v. Walthall*, — Ala. —, 75 So. 570; *J. C. Lysle Milling Co. v. North Alabama Grocery Co.*, — Ala. —, 77 So. 748; *Bass & Green*, — Ala. —, 78 So. 869.

Arkansas. *Chattanooga Roofing & Foundry Co. v. Porter*, 128 Ark. 639, 193 S. W. 797; *Three States Lumber Co. v. Moore*, 132 Ark. 371, 201 S. W. 508.

California. *Buckley v. Silverberg*, 113 Cal. 673, 45 Pac. 804; *Avery v. Wiltsee*, 177 Cal. 484, 171 Pac. 95.

Florida. *Camp v. Hall*, 39 Fla. 535, 22 So. 792.

Illinois. *Nash v. Classen*, 163 Ill. 409, 45 N. E. 276; *Thornton v. Lawther*, 169 Ill. 228, 48 N. E. 412 [reversing, 67 Ill. App. 214].

Indiana. *Croy v. Busenbark*, 72 Ind. 48.

Iowa. *Sawin v. Savings Association*, 95 Ia. 477, 64 N. W. 401; *W. T. Joyce Co. v. Rohan*, 134 Ia. 12, 120 Am. St. Rep. 410, 111 N. W. 319.

Kansas. *J. I. Case Plow Works v. Thorne*, 102 Kan. 849, 172 Pac. 38.

Kentucky. *Vanada v. Hopkins*, 24 Ky. (1 J. J. Mar.) 285, 19 Am. Dec. 92; *H. Herman Sawmill Co. v. Bailey (Ky.)*, 58 S. W. 449; *Columbia, etc., Co. v. Tinsley (Ky.)*, 60 S. W. 10; *Nolin Milling Co. v. White Grocery Co.*, 168 Ky. 417, 182 S. W. 191.

Maine. *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547.

Maryland. *Oxweld Acetylene Co. v. Hughes*, 126 Md. 437, 95 Atl. 45.

tion of agency.² Ostensible authority of an agent is said to exist wherever the principal induces the adversary party to believe that

Massachusetts. *Lock v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631; *Schendel v. Stevenson*, 153 Mass. 351, 26 N. E. 689; *Cauman v. American Credit Indemnity Co.*, 229 Mass. 278, 118 N. E. 259.

Michigan. *Thompson v. Clay*, 60 Mich. 627, 27 N. W. 699; *Martindale v. Lobdell-Emery Manufacturing Co.*, 189 Mich. 477, L. R. A. 1918F, 1, 155 N. W. 559.

Minnesota. *Drohan v. Lumber Co.*, 75 Minn. 251, 77 N. W. 957; *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

Missouri. *Donovan v. Wells*, 265 Mo. 291, 177 S. W. 839.

Montana. *First State Bank v. Lang*, 55 Mont. 146, 174 Pac. 597.

Nebraska. *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938; *Day, etc., Co. v. Bixby (Neb.)*, 93 N. W. 688.

New Hampshire. *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

New Jersey. *Camden, etc., Co. v. Abbott*, 44 N. J. L. 257.

New Mexico. *New Mexico-Colorado Coal & Mining Co. v. Baker*, 21 N. M. 531, 157 Pac. 167.

New York. *Schley v. Fryer*, 100 N. Y. 71, 2 N. E. 280; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827.

North Carolina. *Powell v. King Lumber Co.*, 168 N. Car. 632, 84 S. E. 1032; *Oliver v. United States Fidelity & Guaranty Co.*, 176 N. Car. 598, 97 S. E. 490.

North Dakota. *First National Bank v. Henry*, 30 N. D. 324, 152 N. W. 668; *Michigan-Idaho Lumber Co. v. Northern Fire & Marine Insurance Co.*, 35 N. D. 244, 160 N. W. 130.

Ohio. *Jones v. People's Bank Co.*, 95 O. S. 253, 116 N. E. 34.

Oklahoma. *National Surety Co. v. Miozrany*, — Okla. —, 156 Pac. 651.

Pennsylvania. *Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. Rep. 585, 2 L. R. A. 823, 16 Atl. 817.

South Carolina. *Williams v. Philadelphia Life Insurance Co.*, 105 S. Car. 305, 89 S. E. 675.

Tennessee. *Continental Insurance Co. v. Schulman*, 140 Tenn. 481, 205 S. W. 315; *Minnelly v. Goodwin (Tenn. Ch. App.)*, 39 S. W. 855.

Vermont. *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504; *Valiquette v. Clark Bros. Coal Min. Co.*, 83 Vt. 538, 34 L. R. A. (N.S.) 440, 77 Atl. 869.

Washington. *Galbraith v. Weber*, 58 Wash. 132, 28 L. R. A. (N.S.) 341, 107 Pac. 1050; *Caughren v. Kahan*, 86 Wash. 356, 150 Pac. 445; *Bertrand v. Hunt*, 89 Wash. 475, 154 Pac. 804; *In re Ennis' Estate*, 96 Wash. 352, 165 Pac. 119; *Petersen v. Pacific-American Fisheries*, — Wash. —, 183 Pac. 79.

West Virginia. *Rohrbough v. Express Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849, 40 S. E. 398; *Union Bank & T. Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

Wisconsin. *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645. "Persons dealing with an agent have a right to presume that his agency is general and not limited, and notice of the limited authority must be brought to their knowledge before they are bound to regard it." *Trainer v. Morison*, 78 Me. 160, 163, 57 Am. Rep. 790, 3 Atl. 185 [quoted in *Wood v. Finson*, 89 Me. 459, 460, 36 Atl. 911].

² *W. T. Joyce Co. v. Rohan*, 134 Ia. 12, 120 Am. St. Rep. 410, 111 N. W. 319.

the agent has such authority, whether this is done intentionally or negligently.³ While ratification and estoppel are alike in imposing liability upon a principal who did not authorize such liability in the first instance, they must be distinguished.⁴ While ratification is retroactive and operates upon the entire transaction, estoppel is prospective and operates only upon as much of the contract as is affected by the facts which give rise to the estoppel.⁵ In the absence of notice to the contrary, those who deal with an agent having certain authority, may assume that he may exercise such authority in the manner customary in that business at that locality;⁶ but they may not assume power to exercise such authority in an unusual manner.⁷

If the principal places personal property in the possession of the agent with power to sell, the principal is estopped to deny the power of the agent to fix the price.⁸ If the principal notifies the adversary party that the principal will send its salesman to call upon the adversary party with reference to a proposed sale, the adversary party is justified in believing that such salesman has authority to make a binding contract.⁹ If A's agent, B, induces X to believe that property which B has ordered from A to be shipped to X is charged to B while he induces A to believe that such property is charged to X, A can not recover from X, since as between A and X, A must suffer the loss caused by B's misconduct.¹⁰ If a husband is his wife's agent to deliver a note signed by them both, his statement that she is principal is binding on her, if her name is written above his, and prevents her from interposing the defense that she was a surety.¹¹

By the great weight of authority, the liability of the principal upon a contract made by his agent in excess of authority which is

³First National Bank v. Henry, 30 N. D. 324, 152 N. W. 668.

⁴Depot Realty Syndicate v. Enterprise Brewing Co., 87 Or. 560, 171 Pac. 223; Woodworth v. School District No. 2, Stevens County, 92 Wash. 456, 159 Pac. 757.

⁵Depot Realty Syndicate v. Enterprise Brewing Co., 87 Or. 560, 171 Pac. 223; Woodworth v. School District No. 2, Stevens County, 92 Wash. 456, 159 Pac. 757.

⁶Oliver v. United States Fidelity & Guaranty Co., 176 N. Car. 598, 97 S. E.,

490; Continental Insurance Co. v. Schulman, 140 Tenn. 481, 205 S. W. 315.

⁷Continental Insurance Co. v. Schulman, 140 Tenn. 481, 205 S. W. 315.

⁸Galbraith v. Weber, 58 Wash. 132, 28 L. R. A. (N.S.) 341, 107 Pac. 1050.

⁹Chattanooga Roofing & Foundry Co. v. Porter, 128 Ark. 639, 193 S. W. 797.

¹⁰Felder v. Acme Mills, 112 Miss. 322, 73 So. 52.

¹¹Tompkins v. Triplett, 110 Ky. 824, 62 S. W. 1021.

actually conferred upon the agent by the principal, depends upon the application of principles of estoppel.¹² Thus the principal is liable only so far as the person dealing through the alleged agent had reason to believe from the facts known to him at the time, that the contract was within the scope of the agent's authority.¹³ If a sales agent offers for sale goods at fifty per cent. of their market value, such offer is binding upon his principal only if the agent's authority is clearly shown, or the principal accepts such order.¹⁴ If the contract between the principal and the adversary party is in writing and shows on its face that the agent has no authority to make additional representations, the principal is not bound by additional representations made by his agent and the adversary party can not avoid the contract by reason thereof.¹⁵

The principal may be estopped to deny the authority of the agent by actively holding him out to the world as his agent. Thus private instructions contrary to the apparent authority of the agent and not known to the person dealing with him,¹⁶ or an un-

¹² First National Bank v. Henry, 30 N. D. 324, 152 N. W. 668.

¹³ United States. Stark Electric R. Co. v. McGinty Contracting Co., 238 Fed. 657, 151 C. C. A. 507.

Alabama. Roberts v. Williams, — Ala. —, 73 So. 502; J. C. Lysle Milling Co. v. North Alabama Grocery Co., — Ala. —, 77 So. 748.

California. Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

New York. Blass v. Terry, 156 N. Y. 122, 50 N. E. 953 [reversing, 87 Hun (N. Y.) 563].

North Carolina. Ring Furniture Co. v. Bussell, 171 N. Car. 474, 88 S. E. 484.

Oklahoma. National Surety Co. v. Miozrany (Okla.), 156 Pac. 651.

Tennessee. Fabian Mfg. Co. v. Newman (Tenn. Ch. App.), 62 S. W. 218.

¹⁴ Harris v. Santee River Cypress Lumber Co. (R. I.), 72 Atl. 392.

¹⁵ International Harvester Co. v. Carter, 173 N. Car. 229, 91 S. E. 840; Gish v. Insurance Co., 16 Okla. 59, 13 L. R. A. (N.S.) 826, 87 Pac. 869.

¹⁶ United States. Butler v. Maples, 76 U. S. (9 Wall.) 766, 19 L. ed. 822; Kidd v. Edison, Inc., 239 Fed. 405 [judgment affirmed, Edison, Inc. v. Kidd, 242 Fed. 923]; Associated Press v. International News Service, 240 Fed. 983 [order modified, Associated Press v. International News Service, 245 Fed. 244].

Alabama. A. G. Rhodes Furniture Co. v. Weeden, 108 Ala. 252, 19 So. 318; Lytle v. Bank, 121 Ala. 215, 26 So. 6; Sweetser v. Shorter, 123 Ala. 518, 26 So. 296; King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897; Crandall Pettee Co. v. Jeebles & Colias Confectionery Co., 195 Ala. 152, 69 So. 964; Southern States Fire Insurance Co. v. Kronenberg, — Ala. —, 74 So. 63; People's Bank & Trust Co. v. Walthall, — Ala. —, 75 So. 570; Bass v. Green, — Ala. —, 78 So. 869.

Arkansas. Three States Lumber Co. v. Moore, 132 Ark. 371, 201 S. W. 508.

California. Avery v. Wiltsee, 177 Cal. 484, 171 Pac. 95.

Georgia. Louisville, etc., Co. v. Tift, 100 Ga. 86, 27 S. E. 765; Armour v. Ross, 110 Ga. 403, 35 S. E. 787.

communicated revocation of the agent's authority,¹⁷ do not prevent the principal from being bound by the contract of his agent made in his behalf with a person acting in good faith. Thus a recorded power of attorney and a deed made in pursuance thereof passes title to a bona fide grantee as against a grantee from the principal by a prior unrecorded deed.¹⁸ So a principal is bound by a letter written by his agent at his order, though its contents differ from the instructions given,¹⁹ and a third person may rely on the impression created by A's agent that the contract is made with A, though in fact the agent is making it for B.²⁰ So an uncommuni-

Illinois. *Crain v. Bank*, 114 Ill. 516, 2 N. E. 486.

Iowa. *Hichhorn v. Bradley*, 117 Ia. 130, 90 N. W. 592.

Kansas. *Dreyfus v. Goss*, 67 Kan. 57, 72 Pac. 537.

Massachusetts. *Brown v. Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 535, 43 N. E. 512; *Sanford v. Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883.

Michigan. *Allis v. Voigt*, 90 Mich. 125, 51 N. W. 190; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; *Baker v. Produce Co.*, 113 Mich. 533, 71 N. W. 866.

Minnesota. *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642.

Mississippi. *Potter v. Milling Co.*, 75 Miss. 532, 23 So. 259.

Missouri. *Cross v. R. R. Co.*, 141 Mo. 132, 42 S. W. 675 [affirming, 71 Mo. App. 585]; *Donovan v. Wells*, 265 Mo. 291, 177 S. W. 839.

Nebraska. *Hall v. Hopper*, 64 Neb. 633, 90 N. W. 549.

New Hampshire. *Atto v. Saunders*, 77 N. H. 527, 93 Atl. 1037.

New Mexico. *New Mexico-Colorado Coal & Mining Co. v. Baker*, 21 N. M. 531, 157 Pac. 167.

New York. *Rathbun v. Snow*, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379.

North Carolina. *Powell v. King Lumber Co.*, 168 N. Car. 632, 84 S. E. 1032.

North Dakota. *Michigan Idaho Lumber Co. v. Northern Fire & Marine Insurance Co.*, 35 N. D. 244, 160 N. W. 130.

Oklahoma. *National Surety Co. v. Miozrany*, — Okla. —, 156 Pac. 651.

Pennsylvania. *Anderson v. Surety Co.*, 196 Pa. St. 288, 46 Atl. 306; *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. St. 32, 88 Am. St. Rep. 770, 55 L. R. A. 408, 50 Atl. 286.

South Carolina. *Wilson v. Assurance Co.*, 51 S. Car. 540, 64 Am. St. Rep. 700, 29 S. E. 245; *Williams v. Philadelphia Life Insurance Co.*, 105 S. Car. 305, 89 S. E. 675.

Utah. *Smith v. Droubay*, 20 Utah 443, 58 Pac. 1112.

Washington. *Hall v. Ins. Co.*, 23 Wash. 610, 83 Am. St. Rep. 844, 51 L. R. A. 288, 63 Pac. 505; *Galbraith v. Weber*, 58 Wash. 132, 28 L. R. A. (N.S.) 341, 107 Pac. 1050; *Caughren v. Kahan*, 86 Wash. 356, 150 Pac. 445; *Auwarter v. Kroll*, 89 Wash. 347, 154 Pac. 438.

¹⁷ *Swinnerton v. Argonaut, etc., Co.*, 112 Cal. 375, 44 Pac. 719; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436, 36 Atl. 1003. See § 1743.

¹⁸ *Gratz v. Improvement Co.*, 82 Fed. 381, 40 L. R. A. 393, 27 C. C. A. 305.

¹⁹ *Morris v. Posner*, 111 Ia. 335, 82 N. W. 755.

²⁰ *Lambert v. Loan Association*, 65 N. J. L. 79, 46 Atl. 766.

cated rule that the insurance agent must make a personal examination is not binding on persons taking insurance.²¹ So secret instructions to an agent not to insure certain kinds of property do not prevent the principal from being liable on insurance covering such property.²² So a subagent, who was employed as the agent of the general agent and not as the agent of the insurance company, may bind the company if held out as an agent.²³ The same rule applies where a subagent, with similar powers, having authority to sign the general agent's name, signs it to a policy contrary to the instructions of the company. Such policy binds the company and therefore the general agent is liable over to the company.²⁴ So where an agent, having power to deliver a note on receipt of a written contract, delivers the note before such contract is executed, relying on the promise of the adversary party to execute it later, such note is valid in the hands of a bona fide holder.²⁵ If the principal so acts as to induce the adversary party to believe that an agent has authority to receive a payment, the principal can not deny such authority after such payment is made.²⁶ One who authorizes an agent to make a loan is liable for usury exacted by such agent, though such principal did not authorize usury or know of it.²⁷ So an agent authorized to sell crops binds his principal by waiving his principal's lien as landlord, though he sells more of the crops than specified in his secret instructions.²⁸

The principal may be estopped by acquiescence in conduct of the alleged agent known,²⁹ or which should be known,³⁰ to such

²¹ Phillips v. Ins. Co., 101 Fed. 33.

²² Franklin Fire Ins. Co. v. Bradford, 201 Pa. St. 32, 88 Am. St. Rep. 770, 55 L. R. A. 408, 50 Atl. 286.

²³ Hall v. Ins. Co., 23 Wash. 610, 83 Am. St. Rep. 844, 51 L. R. A. 288, 63 Pac. 505.

²⁴ Franklin Fire Ins. Co. v. Bradford, 201 Pa. St. 32, 88 Am. St. Rep. 770, 55 L. R. A. 408, 50 Atl. 286.

²⁵ Chase National Bank v. Faurot, 149 N. Y. 532, 35 L. R. A. 605, 44 N. E. 165. So if the purchaser of a note leaves it in the custody of payee and knowingly allows the payee to collect it he is estopped to deny payee's agency. Morgan v. Neal, 7 Ida. 629, 97 Am. St. Rep. 264, 65 Pac. 66.

²⁶ First National Bank v. Henry, 30 N. D. 324, 152 N. W. 668; Petersen v.

American Fisheries Co., — Wash. —, 183 Pac. 79.

²⁷ Robinson v. Blaken, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845.

²⁸ Fishbaugh v. Spunaugle, 118 Ia. 337, 92 N. W. 58.

²⁹ Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086; De Witt v. De Witt, 202 Pa. St. 255, 51 Atl. 987; Telephone Co. v. Brown, 104 Tenn. 56, 78 Am. St. Rep. 906, 50 L. R. A. 277, 55 S. W. 155; Valiquette v. Clark Bros. Coal Min. Co., 83 Vt. 538, 34 L. R. A. (N.S.) 440, 77 Atl. 869.

³⁰ Martin v. Webb, 110 U. S. 7, 28 L. ed. 49; Blake v. Mfg. Co. (N. J. Eq.), 38 Atl. 241; Hanover National Bank v. American, etc., Co., 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72.

principal. Thus if a principal has acquiesced in an agent's collecting certain payments, he is estopped to deny his authority to collect later payments.³¹ If the principal has paid drafts which are drawn by his agent in favor of a specified payee without authority, the principal is estopped to deny his liability upon a subsequent draft if he has not given notice that he has revoked such authority.³² A principal who has placed in the hands of his agent papers which would induce the adversary party to believe that the agent was authorized to represent the principal in such transaction, can not deny the authority of the agent.³³ If the owner of a negotiable instrument leaves it in the hands of his agent with apparent power to collect, he can not deny such authority, although the agent does not remit the proceeds to the principal.³⁴ If the principal has deposited with his agent blank powers of attorney and properly executed instruments for the conveyance of realty, the principal can not deny the authority of the agent, although the agent violated secret instructions to place such instrument in escrow until the purchase price was paid.³⁵

It has been said that the liability of the principal to third persons is not based on estoppel; and that it is not necessary to show that the person dealing with the agent knew of the facts upon which his apparent authority was based.³⁶ This is not in accordance with the weight of authority; and probably the courts so holding do so through a confusion between apparent authority vesting in estoppel, and real authority which is proved by the past conduct of principal and agent, whether such conduct is known to the adversary party or not.³⁷

³¹ *Grant v. Humerick* (Ia.), 94 N. W. 510; *Harrison National Bank v. Austin*, 65 Neb. 632, 59 L. R. A. 294, 91 N. W. 540.

³² *Valiquette v. Clark Bros. Coal Min. Co.*, 83 Vt. 538, 34 L. R. A. (N.S.) 440, 77 Atl. 869.

Contra, *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

³³ *Conklin v. Benson*, 159 Cal. 785, 36 L. R. A. (N.S.) 537, 116 Pac. 34; *McLeod v. Despain*, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492.

³⁴ *McLeod v. Despain*, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492.

³⁵ *Conklin v. Benson*, 159 Cal. 785, 36 L. R. A. (N.S.) 537, 116 Pac. 34.

³⁶ *Prescott v. Flinn*, 9 Bing. 19; *Williams v. Mitchell*, 17 Mass. 98; *Blake v. Mfg. Co.* (N. J. Eq.), 38 Atl. 241.

³⁷ *Moore v. Publishing Association*, 95 Fed. 485; *Lester v. Webb*, 83 Mass. (1 All.) 34; *Perry v. Ins. Co.*, 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731; *Fifth National Bank v. Phosphate Co.*, 119 N. Y. 256, 23 N. E. 737. "The recognition by a corporation of acts on the part of an agent similar in character to those which may be in dispute tends strongly to establish the agent's authority." *Olcott v. R. R. Co.*, 27 N.

§ 1761. Acts of unauthorized agent not estoppel. The acts which operate as estoppel must be those of the principal who is to be estopped or of some one authorized by him to perform such acts.¹ The acts and declarations of the alleged agent can not estop the principal from denying the fact of the agency,² and are not even admissible in evidence to establish such agency, if such principal has not acquiesced therein.³ However, his testimony to the fact of his authority is admissible.⁴

Y. 546, 84 Am. Dec. 298 [citing, *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Wood v. R. R. Co.*, 8 N. Y. 160].

¹ *Quint v. O'Connell*, 89 Conn. 353, 94 Atl. 288; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845; *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

² *Quint v. O'Connell*, 89 Conn. 353, 94 Atl. 288; *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

³ *United States Trust Co. v. Robinson*, 79 Fed. 420.

Alabama. *Wailes v. Neal*, 65 Ala. 59.

Arkansas. *Hawcott v. Kilbourn*, 44 Ark. 213.

California. *Smith v. Ins. Co.*, 107 Cal. 432, 40 Pac. 540; *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937.

Colorado. *Union Coal Co. v. Edman*, 16 Colo. 438, 27 Pac. 1060.

Georgia. *Grand Rapids, etc., Co. v. Morel*, 110 Ga. 321, 35 S. E. 312; *Massillon, etc., Co. v. Ackerman*, 110 Ga. 570, 35 S. E. 635; *Amicalola, etc., Co. v. Coker*, 111 Ga. 872, 36 S. E. 950.

Illinois. *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569.

Iowa. *Whitan v. R. R. Co.*, 96 Ia. 737, 65 N. W. 403.

Kansas. *Machine Co. v. Clark*, 15 Kan. 492.

Maine. *Eaton v. Provident Association*, 89 Me. 58, 35 Atl. 1015.

Michigan. *Grover & Baker Sewing Machine Co. v. Polhemus*, 34 Mich. 247;

Fontaine, etc., Electrical Co. v. Rauch, 117 Mich. 401, 75 N. W. 1063.

Missouri. *Murphy v. Ins. Co.*, 83 Mo. App. 481.

Nebraska. *Association v. Murray*, 47 Neb. 627, 66 N. W. 635.

New Jersey. *Gifford v. Landrine*, 37 N. J. Eq. 127.

North Carolina. *Taylor v. Hunt*, 118 N. Car. 168, 24 S. E. 359; *Western Carolina Realty Co. v. Rumbough*, 172 N. Car. 741, 90 S. E. 931.

North Dakota. *Q. W. Loverin-Browne Co. v. Bank*, 7 N. D. 569, 75 N. W. 923.

Pennsylvania. *Central, etc., Supply Co. v. Thompson*, 112 Pa. St. 118, 3 Atl. 439.

South Carolina. *Ehrhardt v. Bree-land*, 57 S. Car. 142, 35 S. E. 537.

Vermont. *Dickerman v. Ins. Co.*, 67 Vt. 609, 32 Atl. 489.

Virginia. *Fisher v. White*, 94 Va. 236, 26 S. E. 573.

Washington. *Woodworth v. School District No. 2*, 92 Wash. 456, 150 Pac. 757.

West Virginia. *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555; *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222.

⁴ **Arkansas.** *Concordia Fire Ins. Co. v. Mitchell*, 122 Ark. 357, 183 S. W. 770; *Daly v. Arkadelphia Milling Co.*, 126 Ark. 405, 189 S. W. 1053.

California. *McRae v. Development Co. (Cal.)*, 54 Pac. 743.

Iowa. *O'Leary v. Ins. Co.*, 100 Ia. 390, 69 N. W. 686.

If A's agent, B, is assuming to engage in a transaction on his own personal account, A is not liable for B's representations or contracts.⁵ If B, who is the general agent of a life insurance company, A, organizes an independent company to pay premiums upon policies issued by A, and to take such policies as security for such payments, A is not bound by B's contracts or agreements in such independent business,⁶ and accordingly A is not estopped from setting up as a defense the fact that premiums have not been paid upon policies, although B has represented to such policyholders that under his contract no further premiums need be paid.⁷

§ 1762. Liability of principal in contract—Agent acting outside of authority. The principal is not liable for a contract made by his agent outside both his real and his apparent authority.¹ The liability of the principal where the agent has exceeded his author-

Michigan. *Spears v. Black*, 190 Mich. 693, 157 N. W. 382.

Oklahoma. *Roff Oil & Cotton Co. v. King*, 46 Okla. 31, 148 Pac. 90.

Pennsylvania. *Lawall v. Groman*, 180 Pa. St. 532, 57 Am. St. Rep. 662, 37 Atl. 98; *Powell v. Old Hickory Building & Loan Association*, 252 Pa. St. 587, 97 Atl. 1023.

Rhode Island. *Martin v. St. Aloysius Church*, 38 R. I. 339, 95 Atl. 768.

South Carolina. *Connor v. Johnson*, 59 S. Car. 115, 37 S. E. 240; *Patterson v. Home Bank*, 102 S. Car. 434, 86 S. E. 815.

West Virginia. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222.

⁵ *Security Life Ins. Co. v. Eades*, 152 Ky. 577, L. R. A. 1917D, 1198, 153 S. W. 989.

⁶ *Security Life Ins. Co. v. Eades*, 152 Ky. 577, L. R. A. 1917D, 1198, 153 S. W. 989.

⁷ *Security Life Ins. Co. v. Eades*, 152 Ky. 577, L. R. A. 1917D, 1198, 153 S. W. 989.

¹ **United States.** *Clyde Steamship Co. v. Whaley*, 231 Fed. 76, L. R. A. 1916F, 289.

Alabama. *Simon v. Johnson*, 101

Ala. 368, 13 So. 491; *Birmingham, etc., Co. v. R. R. Co.*, 127 Ala. 137, 28 So. 679; *Hopkins v. Jordan*, — Ala. —, 77 So. 710; *Thompson v. Atchley*, — Ala. —, 78 So. 196.

Arizona. *Brutinel v. Nygren*, 17 Ariz. 491, L. R. A. 1918F, 713, 154 Pac. 1042.
Arkansas. *Snapp v. Stanwood*, 65 Ark. 222, 45 S. W. 546; *United States Bedding Co. v. Andre*, 105 Ark. 111, 41 L. R. A. (N.S.) 1019, 150 S. W. 413; *Brunswick-Balke-Collander Co. v. Faulkner*, 131 Ark. 594, 199 S. W. 904; *Wales Riggs Plantations v. Grooms*, 132 Ark. 155, 200 S. W. 804; *Wilson v. Mississippi County*, — Ark. —, 206 S. W. 741.

Connecticut. *Galvano Type Engraving Co. v. Jackson*, 77 Conn. 564, 60 Atl. 127.

Florida. *Lakeside, etc., Co. v. Campbell*, 39 Fla. 523, 22 So. 878; *Rhode v. Gallat*, 70 Fla. 536, 70 So. 471.

Georgia. *Brandenstein v. Douglas*, 105 Ga. 845, 32 S. E. 341.

Idaho. *Folen v. Saxton*, 31 Ida. 319, 171 Pac. 669.

Illinois. *Kinser v. Clay Co.*, 165 Ill. 505, 46 N. E. 372 [affirming, 64 Ill. App. 437]; *Blackmer v. Mining Co.*, 187 Ill.

ity depends on principles of estoppel. If no facts exist, therefore, to estop the principal from denying the authority of the agent,

32, 58 N. E. 289; *Hartenbower v. Uden*, 242 Ill. 434, 28 L. R. A. (N.S.) 738, 90 N. E. 298.

Indiana. *Kiefer v. Klinsick*, 144 Ind. 46, 42 N. E. 447; *Noftager v. Barkdoll*, 148 Ind. 531, 47 N. E. 960.

Iowa. *Stover v. Flower*, 120 Ia. 514, 94 N. W. 1100.

Kansas. *Pneumatic Scale Co. v. Carey Salt Co.*, 97 Kan. 514, 155 Pac. 942; *Emerson-Brantingham Implement Co. v. Willhite*, 102 Kan. 56, 169 Pac. 549.

Kentucky. *Godshaw v. Struck*, 109 Ky. 285, 58 S. W. 781, 51 L. R. A. 668; *Robinson v. Pikeville Bank*, 146 Ky. 538, 37 L. R. A. (N.S.) 1186, 142 S. W. 1065; *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

Louisiana. *Warren v. Goodwyn*, 110 La. 198, 34 So. 411; *Bolton v. Rouse*, — La. —, 80 So. 226.

Maine. *Munroe v. Whitehouse*, 90 Me. 139, 37 Atl. 866; *Davies v. Steamboat Co.*, 94 Me. 379, 53 L. R. A. 239, 47 Atl. 896.

Maryland. *Smith v. Myers*, 130 Md. 64, 99 Atl. 938.

Massachusetts. *Clark v. Murphy*, 164 Mass. 490, 41 N. E. 674; *Foote v. Cotting*, 195 Mass. 55, 15 L. R. A. (N.S.) 693, 80 N. E. 600.

Michigan. *Clark v. Haupt*, 109 Mich. 212, 68 N. W. 231; *Gore v. Assurance Co.*, 119 Mich. 136, 77 N. W. 650.

Minnesota. *Olson v. Ry. Co.*, 81 Minn. 402, 84 N. W. 219; *Anderson v. Butterick Publishing Co.*, 132 Minn. 30, 155 N. W. 1045.

Mississippi. *Dahnke-Walker Milling Co. v. Phillips*, 117 Miss. 204, 78 So. 6.

Missouri. *Keltner v. Harris (Mo.)*, 196 S. W. 1.

Montana. *Moore v. Skyles*, 33 Mont. 135, 3 L. R. A. (N.S.) 136, 82 Pac. 799.

Nebraska. *Marshall v. Kirschbraun*, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

New Jersey. *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *Perrine v. Cooley*, 42 N. J. L. 623; *Scherer v. Post Office Building & Loan Association*, 91 N. J. L. 585, 103 Atl. 202.

New York. *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, L. R. A. 1918B, 575, 116 N. E. 386.

North Carolina. *Ferguson v. Mfg. Co.*, 118 N. Car. 946, 24 S. E. 710; *Swindell v. Latham*, 145 N. Car. 144, 122 Am. St. Rep. 430, 58 S. E. 1010; *Chesson v. Richmond Cedar Works*, 172 N. Car. 32, L. R. A. 1918F, 6, 89 S. E. 800; *International Harvester Co. v. Carter*, 173 N. Car. 229, 91 S. E. 840; *Graham v. Mutual Life Insurance Co.*, 176 N. Car. 313, 97 S. E. 6.

Ohio. *Spengler v. Sonnenberg*, 88 O. S. 192, 52 L. R. A. (N.S.) 510, 102 N. E. 737.

Oregon. *United States National Bank v. Herron*, 73 Or. 391, L. R. A. 1916C, 125, 144 Pac. 661; *Portland v. American Surety Co.*, 79 Or. 38, 153 Pac. 786.

Pennsylvania. *Mundis v. Emig*, 171 Pa. St. 417, 32 Atl. 1135; *Thompson v. Sproul*, 179 Pa. St. 266, 36 Atl. 290; *American Mailing Device Corporation v. Widener*, 260 Pa. St. 375, 103 Atl. 875.

Vermont. *Brown v. West*, 69 Vt. 440, 38 Atl. 87.

Washington. *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845; *Amann v. Pantages*, 90 Wash. 271, 155 Pac. 1070; *National City Bank v. Gorham Engineering Co.*, 95 Wash. 52, 163 Pac. 6; *Columbia Security Co. v. Aetna Accident & Liability Co.*, — Wash. —, 183 Pac. 137.

Wisconsin. *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485; *Parr v. Mfg. Co.*, 117 Wis. 278, 93 N. W. 1099.

persons dealing with the agent must take notice of his powers.² So persons dealing with an agent are bound by known limitations on his authority.³ So where the agent is a special agent of limited powers, the principal in the absence of estoppel or ratification, is not bound by his contract in excess of his authority.⁴ Thus an agreement by a local railway agent in violation of a known rule of the railway to make no charge to a large shipper for demurrage or storage is not binding on the company.⁵ So an agent having an assignment of a judgment for safe keeping can not assign such judgment to one who knows the facts.⁶ A principal will not be bound by a contract made on his behalf by an agent from the

² **Alabama.** *Insurance Co. v. Thornton*, 130 Ala. 222, 89 Am. St. Rep. 30, 55 L. R. A. 547, 30 So. 614.

Arizona. *Brutinel v. Nygren*, 17 Ariz. 491, 154 Pac. 1042.

Georgia. *Planters', etc., Fire Association v. De Loach*, 113 Ga. 802, 39 S. E. 466.

Illinois. *Hartenbower v. Uden*, 242 Ill. 434, 28 L. R. A. (N.S.) 738, 90 N. E. 298.

Kentucky. *Robinson v. Pikeville*, 146 Ky. 536, 37 L. R. A. (N.S.) 1186, 142 S. W. 1065; *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

Michigan. *Deffenbaugh v. Mfg. Co.*, 120 Mich. 242, 79 N. W. 197; *Acorn Refining Co. v. Knowlson*, 188 Mich. 123, 154 N. W. 11.

Montana. *Spelman v. Milling Co.*, 26 Mont. 76, 55 L. R. A. 640, 66 Pac. 597.

Nebraska. *Chase v. Swift*, 60 Neb. 696, 83 Am. St. Rep. 552, 84 N. W. 86; *Marshall v. Kirschbraun*, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

New York. *Carney v. Ins. Co.*, 162 N. Y. 453, 76 Am. St. Rep. 347, 49 L. R. A. 471, 57 N. E. 78.

North Carolina. *Swindell v. Latham*, 145 N. Car. 144, 122 Am. St. Rep. 430, 58 S. E. 1010.

Oklahoma. *Gish v. Insurance Co.*, 16 Okla. 59, 13 L. R. A. (N.S.) 826, 87 Pac. 869.

Ohio. *Spengler v. Sonnenberg*, 88 O. S. 192, 52 L. R. A. (N.S.) 510, 102 N. E. 737.

Oregon. *United States National Bank v. Herron*, 73 Or. 391, L. R. A. 1916C, 125, 144 Pac. 661.

South Dakota. *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053.

Washington. *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

³ *Littleton v. Loan, etc., Association*, 97 Ga. 172, 25 S. E. 826; *Gorham v. Felker*, 102 Ga. 260, 28 S. E. 1002; *Wynne v. Parke*, 89 Tex. 413, 34 S. W. 907; *Wells v. Ins. Co.*, 41 W. Va. 131, 23 S. E. 527.

⁴ **California.** *Rigby v. Lowe*, 125 Cal. 613, 58 Pac. 153.

Georgia. *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, 32 S. E. 591; *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948.

Kentucky. *Jones v. Brand*, 106 Ky. 410, 50 S. W. 679.

Maryland. *Hardwick v. Kirwan*, 91 Md. 285, 46 Atl. 987.

Massachusetts. *Norton v. Nevills*, 174 Mass. 243, 54 N. E. 537.

Texas. *Mann v. Oil Co.*, 92 Tex. 377, 48 S. W. 567.

⁵ *Harris v. Banking Co.*, 91 Ga. 317, 18 S. E. 159.

⁶ *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250, 63 N. E. 655.

sale of land which contains terms which the principal has not authorized.⁷ The principal is not bound by a draft signed by his agent on his behalf without his authority.⁸ An endorsement by an unauthorized agent does not pass title to a negotiable instrument;⁹ and if such principal regains possession of such negotiable instrument, the purchaser has no right of action against him.¹⁰ A principal is not bound by a contract of purchase at an excessive price made by an agent in excess of his authority,¹¹ or by a contract to buy on credit, entered into by an agent who is authorized only to buy for cash.¹² A conveyance by an attorney in fact, having known authority to convey only on approval by his principal, is of no validity if made without such approval.¹³ So if A buys a piano from B as agent of X, and makes his note therefor payable to B personally, it has been held that if B does not account to X for the proceeds of such note, X may recover the piano, X not having ratified the sale and no such custom of business being shown.¹⁴ A principal is not bound where an agent with mere power to sell, inserts in a contract a clause for interest in case of delay in delivery,¹⁵ or makes a contract with reference to deferred payments,¹⁶ or makes specific representations that the threshing machine sold by him has been shipped, thereby inducing the vendee to deliver his old machine in part payment, and thus leaving him without any threshing machine when needed.¹⁷ If the contract between the principal and the adversary party is in writing and if it shows upon its face that the agent has no authority to alter the provisions thereof, the principal is not bound by an additional

⁷ *Smith v. Myers*, 130 Md. 64, 99 Atl. 938; *Spengler v. Sonnenberg*, 88 O. S. 192, 52 L. R. A. (N.S.) 510, 102 N. E. 737.

⁸ *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

⁹ *Hamilton National Bank v. Nye*, 37 Ind. App. 464, 117 Am. St. Rep. 333, 77 N. E. 295; *Moore v. Skyles*, 33 Mont. 135, 3 L. R. A. (N.S.) 136, 82 Pac. 799; *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, L. R. A. 1918B, 575, 116 N. E. 386.

¹⁰ *Moore v. Skyles*, 33 Mont. 135, 3 L. R. A. (N.S.) 136, 82 Pac. 799.

¹¹ *Marshall v. Kirschbraun*, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

¹² *Swindell v. Latham*, 145 N. Car. 144, 122 Am. St. Rep. 430, 58 S. E. 1010.

¹³ *Alcorn v. Buschke*, 133 Cal. 655, 66 Pac. 15.

¹⁴ *Baldwin v. Tucker*, 112 Ky. 282, 65 S. W. 841.

¹⁵ *Hardwick v. Kirwan*, 91 Md. 285, 46 Atl. 987.

¹⁶ *Rhode v. Gallat*, 70 Fla. 536, 70 So. 471.

¹⁷ *J. J. Case, etc., Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82.

warranty which his agent has made.¹⁸ An insurance company is not bound by an agreement as to the terms of a contract for a policy entered into on its behalf by an agent who is authorized only to solicit insurance.¹⁹ If an insurance agent delivers a policy which by its terms is not to take effect until the first premium is paid, and the insured agrees to pay therefor by giving the agent credit for such premium on his private account, the insurance company is not liable if the agent does not account to it for such premium.²⁰ So if an insurance policy shows on its face that an agent has no authority to waive certain provisions thereof, an attempted waiver by an agent not having such authority in fact is invalid.²¹ So while a rule of an express company that express orders must be signed by their local agent does not prevent recovery on express orders signed by a clerk in the office of the local agent, such rule not being known,²² yet if this clerk had solicited business outside the office and had made no charge therefor, the person buying such orders with knowledge of these facts must take notice that such business is outside the apparent authority of an express agent. So an agent who has merely power to sell can not bind his principal by a contract of sale which provides for payment in something other than cash, such as lumber,²³ second-hand machinery,²⁴ or a note and a certificate of deposit.²⁵ An agent with authority to inspect lumber can not bind his principal by agreeing to accept lumber which he has not inspected.²⁶ So an agent with authority only to collect rents can not bind his principal by a contract to lease.²⁷ A notice given by an unauthorized agent to the effect that the principal will not perform, can not be regarded by the adversary party as a breach.²⁸

¹⁸ *Crawford v. Livingston*, 153 Ky. 58, 44 L. R. A. (N.S.) 640, 154 S. W. 407; *Somerville v. Gullett Gin Co.*, 137 Tenn. 509, 194 S. W. 576.

¹⁹ *Floars v. Aetna Life Ins. Co.*, 144 N. Car. 232, 11 L. R. A. (N.S.) 357, 56 S. E. 915.

²⁰ *Tomsecsek v. Ins. Co.*, 113 Wis. 114, 57 L. R. A. 455, 88 N. W. 1013.

²¹ *Thornton v. Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; *Cook v. Ins. Co.*, 84 Mich. 12, 47 N. W. 568; *Cleaver v. Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660.

²² *Rohrbaugh v. Express Co.*, 50 W. Va. 148, 88 Am. St. Rep. 849, 40 S. E. 398.

²³ *J. A. Fay, etc., Co. v. Causey*, 131 N. Car. 350, 42 S. E. 827.

²⁴ *Elfring v. Birdsall Co.*, — S. D. —, 92 N. W. 29.

²⁵ *Wilken v. Voss*, 120 Ia. 500, 94 N. W. 1123.

²⁶ *Campbellsville Lumber Co. v. Spotswood (Ky.)*, 74 S. W. 235.

²⁷ *Dieckman v. Wierich (Ky.)*, 73 S. W. 1119.

²⁸ *Amann v. Pantages*, 90 Wash. 271, 155 Pac. 1070.

If the adversary party knows that the interest of the agent is adverse to that of the principal, he is charged with notice that the agent is not authorized to represent his principal in such transaction.²

§ 1763. Rights and liabilities of principal in quasi-contract—Agent acting outside of scope of authority. If the principal has received benefits under a contract made on his behalf by an unauthorized agent without knowledge of the material facts, and if the circumstances are such that the retention of such benefit does not amount to ratification,¹ the principal is liable in quasi-contract to the person from whom such benefits were received.² If the agent has bought property in excess of the price at which he was authorized to buy it and the property has been used by the principal so that it can not be restored, the principal is liable to the person by whom such property was furnished for reasonable compensation therefor,³ especially if such reasonable price is less than the price at which the agent was authorized to purchase.⁴ If the agent has fraudulently prepared two copies of a contract in which he has inserted different rates of compensation and if he has obtained the assent of his principal to one of such contracts and the assent of the adversary party to the other, the principal is liable for reasonable compensation for work and materials furnished under such contract.⁵ If the agent has obtained money under a prize contest by fraud and he has paid it over to his principal, the principal must repay such money to the person from whom it was obtained, although the principal did not take any part in the agent's misconduct.⁶ If B, without authority, has borrowed money from X on the credit of B's principal, A, it has

² DeBaca v. Higgins, 58 Colo. 75, L. R. A. 1915B, 1091, 143 Pac. 832; Grand Lodge of Kansas, Ancient Order of United Workmen v. State Bank, 92 Kan. 876, L. R. A. 1915B, 815, 142 Pac. 974; Langlois v. Grammon, 123 La. 453, 22 L. R. A. (N.S.) 414, 49 So. 18; Missouri v. Atkins (Mo.), L. R. A. 1916C, 1101, 180 S. W. 848.

¹ See § 1765.

² Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 Atl. 127; Greenberg v. Evening Post Association, 91 Conn. 371, 99 Atl. 1037; Vickery v.

Ritchie, 202 Mass. 247, 26 L. R. A. (N. S.) 810, 88 N. E. 835; Marshall v. Kirschbraun, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

³ Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 Atl. 127; Marshall v. Kirschbraun, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

⁴ Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 Atl. 127.

⁵ Vickery v. Ritchie, 202 Mass. 247, 26 L. R. A. (N.S.) 810, 88 N. E. 835.

⁶ Greenberg v. Evening Post Association, 91 Conn. 371, 99 Atl. 1037.

been held that X may recover such money from A if B used it to replace A's money which B had appropriated wrongfully.⁷

The rule that a principal is not bound by the acts of an unauthorized agent in the absence of estoppel is limited by the principles of negotiable instruments.⁸ If an agent has paid money which belongs to his principal over to a third person who takes for value and without notice, the principal can not recover such payment.⁹ If A's agent, B, has used A's money in paying B's personal debt to X, A can recover from X only if he is able to show that X knew that the money belonged to A, and that X did not know that the debt was a personal debt of B's.¹⁰

If the principal is personally liable for the performance of an act he can not escape liability by showing that his failure to perform was due to the unauthorized act of an agent.¹¹ If deposits have been made properly with a bank, the bank can not escape liability by showing that such deposits were withheld and misappropriated by an agent in excess of his authority.¹²

If the contract of the agent exceeds his authority, it will be held good as far as his authority extends if such part can be separated from the rest. Thus if an attorney in fact is authorized to execute a quit-claim deed only, a warranty deed executed by him will pass title, though the covenant of warranty will not bind the principal.¹³

§ 1764. Ratification—Nature and effect. Ratification, as the term is used in the law of agency, is the adoption and confirmation by one person of an act or contract which has been performed or entered into on his behalf by another who, at the time, assumed to act as his agent in doing such act or in making such contract without authority so to do.¹ In addition to liability created originally

⁷ *Bannatyne v. MacIver* [1906], 1 K. B. 103.

⁸ *Perry v. Oerman*, 63 W. Va. 566, 15 L. R. A. (N.S.) 310, 60 S. E. 604.

See § 2347.

⁹ *Finney v. Studebaker Corporation*, 196 Ala. 422, 72 So. 54.

¹⁰ *Perry v. Oerman*, 63 W. Va. 566, 15 L. R. A. (N.S.) 310, 60 S. E. 604.

¹¹ *Minnesota Mutual Life Insurance Company v. Tagus State Bank*, 34 N. D. 566, L. R. A. 1917A, 519, 158 N. W. 1063.

¹² *Minnesota Mutual Life Insurance*

Company v. Tagus State Bank, 34 N. D. 566, L. R. A. 1917A, 519, 158 N. W. 1063.

¹³ *Robinson v. Lowe*, 50 W. Va. 75, 40 S. E. 454.

¹ *Gould v. Maine Farmers' Mutual Fire Insurance Co.*, 114 Me. 416, 96 Atl. 732.

See, to the same effect, *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060; *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

"The doctrine of ratifications proceeds upon the theory that there was

by the contract of the agent, a principal may be liable by reason of his ratification of an unauthorized contract made by one who assumes to act as his agent, or who is his agent, but who exceeds his authority.² In order to operate as a ratification, the acts or

no previous authority and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied is equivalent to previous authority, and results as effectively to establish the relation of principal and agent as if the agency had been authorized in the beginning." *Ballard v. Nye*, 138 Cal. 588 [quoted in *Amazon Fire Insurance Co. v. Bond*, — Okla. —, 165 Pac. 414].

² *United States. Pacific Coast Casualty Co. v. General Bonding & Casualty Insurance Co.*, 240 Fed. 36, 153 C. C. A. 72.

Alabama. *Martin v. Powell*, — Ala. —, 75 So. 358.

Arkansas. *Radford v. Practical Premium Co.*, 125 Ark. 199, 188 S. W. 562.

California. *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559.

Colorado. *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Western Investment & Land Co. v. First National Bank*, — Colo. —, 172 Pac. 6.

Georgia. *Atlanta Buggy Co. v. Hess Spring & Axle Co.*, 124 Ga. 338, 4 L. R. A. (N.S.) 431, 52 S. E. 613.

Idaho. *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

Illinois. *Klinck v. Chicago City Ry. Co.*, 262 Ill. 280, 52 L. R. A. (N.S.) 70, 104 N. E. 669; *Meldahl v. Wallace*, 270 Ill. 220, 110 N. E. 354; *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Kentucky. *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 12 L. R. A. (N.S.) 427, 104 S. W. 758.

Massachusetts. *Keedy v. Amherst*, 222 Mass. 72, 109 N. E. 817; *LaFrance v. Desautels*, 225 Mass. 324, 114 N. E. 312; *Mills v. U. S. Slicing Machine Co.*,

230 Mass. 95, 119 N. E. 690; *Collins v. Splane*, 230 Mass. 281, 120 N. E. 66.

Michigan. *Peck Co. v. Gordon*, 112 Mich. 487, 70 N. W. 1034.

Minnesota. *Hunter v. Cobe*, 84 Minn. 187, 87 N. W. 612; *Block v. Duluth Log Co.*, 134 Minn. 313, 159 N. W. 760.

Missouri. *In re Soulard's Estate*, 141 Mo. 642, 43 S. W. 617; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300 [reversing in banc, 37 S. W..516].

New Jersey. *Spencer Heater Co. v. Abbott*, 91 N. J. L. 594, 104 Atl. 91.

North Dakota. *Fleming v. Sherwood*, 24 N. D. 144, 43 L. R. A. (N.S.) 945, 139 N. W. 101.

Oklahoma. *Horton v. Early*, 39 Okla. 99, 47 L. R. A. (N.S.) 314, 134 Pac. 436; *Washington v. Colvin (Okla.)*, 155 Pac. 251; *Antrim Lumber Co. v. Oklahoma State Bank*, — Okla. —, L. R. A. 1918A, 528, 162 Pac. 723; *Amazon Fire Insurance Co. v. Bond*, — Okla. —, 165 Pac. 414.

Oregon. *Masters v. Walker*, 89 Or. 526, 174 Pac. 1164.

Pennsylvania. *Daughters of American Revolution v. Schenley*, 204 Pa. St. 572, 54 Atl. 366.

Rhode Island. (Supreme Assembly, etc.) *Good Fellows v. Campbell*, 17 R. I. 402, 13 L. R. A. 601, 22 Atl. 307.

Tennessee. *Knights of Pythias v. Cogbill*, 99 Tenn. 28, 41 S. W. 340.

Virginia. *Richmond, etc., Co. v. Ry. Co.*, 95 Va. 386, 28 S. E. 573.

Washington. *Matger v. Arcade Building & Realty Co.*, 80 Wash. 401, L. R. A. 1915A, 288, 141 Pac. 900; *Lindeman Lumber Co. v. Remolite Paint Co.*, 90 Wash. 26, 155 Pac. 409.

Wisconsin. *McDermott v. Jackson*, 97 Wis. 64, 72 N. W. 375.

conduct of the principal must be such as to show his intent to adopt the contract which has been made on his behalf.³ A power of attorney to do certain acts in the future is not a ratification of prior unauthorized acts.⁴ If the ratification is in writing its effect is a question for the court.⁵ If the evidence is such that reasonable men could draw different conclusions as to whether or not the principal had adopted the unauthorized contract, the question of ratification is one of fact to be determined by the jury under appropriate instructions by the court.⁶ It has been said that a contract in excess of the authority of the agent is void.⁷ This would imply that it had no legal effect and could not be ratified; but such statement is made of contracts which the principal has attempted to disaffirm. Whether such contract can be said to be void is considered subsequently in connection with the right of the adversary party to repudiate such contract upon ratification by the principal.⁸ Thus if a wife signs her husband's name to a note without authority, he is bound thereby if he subsequently ratifies it.⁹ A wife's purchase of articles which are not household necessities, upon her husband's credit, is binding upon him if he subsequently ratifies such purchase.¹⁰

The principal can not ratify a contract which he could not have authorized originally. Thus where the principal is an administratrix, she can not ratify a contract of an agent which she could not have authorized.¹¹

The principal has a reasonable time to ascertain the facts and return what he has received under such contract.¹² Delay beyond a reasonable time amounts to acquiescence.¹³

³ *Parker v. Wilson*, 179 Ala. 361, 43 L. R. A. (N.S.) 87, 60 So. 150 (a case of tort); *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144; *War Fork Land Co. v. Marcum*, — Ky. —, 202 S. W. 668.

⁴ *War Fork Land Co. v. Marcum*, — Ky. —, 202 S. W. 668.

⁵ *Blackwell v. Kercheval*, 29 Ida. 473, 160 Pac. 741.

⁶ *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

⁷ *Spengler v. Sonnenberg*, 88 O. S. 192, 52 L. R. A. (N.S.) 510, 102 N. E. 737.

⁸ See § 1769.

⁹ *Hewling v. Wilshire* (Ky.), 61 S. W. 264.

¹⁰ *Shuman v. Steinel*, 129 Wis. 422, 116 Am. St. Rep. 961, 7 L. R. A. (N.S.) 1048, 109 N. W. 74.

¹¹ *Upton v. Dennis*, 133 Mich. 238, 94 N. W. 728.

¹² *Northwestern Lumber Co. v. Cornell*, 99 Wash. 250, 169 Pac. 590; *McDermott v. Jackson*, 102 Wis. 419, 78 N. W. 598 [same case, 97 Wis. 64, 72 N. W. 375].

It is said that he must act in haste. *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, 171 Pac. 223.

¹³ *Georgia Home Ins. Co. v. Smithville* (Tex. Civ. App.), 49 S. W. 412;

Ratification once made with full knowledge of facts prevents subsequent disaffirmance.¹⁴

Since this is properly a ratification, no new consideration is necessary.¹⁵ Mere omission to discharge the agent for other alleged misconduct is not ratification.¹⁶ It has been said, however, that failure to discharge an agent is evidence of a ratification if the principal has had an opportunity to investigate the transaction, but it is not such evidence until the principal has had an opportunity to investigate.¹⁷ This principal can apply only in cases in which the natural consequence of such misconduct, if unauthorized, would be the discharge of the agent. The act of the principal in repudiating a contract for an erroneous reason can not be regarded as a ratification.¹⁸

If the original lack of authority on the part of the agent is conceded or established, the person who claims that the contract was ratified by the principal has the burden of establishing such ratification.¹⁹

§ 1765. Methods of ratification. If the contract is not under seal, and if the contract is not one which, under the statute in force, requires written authority, no special form of ratification is necessary. Such ratification may be made expressly,¹ as by admitting the existence and binding effect of such contract,² or by insisting on new conditions which are accepted.³

Northwestern Lumber Co. v. Cornell, 99 Wash. 250, 169 Pac. 590.

See also, *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, 171 Pac. 223.

¹⁴ *Hunter v. Cobe*, 84 Minn. 187, 87 N. W. 612.

¹⁵ *Plumb v. Curtis*, 68 Conn. 154, 33 Atl. 998; *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

¹⁶ *Edmunds v. Atchison, T. & S. F. Ry. Co.*, 174 Cal. 246, 162 Pac. 1038; *Fortune v. Stockton*, 182 Ill. 454, 55 N. E. 367 [affirming, 82 Ill. App. 272].

¹⁷ *Edmunds v. Atchison, T. & S. F. Ry. Co.*, 174 Cal. 246, 162 Pac. 1038.

¹⁸ *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073.

¹⁹ *United States National Bank v. Herron*, 73 Or. 391, L. R. A. 1916C, 125, 144 Pac. 661.

¹ *Arkansas. Radford v. Practical Premium Co.*, 125 Ark. 199, 188 S. W. 562.

California. Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 569.

Idaho. Blackwell v. Kercheval, 27 Ida. 537, 149 Pac. 1060.

Kentucky. Short v. Metz Co., 165 Ky. 319, 176 S. W. 1144.

Michigan. Ericsson Manufacturing Co. v. Caille Bros. Co., 195 Mich. 545, 162 N. W. 81.

South Carolina. Brown v. Wilson, 45 S. Car. 619, 55 Am. St. Rep. 779, 23 S. E. 630.

Wisconsin. Johnson v. Mfg. Co., 103 Wis. 291, 79 N. W. 236.

For authority to enter into a sealed contract, see § 1734.

For authority which by statute must be in writing, see § 1736.

² *Ericsson Manufacturing Co. v. Caille Bros. Co.*, 195 Mich. 545, 162 N. W. 81.

³ *Robert, etc., Co. v. Mfg. Co.*, 173 Pa. St. 447, 34 Atl. 450.

Ratification may be implied from the conduct of the principal,⁴ as by accepting the benefits of the contract with full knowledge of the facts.⁵ This rule is sometimes stated in the form that retention of the proceeds of the contract estops the principal to deny the

United States. *Swift v. Detroit Rock Salt Co.*, 233 Fed. 231, 147 C. C. A. 237; *Arzuaga v. Gonzalez*, 239 Fed. 60, L. R. A. 1917D, 697; *Pacific Coast Casualty Co. v. General Bonding & Casualty Insurance Co.*, 240 Fed. 36, 153 C. C. A. 72.

Colorado. *Ft. Morgan Reservoir & Irrigation Co. v. Sterling Irr. Co.*, — Colo. —, 171 Pac. 72.

Idaho. *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

Illinois. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Kentucky. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

Minnesota. *Jones v. Blair*, 137 Minn. 306, 163 N. W. 523.

Montana. *Milwaukee Land Co. v. Ruesink*, 50 Mont. 489, 148 Pac. 396.

Nebraska. *Nye - Schneider - Fowler Grain Co. v. Hopkins*, 99 Neb. 244, 155 N. W. 1097.

New York. *Bloomquist v. Farson*, 222 N. Y. 375, 118 N. E. 855.

Oklahoma. *Fant v. Campbell*, 8 Okla. 586, 58 Pac. 741.

Pennsylvania. *Lemmon v. East Palestine Rubber Co.*, 260 Pa. St. 28, 103 Atl. 510.

Washington. *Baker v. Seattle & Puget Sound Packing Co.*, 95 Wash. 45, 163 Pac. 17.

United States. *Swift v. Detroit Rock Salt Co.*, 233 Fed. 231, 147 C. C. A. 237.

Alabama. *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Martin v. Powell*, — Ala. —, 75 So. 358.

Arkansas. *Coffin v. Planters' Cotton Co.*, 124 Ark. 360, 187 S. W. 309; *Co-operative Stores Co. v. Marianna Hotel Co.*, 128 Ark. 196, 193 S. W. 529.

California. *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433.

Connecticut. *Duncan v. Kearney*, 72 Conn. 585, 45 Atl. 358.

Georgia. *Smith v. Holbrook*, 99 Ga. 256, 25 S. E. 627.

Idaho. *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

Illinois. *Booth v. Wiley*, 102 Ill. 84; *Meldahl v. Wallace*, 270 Ill. 220, 110 N. E. 354; *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Iowa. *France v. Haynes*, 67 Ia. 139, 25 N. W. 98; *Noble v. White*, 103 Ia. 352, 72 N. W. 556; *White v. Creamery Co.*, 108 Ia. 522, 79 N. W. 283; *Cassady v. Ins. Co.*, 109 Ia. 539, 80 N. W. 521; *State Bank v. Kelly*, 109 Ia. 544, 80 N. W. 520; *J. P. Calnan Construction Co. v. Brown*, 110 Ia. 37, 81 N. W. 163; *Fleischman v. Ver Does*, 111 Ia. 322, 82 N. W. 757; *Higbee v. Trumbauer*, 112 Ia. 74, 83 N. W. 812; *Blaess v. Nichols Sheperd Co.*, 115 Ia. 373, 88 N. W. 829; *Russ v. Hansen*, 119 Ia. 375, 93 N. W. 502; *Hosteter v. Wear-U-Well Shoe Co.*, 171 Ia. 346, 152 N. W. 1.

Such conduct prevents disaffirmance. *Harkness v. Cleaves*, 113 Ia. 140, 84 N. W. 1033 (obiter, as evidence also showed either authority to deliver deed, or ratification).

Kansas. *McKinstry v. Bank*, 57 Kan. 279, 46 Pac. 302; *Rush v. Leavitt*, 99 Kan. 498, 162 Pac. 310.

Kentucky. *Graves v. Cord (Ky.)*, 44 S. W. 665; *Singer Mfg. Co. v. Stephens (Ky.)*, 53 S. W. 525.

Massachusetts. *Attorney General v. Onset Bay Grover Association*, 221 Mass. 342, 109 N. E. 165.

Michigan. *Payn v. Gidley*, 122 Mich. 605, 81 N. W. 558; *Sokup v. Letellier*, 123 Mich. 640, 82 N. W. 523.

agency.⁶ A vendor who receives and retains the price of machinery can not avoid a warranty thereof made by the agent who sold it.⁷ If the principal retains the proceeds of a loan with knowledge of the facts he ratifies the promissory note to which his unauthorized agent has signed the principal's name.⁸ A vendee is liable for property bought for him by his agent without authority and received and accepted by him.⁹ If the principal retains possession of realty which its agent has leased, it ratifies such unauthorized lease.¹⁰ If the principal with knowledge of the facts accepts a negotiable instrument and collateral security for the purchase money, he thereby ratifies the act of his agent in making an unauthorized sale.¹¹ Retaining property received under the agent's contract is not ratification where rejection is impossible,¹² as where the material acquired by the agent has been built into the principal's house,¹³ or repairs were made upon property owned by the

Minnesota. Wright v. Church, 72 Minn. 78, 74 N. W. 1015; Anderson v. Johnson, 74 Minn. 171, 77 N. W. 26; Payne v. Hackney, 84 Minn. 195, 87 N. W. 608.

Nebraska. Day v. Miller, 1 Neb. (unoff.) 107, 95 N. W. 359; Nye-Schneider-Fowler Grain Co. v. Hopkins, 99 Neb. 244, 155 N. W. 1097.

New York. Smith v. Barnard, 148 N. Y. 420, 42 N. E. 1054; Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855.

North Carolina. Williams v. Lumber Co., 118 N. Car. 928, 24 S. E. 800.

North Dakota. Fleming v. Sherwood, 24 N. D. 144, 43 L. R. A. (N.S.) 945, 139 N. W. 101.

Ohio. Woodward v. Suydam, 11 Ohio 360.

Oklahoma. Washington v. Colvin, 55 Okla. 774, 155 Pac. 251; Antrim Lumber Co. v. Oklahoma State Bank, — Okla. —, 162 Pac. 723.

Pennsylvania. Lemmon v. East Palestine Rubber Co., 260 Pa. St. 28, 103 Atl. 510.

South Carolina. Welch v. Mfg. Co., 55 S. Car. 568, 33 S. E. 739.

Utah. Marks v. Taylor, 23 Utah 152, 63 Pac. 897 [modified, 23 Utah 470, 65 Pac. 203].

Washington. Matzger v. Arcade Building & Realty Co., 80 Wash. 401, L. R. A. 1915A, 288, 141 Pac. 900.

West Virginia. Star Piano Co. v. Brockmeyer, 78 W. Va. 780, 90 S. E. 338.

Wisconsin. Field v. Doyon, 64 Wis. 560, 25 N. W. 653; Kriz v. Peege, 119 Wis. 105, 95 N. W. 108; Gnat v. Westchester Fire Insurance Co., 167 Wis. 274, 167 N. W. 250.

⁶ Lull v. Bank, 110 Ia. 537, 81 N. W. 784.

⁷ Blaess v. Nichols Shepard Co., 115 Ia. 373, 88 N. W. 829.

⁸ Antrim Lumber Co. v. Oklahoma State Bank, — Okla. —, L. R. A. 1918A, 528, 162 Pac. 723.

⁹ Haney, etc., Co. v. Institute, 113 Ga. 289, 38 S. E. 761.

¹⁰ Co-operative Stores Co. v. Marianna Hotel Co., 128 Ark. 196, 193 S. W. 529; Hosteter v. Wear-U-Well Shoe Co., 171 Ia. 346, 152 N. W. 1.

¹¹ Star Piano Co. v. Brockmeyer, 78 W. Va. 780, 90 S. E. 338.

¹² Findlay v. Hildenbrand, 17 Ida. 403, 29 L. R. A. (N.S.) 400, 105 Pac. 790; Marshall v. Kirschbraun, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

¹³ Moyle v. Society, 16 Utah 69, 50 Pac. 806.

principal.¹⁴ If goods which have been purchased by an agent under an unauthorized contract have been mingled with the principal's goods and the principal has the practical choice between permitting all of such goods to be wasted and using all of them, his action in making use of all of such goods is not a ratification of such contract.¹⁵ If an agent has made an unauthorized contract of employment and the principal has protested against the performance of such contract by the adversary party, the fact that such contract has been performed and that the principal has offered what he considers a reasonable compensation for such work, does not amount to a ratification.¹⁶ Ratification may be effected by accepting services under the contract,¹⁷ or suing thereon,¹⁸ including the filing of a cross-petition,¹⁹ or an answer,²⁰ based thereon; or by filing a claim for the proceeds of the transaction as exempt from execution;²¹ or by acquiescence therein with knowledge of the facts,²² and by acting thereon,²³ if for such a length of time

¹⁴ *Forman v. The Liddesdale* [1900], A. C. 190. (Repair of a ship.)

¹⁵ *Marshall v. Kirschbraun*, 100 Neb. 876, L. R. A. 1917E, 786, 161 N. W. 577.

¹⁶ *Findlay v. Hildenbrand*, 17 Ida. 403, 29 L. R. A. (N.S.) 400, 105 Pac. 790.

¹⁷ *People's National Bank v. Geisthardt*, 55 Neb. 232, 75 N. W. 582.

¹⁸ *United States. The Seguranc*, 250 Fed. 19.

Alabama. Capital Security Co. v. Owen, 196 Ala. 385, 72 So. 8.

Connecticut. Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. Rep. 88, 17 Atl. 278; *Curnane v. Scheidel*, 70 Conn. 13, 38 Atl. 875.

Iowa. Warder, etc., Co. v. Cuthbert, 99 Ia. 681, 68 N. W. 917.

Massachusetts. Edgar v. Breck, 172 Mass. 581, 52 N. E. 1083.

Oregon. Bank v. Walch, 76 Or. 272, 147 Pac. 534.

South Dakota. Plano Mfg. Co. v. Millage, 14 S. D. 331, 85 N. W. 594.

¹⁹ *The Seguranc*, 250 Fed. 19.

²⁰ *Chicago, R. I. & P. Ry. Co. v. Burke*, — Okla. —, 175 Pac. 547.

²¹ *Wright v. Conservative Loan Co.*, — Okla. —, 175 Pac. 553.

²² *Arkansas. Coffin v. Planters' Cotton Co.*, 124 Ark. 360, 187 S. W. 309.

California. Market, etc., Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

Connecticut. J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 Atl. 1122.

Illinois. Glucose, etc., Co. v. Flinn, 184 Ill. 123, 56 N. E. 400 [affirming, 85 Ill. App. 131].

Minnesota. Singer Mfg. Co. v. Flynn, 63 Minn. 475, 65 N. W. 923. (Acquiescence for two years.)

New Jersey. Lyle v. Addicks, 62 N. J. Eq. 123, 49 Atl. 1121.

New York. Hanover National Bank v. American, etc., Co., 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72.

Oklahoma. Wright v. Conservative Loan Co., — Okla. —, 175 Pac. 553.

Utah. Moran v. Knights of Columbus, 46 Utah 397, 151 Pac. 353.

Washington. Baker v. Seattle & Puget Sound Packing Co., 95 Wash. 45, 163 Pac. 17.

²³ *Baker v. Seattle & Puget Sound Packing Co.*, 95 Wash. 45, 163 Pac. 17.

that third parties have in the meanwhile acted in reliance on such acquiescence;²⁴ or by performance with knowledge of the facts;²⁵ or by payment under such contract;²⁶ or by receiving money thereunder,²⁷ or by bringing an action upon such contract.²⁸ Acquiescence for three years²⁹ tends to show ratification.

In some jurisdictions it is said that the principal must disavow within a reasonable time and that failure to disavow within such reasonable time operates as ratification.³⁰

The failure of the principal to disavow a contract of one who is not an agent or who is acting in excess of his authority, does not amount to ratification unless such failure on the part of the principal induces action in reliance upon the apparent validity of such transaction.³¹

If the unauthorized act of the agent amounts to a breach of the principal's contract the acquiescence of the principal will amount to a ratification, so that the breach will be treated as the breach of the principal.³² If an agent of a common carrier has taken a ticket from a passenger and has ejected him from the train, the refusal of the carrier to give relief against such wrongful act operates as a ratification.³³ Retention of a thing of no value as a deed made without principal's authority to a third person, is not ratification.³⁴ So refusal to receive the purchase money when tendered excuses the principal from making tender of the purchase notes.³⁵

²⁴ Coffin v. Planters' Cotton Co., 124 Ark. 360, 187 S. W. 309; Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800; Dewing v. Hutton, 48 W. Va. 576, 37 S. E. 670; Roundy v. Erspamer, 112 Wis. 181, 87 N. W. 1087.

²⁵ Klinck v. Chicago City Ry. Co., 262 Ill. 280, 52 L. R. A. (N.S.) 70, 104 N. E. 669.

²⁶ Swearingen v. Bulger, 117 Ark. 557, 176 S. W. 328; Horton v. Early, 39 Okla. 99, 47 L. R. A. (N.S.) 314, 134 Pac. 436; Mullaney v. Evans, 33 Or. 330, 54 Pac. 886; Anderson v. Surety Co., 196 Pa. St. 288, 46 Atl. 306.

²⁷ Des Moines National Bank v. Meredith, 114 Ia. 9, 86 N. W. 46; Dillaway v. Alden, 88 Me. 230, 33 Atl. 981; Milwaukee Land Co. v. Ruesink, 50 Mont. 489, 148 Pac. 396.

²⁸ Jones v. Blair, 137 Minn. 306, 163 N. W. 523.

²⁹ Cheshire Provident Institution v. Vandergrift, 1 Neb. (unoff.) 339, 95 N. W. 615.

³⁰ Moran v. Knights of Columbus, 46 Utah 397, 151 Pac. 353.

³¹ Short v. Metz Co., 165 Ky. 319, 176 S. W. 1144; Robbins v. Blanding, 87 Minn. 246, 91 N. W. 844.

³² Forrester v. Southern Pacific Co., 36 Nev. 247, 48 L. R. A. (N.S.) 1, 134 Pac. 753, 136 Pac. 705.

³³ Forrester v. Southern Pacific Co., 36 Nev. 247, 48 L. R. A. (N.S.) 1, 134 Pac. 753, 136 Pac. 705.

³⁴ Bromley v. Aday, 70 Ark. 351, 68 S. W. 32. (In this case the abstract, too, was retained.)

³⁵ Cole v. Baker, 16 S. D. 1, 91 N. W. 324.

The act of the principal in electing to treat the contract as valid as between himself and his agent has been held to operate as a ratification as between the principal and the adversary party.³⁶ The act of the principal in retaining a commission under an unauthorized purchase of stock in a bank for a third person makes the principal a stockholder in the bank during the time in which such stock stands in the principal's name.³⁷ The act of the principal in bringing an action against the agent to recover the proceeds of the sale of property operates as a ratification of such unauthorized sale as against the purchaser,³⁸ and prevents the principal from maintaining a subsequent suit in equity to cancel such conveyance.³⁹

To constitute ratification the money or property received must be received under the unauthorized contract. So if a lease made by an agent without authority is expressly repudiated by the principal, but he allows the tenant to remain from month to month at the rent fixed by the lease, this is not a ratification.⁴⁰ If X, the agent of A, a steamship company, issues a bill of lading before receiving the goods, and A repudiates the contract as soon as it learns of it, A's act in taking property from X to secure A against any liability upon such bill is not ratification.⁴¹ So if the principal claims damages from his agent for making an unauthorized contract, this does not amount to a ratification.⁴²

If the principal has not received anything under the unauthorized transaction except that to which he was entitled in any event, his retention of such benefits does not operate as a ratification.⁴³ If A has agreed to sell property to B, and B assumes to act as A's

³⁶ *Arzuaga v. Gonzalez*, 239 Fed. 60, 152 C. C. A. 110, L. R. A. 1917D, 697; *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

³⁷ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

³⁸ *Arzuaga v. Gonzalez*, 239 Fed. 60, 152 C. C. A. 110, L. R. A. 1917D, 697.

³⁹ *Arzuaga v. Gonzalez*, 239 Fed. 60, 152 C. C. A. 110, L. R. A. 1917D, 697.

⁴⁰ *Owens v. Swanton*, 25 Wash. 112, 64 Pac. 921.

⁴¹ *Lazard v. Transportation Co.*, 78 Md. 1, 26 Atl. 897.

⁴² *Jameson v. Colwell*, 25 Or. 199, 35 Pac. 245.

⁴³ *Iowa. Halligan v. Iowa Steam Laundry Co.*, 170 Ia. 582, 153 N. W. 212.

Kentucky. Short v. Metz Co., 165 Ky. 319, 176 S. W. 1144.

Massachusetts. Foote v. Cotting, 195 Mass. 55, 15 L. R. A. (N.S.) 693, 80 N. E. 600.

Michigan. Grover & Baker Sewing Machine Co. v. Polhemus, 34 Mich. 247.

New Mexico. Doran v. First National Bank, 22 N. M. 236, 160 Pac. 770.

Oklahoma. Bouquot v. Awad, 54 Okla. 55, 153 Pac. 1104.

agent in reselling such property to C, the fact that A retains money which C paid to B under such contract, and which B paid to A under the contract of sale, does not operate as ratification.⁴⁴ If B, who has A's money in his possession, is authorized to pay A's taxes, and B assumes to borrow money from C for such purposes, the fact that A retains the benefit of such payment does not operate as a ratification of such contract.⁴⁵ If B has assumed as A's agent to exchange A's realty for a transfer of personalty to B in B's name and for B's benefit, the act of A in maintaining an action of replevin against an officer who has seized such property in attachment proceedings is not a ratification.⁴⁶

The act of the principal in asserting rights to which he was entitled without any reference to the unauthorized acts of his agent does not operate as a ratification.⁴⁷ If B, who is the owner of certain stock, has deposited it with A, as collateral security, A is entitled to the proceeds thereof, and A's act in retaining such proceeds is not a ratification of B's fraudulent representations in selling such stock, although he assumes to act as A's agent.⁴⁸

The agent who entered into an unauthorized contract has no authority to ratify it unless such authority has in the meantime been conferred upon him by the principal.⁴⁹

If the conduct of another agent is relied upon as ratification, such other agent must himself have authority to perform or to ratify such act.⁵⁰

Whether the principal has done the acts which are relied upon as ratification is a question of fact.⁵¹ If the contract is one which, under the statute in force, requires written authority in the first instance, the ratification of the contract of an unauthorized agent

⁴⁴ *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

⁴⁵ *Foote v. Cotting*, 195 Mass. 55, 15 L. R. A. (N.S.) 693, 80 N. E. 600.

⁴⁶ *Bouquot v. Awad*, 54 Okla. 55, 153 Pac. 1104.

⁴⁷ *Doran v. First National Bank*, 22 N. M. 236, 160 Pac. 770.

⁴⁸ *Halligan v. Iowa Steam Laundry Co.*, 170 Ia. 582, 153 N. W. 212.

⁴⁹ *McAdow v. Kansas City Western Railway Co.*, 100 Kan. 309, L. R. A. 1917E, 539, 164 Pac. 177.

⁵⁰ *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148, 56 L. R. A. 564, 62 N. E. 592; *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759; *City Trust Co. v. Bankers' Mortgage Loan Co.*, 102 Neb. 532, 167 N. W. 785; *Behonan v. R. R.*, 70 N. H. 526, 49 Atl. 103.

⁵¹ *Ft. Morgan Reservoir & Irrigation Co. v. Sterling Irrigation Co.*, — Colo. —, 171 Pac. 72; *Western Investment & Land Co. v. First National Bank*, — Colo. —, 172 Pac. 6; *Spencer Heater Co. v. Abbott*, 91 N. J. L. 594, 104 Atl. 91.

must be in writing, and oral ratification is insufficient.⁵² If the contract is under seal and if the seal still has its common-law effect, the question of the sufficiency and effect of a ratification not under seal turns on the question whether the original instrument was one which was required to be under seal, or was one which might have been executed as a valid instrument without the use of a seal. If the instrument was one which could be executed only under seal, authority could be conferred upon the agent only by an instrument under seal,⁵³ and ratification not under seal would be inoperative.⁵⁴ If the original instrument was one which might be executed either under seal or without a seal, sealed authority was necessary in the first instance in order to enable the agent to bind his principal by an instrument under seal;⁵⁵ but, since such instrument might have been valid as a simple instrument, the seal which the agent has added may be treated as surplusage and such instrument may be ratified by authority not under seal.⁵⁶ While such ratification is sufficient,⁵⁷ the original sealed instrument and the unsealed ratification make the instrument the valid instrument of the principal, but in legal effect it is not under seal.⁵⁸ Such instrument may be the basis of an action of assumpsit, but it can not be declared on in debt as a writing obligatory.⁵⁹ If the instrument in question assumes to relate to realty, as to which it must be under seal, and also as to personalty, as to which a seal is not necessary, oral ratification may make such instrument valid as to personalty, but not as to realty.⁶⁰

⁵² *Hunter v. Cobe*, 84 Minn. 187, 87 N. W. 612; *Lithograph Building Co. v. Watt*, 96 O. S. 74, 117 N. E. 25; *Slotboom v. Simpson Lumber Co.*, 67 Or. 516, 135 Pac. 889, 136 Pac. 641.

It is said, however, that if the ratification is in writing, it is not necessary that it should be executed in the same form as would have been necessary in the original instrument. *Boyd Lumber Co. v. Mills*, 146 Ga. 794, L. R. A. 1918A, 1154, 92 S. E. 534.

⁵³ See § 1734.

⁵⁴ *Oxford v. Crow* [1893], 3 Ch. 535; *Pollard v. Gibbs*, 55 Ga. 45; *Ingraham v. Edwards*, 64 Ill. 528; *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521;

Smith v. Dickinson, 26 Tenn. (4 Humph.) 261, 44 Am. Dec. 306.

⁵⁵ See § 1734.

⁵⁶ *Lynch v. Smith*, 25 Colo. 103, 54 Pac. 634; *Palmer v. Seligman*, 77 Mich. 305, 43 N. W. 974; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

⁵⁷ *Lynch v. Smith*, 25 Colo. 103, 54 Pac. 634; *Palmer v. Seligman*, 77 Mich. 305, 43 N. W. 974; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

⁵⁸ *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

⁵⁹ *Ingraham v. Edwards*, 64 Ill. 528.

⁶⁰ *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

If the jurisdiction is one in which the common-law effect of the seal has been abolished,⁶¹ a sealed instrument which is executed by an unauthorized agent on behalf of his principal may be ratified by the principal either by oral ratification or by a written instrument which is not under seal.⁶²

§ 1766. Necessity of full knowledge of facts. In order to bind the principal absolutely and irrevocably a ratification must be made with full knowledge of the material facts.¹ If made without such knowledge the principal may avoid both the ratification and the original contract, at least as to those who have not in good faith acted upon the ratification.² On the one hand, the principal is bound to act not only with reference to his actual knowledge, but also with reference to knowledge which he would have obtained upon proper inquiry if he had actual knowledge of facts which would have put a man of ordinary intelligence upon an inquiry

⁶¹ See § 1156 and § 1166.

⁶² *McLeod v. Morrison*, 66 Wash. 683, 38 L. R. A. (N.S.) 783, 120 Pac. 528.

¹ *Arkansas*. *Brunswick-Balke-Collander Co. v. Faulkner*, 131 Ark. 594, 199 S. W. 904.

Kentucky. *War Fork Land Co. v. Marcum*, 180 Ky. 352, 202 S. W. 668.

Montana. *First State Bank v. Lang*, 65 Mont. 146, 174 Pac. 597.

New Jersey. *Spencer Heater Co. v. Abbott*, 91 N. J. L. 594, 104 Atl. 91.

Oklahoma. *First National Bank v. Brewer*, — Okla. —, 174 Pac. 1077.

Oregon. *De War v. First National Bank*, 88 Or. 541, 171 Pac. 1106.

² *England*. *Marsh v. Joseph* [1897], 1 Ch. 213.

United States. *Bennecke v. Ins. Co.*, 105 U. S. 355, 26 L. ed. 990; *Bell v. Cunningham*, 28 U. S. (3 Pet.) 69, 7 L. ed. 608.

Alabama. *Wheeler v. McGuire*, 86 Ala. 398, 2 L. R. A. 808, 5 So. 190.

Arizona. *Brutinel v. Nygren*, 17 Ariz. 491, L. R. A. —, 154 Pac. 1042.

Arkansas. *Martin v. Hickman*, 64 Ark. 217, 41 S. W. 852; *Coffin v. Planters' Cotton Co.*, 124 Ark. 360, 187 S. W.

309; *Brunswick-Balke-Collander Co. v. Faulkner*, 131 Ark. 594, 199 S. W. 904.

California. *Ballard v. Nye* (Cal.), 69 Pac. 481; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232, 57 Pac. 980.

Colorado. *Dean v. Hipp*, — Colo. App. —, 66 Pac. 804.

Florida. *Oxford Lake Line v. Bank*, 40 Fla. 349, 24 So. 480.

Georgia. *Ludden, etc., Music House v. McDonald*, 117 Ga. 60, 43 S. E. 425.

Idaho. *Blackwell v. Kercheval*, 29 Ida. 473, 160 Pac. 741.

Iowa. *Meyer v. Wegener*, 114 Ia. 74, 86 N. W. 49.

Kentucky. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144; *Geary v. Taylor*, 166 Ky. 501, 179 S. W. 426; *War Fork Land Co. v. Marcum*, 180 Ky. 352, 202 S. W. 668.

Maine. *Gould v. Maine Farmers' Mutual Fire Insurance Co.*, 114 Me. 416, 96 Atl. 732.

Massachusetts. *Combs v. Scott*, 94 Mass. (12 All.) 493; *Thatcher v. Pray*, 113 Mass. 291, 18 Am. Rep. 480; *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345; *Worcester v. Cook*, 220 Mass.

which would have revealed the truth.³ On the other hand, the principal is not charged with constructive notice of the unauthorized acts of the agent.⁴ If he were charged with such notice he would always be liable for unauthorized acts and discussion of the scope of the agent's authority or of estoppel or ratification would be unnecessary.⁵ If the principal elects to ratify the act of his agent, knowing that he is ignorant of many of the facts of the case, he is bound by such election.⁶ The conduct of the principal does not amount to ratification if he does not know that the person who assumed to bind him as agent was acting in the capacity of agent.⁷

A sale is ratified by the principal's receipt of money which he had no reason to think came from any other source except the sale

539, 108 N. E. 511; *Smith v. Abbott*, 221 Mass. 326, 109 N. E. 190; *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

Michigan. *Leonardson v. Troy Tp.*, 125 Mich. 209, 84 N. W. 63; *Acorn Refining Co. v. Knowlson*, 188 Mich. 123, 154 N. W. 11.

Minnesota. *Prentiss v. Nelson*, 69 Minn. 496, 72 N. W. 831; *Hunt v. Agricultural Works*, 69 Minn. 539, 72 N. W. 813; *Godfrey v. Ins. Co.*, 70 Minn. 224, 73 N. W. 1; *Gund Brewing Co. v. Tourtellotte*, 108 Minn. 71, 29 L. R. A. (N.S.) 210, 121 N. W. 417.

Montana. *First State Bank v. Lang*, 55 Mont. 146, 174 Pac. 597.

Nebraska. *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478, 71 N. W. 724; *Henry, etc., Co. v. Halter*, 58 Neb. 685, 79 N. W. 616; *Bullard v. DeGraff*, 59 Neb. 783, 82 N. W. 4.

New York. *Bierman v. Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636, 37 L. R. A. 799, 45 N. E. 856.

North Dakota. *Martinson v. Kershner*, 32 N. D. 46, 155 N. W. 37.

Oklahoma. *Stock Exchange Bank v. Williamson*, 6 Okla. 348, 50 Pac. 93; *Gaar v. Rogers*, 46 Okla. 67, 148 Pac. 161; *First National Bank v. Brewer*, — Okla. —, 174 Pac. 1077.

Oregon. *Conser v. Coleman*, 31 Or. 550, 50 Pac. 914; *Grice v. Oregon-Wash-*

ington R. & Navigation Co., 78 Or. 17, 152 Pac. 509 [adhering on rehearing, to *Grice v. Oregon-Washington R. & Navigation Co.*, 150 Pac. 862]; *De War v. First National Bank*, 88 Or. 541, 171 Pac. 1106; *Haines v. First National Bank*, 89 Or. 42, 172 Pac. 505.

Pennsylvania. *Shields v. Hitchman*, 251 Pa. St. 455, 96 Atl. 1039.

Tennessee. *Somerville v. Gullett Gin Co.*, 137 Tenn. 509, 194 S. W. 576.

Texas. *American National Bank v. Cruger*, 91 Tex. 446, 44 S. W. 278.

Utah. *Moyle v. Society*, 16 Utah 69, 50 Pac. 806.

Virginia. *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, L. R. A. 1917F, 303, 71 S. E. 626.

Washington. *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499.

Wisconsin. *Knapp v. Smith*, 97 Wis. 111, 72 N. W. 349.

³ *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

⁴ *Acorn Refining Co. v. Knowlson*, 188 Mich. 123, 154 N. W. 11.

⁵ *Acorn Refining Co. v. Knowlson*, 188 Mich. 123, 154 N. W. 11.

⁶ *Western Investment & Land Co. v. First National Bank*, — Colo. —, 172 Pac. 6.

⁷ *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

thus ratified;⁸ but mere delivery of goods by the principal according to the terms of the contract made by his agent would not be a ratification unless the principal knew of the contract,⁹ as where the goods had been sold with an unauthorized warranty,¹⁰ or under unauthorized representations.¹¹ The fact that the seller attempts to put a machine in such a condition as to satisfy the needs of the purchaser, does not amount to a ratification of an oral warranty given by the agent of which the seller had no notice.¹² If a claim agent agrees to pay one injured by the fault of the road a certain sum of money and employment for life in settlement of his claim, payment of such sum and employment of such person by the railroad for a limited time is not ratification of the contract for permanent employment unless known to the railroad.¹³

The act of a principal in accepting benefits under an unauthorized contract of an agent does not amount to ratification, if he does not know from what source such benefits come.¹⁴ The fact that the principal has accepted certain money which is due to him from the agent does not amount to a ratification of an unauthorized contract unknown to the principal under which the agent borrowed such money.¹⁵ A principal who does not know the details of a contract of sale which his agent has made on his behalf does not, by executing and delivering a deed, ratify an unauthorized covenant in such contract to the effect that the purchasers shall be entitled to the rent of such realty for a certain period prior to the conveyance thereof.¹⁶ Failure on the part of a shipper to repudiate an unauthorized contract for a limitation of liability does not amount to ratification unless it is shown that he knows of such limitation on the common-law liability of the carrier in time to have repudiated such contract.¹⁷

⁸ *Columbia, etc., Co. v. Tinsley* (Ky.), 60 S. W. 10.

⁹ *Estrella Vineyard Co. v. Butler*, 125 Cal. 232, 57 Pac. 980.

¹⁰ *Bierman v. Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636, 37 L. R. A. 799, 45 N. E. 856.

¹¹ *Worcester v. Cook*, 220 Mass. 539, 106 N. E. 511.

¹² *Somerville v. Gullett Gin Co.*, 137 Tenn. 509, 194 S. W. 576.

¹³ *Bohanan v. R. R.*, 70 N. H. 526, 49 Atl. 103.

¹⁴ *Blackwell v. Kercheval*, 29 Ida. 473, 160 Pac. 741; *Short v. Metz Co.*,

165 Ky. 319, 176 S. W. 1144; *Foot v. Cotting*, 195 Mass. 55, 15 L. R. A. (N.S.) 693, 80 N. E. 600; *Calhoun v. McCrory Piano & Realty Co.*, 129 Tenn. 651, 52 L. R. A. (N.S.) 571, 168 S. W. 149.

¹⁵ *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

¹⁶ *Gund Brewing Co. v. Tourtellotte*, 108 Minn. 71, 29 L. R. A. (N.S.) 210, 121 N. W. 417.

¹⁷ *Grice v. Oregon-Washington R. & Navigation Co.*, 78 Or. 17, 152 Pac. 509 [adhering on rehearing to 150 Pac. 862].

Mistake as to a collateral contract made with other parties as a means of performing the contract ratified, does not avoid a ratification.¹⁰

§ 1767. Partial ratification impossible. The principal must affirm or disaffirm the contract as an entirety. He can not affirm the part beneficial to himself and disaffirm the rest.¹ If he receives and retains property thereunder, this amounts to a ratification of the entire contract, even if he expressly declares his intention of

¹⁰ *Brong v. Spence*, 56 Neb. 638, 77 N. W. 54.

¹ *United States. Rader v. Maddox*, 150 U. S. 128, 38 L. ed. 1025; *Zimmern v. Blount*, 238 Fed. 740, 151 C. C. A. 590.

Georgia. Atlanta Buggy Co. v. Hess Spring & Axle Co., 124 Ga. 338, 4 L. R. A. (N.S.) 431, 52 S. E. 613; *Dolvin v. American Harrow Co.*, 125 Ga. 699, 28 L. R. A. (N.S.) 785, 54 S. E. 706.

Illinois. Cochran v. Chitwood, 59 Ill. 53.

Indiana. Travelers' Ins. Co. v. Pat-ten, 119 Ind. 416, 20 N. E. 790; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279, 64 N. E. 647, 63 N. E. 245.

Idaho. Burke, etc., Co. v. Wells, 7 Ida. 42, 60 Pac. 87.

Iowa. Sullivan v. O'Callaghan, — Ia. —, 166 N. W. 74.

Kansas. Rush v. Leavitt, 99 Kan. 498, 162 Pac. 310.

Kentucky. Western Mfg. Co. v. Cotton, 126 Ky. 749, 12 L. R. A. (N.S.) 427, 104 S. W. 758.

Massachusetts. Coolidge v. Smith, 129 Mass. 554; *Porter v. Oceanic S. S. Co.*, 223 Mass. 224, 111 N. E. 864.

Michigan. St. Johns Mfg. Co. v. Munger, 106 Mich. 90, 58 Am. St. Rep. 468, 29 L. R. A. 63, 64 N. W. 3; *Dodge v. Tullock*, 110 Mich. 480, 68 N. W. 239.

Minnesota. King v. Lumber Co., 80 Minn. 274, 83 N. W. 170; *Jones v. Blair*, 137 Minn. 306, 163 N. W. 523; *Carlson v. Burg (Minn.)*, 162 N. W. 889.

Nebraska. Farmer's, etc., Bank v. Bank, 49 Neb. 379, 68 N. W. 488; *Osborn Co. v. Jordan*, 52 Neb. 465, 72 N. W. 479; *Martin v. Humphrey*, 58 Neb. 414, 78 N. W. 715; *German National Bank v. Bank*, 59 Neb. 7, 80 N. W. 48; *Citizens' State Bank v. Pence*, 59 Neb. 579, 81 N. W. 623; *Hall v. Hopper*, 64 Neb. 633, 90 N. W. 549; *Hinman v. Mfg. Co.*, 65 Neb. 187, 90 N. W. 934; *Nye-Schneider-Fowler Grain Co. v. Hopkins*, 99 Neb. 244, 155 N. W. 1097.

New Mexico. Lawrence Coal Co. v. Shanklin, — N. M. —, 183 Pac. 435.

North Carolina. Anderson v. American Suburban Corporation, 155 N. Car. 131, 36 L. R. A. (N.S.) 896, 71 S. E. 221.

Oregon. McLeod v. Despain, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492; *Columbia County v. Consolidated Contract Co.*, 83 Or. 251, 163 Pac. 438; *Ulbrand v. Bennett*, 83 Or. 557, 163 Pac. 445.

Pennsylvania. Pennsylvania, etc., Co. v. Cook, 123 Pa. St. 170, 16 Atl. 762; *Schultheis v. Sellers*, 223 Pa. St. 513, 22 L. R. A. (N.S.) 1210, 72 Atl. 887.

Tennessee. Fort v. Coker, 58 Tenn. (11 Heisk.) 579.

West Virginia. Lane v. Black, 21 W. Va. 617; *Lowance v. Johnson*, 75 W. Va. 784, 84 S. E. 937.

Wisconsin. Strasser v. Conklin, 54 Wis. 102, 11 N. W. 254; *Gnat v. Westchester Fire Insurance Co.*, 167 Wis. 274, 167 N. W. 250.

avoiding his liability.² A principal can not retain land bought by his agent and avoid rescission for the fraud, constructive fraud or undue influence of the agent.³ If a principal with knowledge of the facts elects to enforce a contract made on his behalf by an agent, the principal can not repudiate his agent's unauthorized act in accepting a part payment from the purchaser.⁴ If the principal wishes to enforce an unauthorized contract of sale made on his behalf by an agent, he can not repudiate the representations,⁵ guarantees,⁶ or collateral promises made as a part of such contract of sale.⁷ So a client who accepts and retains the proceeds of a judgment can not claim ignorance of the terms of the decree or want of authority in the attorney to enter it in such form.⁸ Receipt of part of the property to be delivered under a contract is a ratification of the entire contract.⁹ The principal can not enforce a note for an insurance policy taken by his agent and repudiate the agreement for rescission at the option of the maker under which such note was given.¹⁰ So the principal can not enforce a loan and

² **Kansas.** *Rush v. Leavitt*, 99 Kan. 498, 162 Pac. 310.

Kentucky. *Henry Vogt Machine Co. v. Lingenfelter* (Ky.), 62 S. W. 499.

Louisiana. *Boudreaux v. Feibleman*, 105 La. 401, 29 So. 881.

Minnesota. *Coggins v. Higbie*, 83 Minn. 83, 85 N. W. 930.

Nebraska. *Plano Mfg. Co. v. Nordstorm*, 63 Neb. 123, 88 N. W. 164.

Oregon. *Ulbrand v. Bennett*, 83 Or. 557, 163 Pac. 445.

Wisconsin. *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980.

³ *Nye-Schneider-Fowler Grain Co. v. Hopkins*, 99 Neb. 244, 155 N. W. 1097; *Stephens v. Ozbourne*, 107 Tenn. 572, 89 Am. St. Rep. 957, 64 S. W. 902; *Miranovitz v. Gee*, 163 Wis. 246, 157 N. W. 790.

⁴ *Jones v. Blair*, 137 Minn. 306, 163 N. W. 523.

⁵ **United States.** *Zimmern v. Blount*, 238 Fed. 740, 151 C. C. A. 590.

Kansas. *Rush v. Leavitt*, 99 Kan. 498, 162 Pac. 310.

Massachusetts. *Attorney General v.*

Onset Bay Grover Association, 221 Mass. 342, 109 N. E. 165.

Minnesota. *Carlson v. Burg* (Minn.), 162 N. W. 889.

Oregon. *Bank v. Walch*, 76 Or. 272, 147 Pac. 534.

Pennsylvania. *Schultheis v. Sellers*, 223 Pa. St. 513, 22 L. R. A. (N.S.) 1210, 72 Atl. 887.

⁶ *Capital Security Co. v. Owen*, 196 Ala. 385, 72 So. 8.

⁷ *Dolvin v. American Harrow Co.*, 125 Ga. 699, 28 L. R. A. (N.S.) 785, 54 S. E. 706; *Anderson v. American Suburban Corporation*, 155 N. Car. 131, 36 L. R. A. (N.S.) 896, 71 S. E. 221.

⁸ *Julier v. Julier*, 62 O. S. 90, 78 Am. St. Rep. 697, 56 N. E. 661. (In this case the decree was for alimony and barred the dower of the innocent and prevailing plaintiff in return for which she received a larger allowance of alimony.)

⁹ *Daniels v. Brodie*, 54 Ark. 216, 11 L. R. A. 81, 15 S. W. 467.

¹⁰ *Andrews v. Robertson*, 111 Wis. 334, 54 L. R. A. 673, 87 N. W. 190.

repudiate liability for usury.¹¹ A shipper can not insist that his goods be transported by a carrier under a contract made through his agent, and at the same time repudiate the terms of the contract under which the shipper accepted the goods.¹² So a principal can not retain property taken by his agent in payment of a debt due the principal and repudiate the contract under which it was given.¹³ A principal can not set up a release which his agent has obtained and at the same time repudiate the contract under which it was obtained.¹⁴ But if the agent has made two or more independent contracts, the principal may affirm one and disaffirm the other.¹⁵

§ 1768. Necessity of acting as agent. The doctrine of ratification in agency applies only to the contracts of one who is an agent or who claims to act as agent. A contract made by one who is not an agent and does not claim to act as agent can not be ratified.¹ To permit ratification under such circumstances would be to permit a person to whom an offer was not made to force a contract upon a party who did not mean to deal with him. The fact that the party who has received benefits under such a contract retains

¹¹ Robinson v. Blaker, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845.

¹² Porter v. Ocean S. S. Co., 223 Mass. 224, 111 N. E. 864.

¹³ Daniels v. Brodie, 54 Ark. 216, 11 L. R. A. 81, 15 S. W. 467; Sullivan v. O'Callaghan, — Ia. —, 166 N. W. 74.

¹⁴ Columbia County v. Consolidated Contract Co., 83 Or. 251, 163 Pac. 438.

¹⁵ Schollay v. Drug Co., 17 Colo. App. 126, 67 Pac. 182.

¹ England. Keighley v. Durant [1901], App. Cas. 240 [reversing, Durant v. Roberts (1900), 1 Q. B. 629]; Keighley v. Durant [1901], A. C. 240.

Canada. Fraser v. Sweet, 13 Manitoba L. Rep. 147, 2 B. R. C. 254.

Illinois. Merrit v. Kewanee, 175 Ill. 537, 51 N. E. 867.

Idaho. Blackwell v. Kercheval, 29 Ida. 473, 160 Pac. 741.

Kentucky. Short v. Metz Co., 165 Ky. 319, 176 S. W. 1144.

Maine. Gould v. Maine Farmers' Mutual Fire Insurance Co., 114 Me. 416, 96 Atl. 732.

New Jersey. Schlesinger v. Forest Products Co., 78 N. J. L. 637, 138 Am. St. Rep. 627, 30 L. R. A. (N.S.) 347, 76 Atl. 1024; Brown Realty Co. v. Myers (N. J.), 98 Atl. 310.

North Carolina. Rawlings v. Neal, 126 N. Car. 271, 35 S. E. 597.

Ohio. Williams v. Sterns, 59 O. S. 23, 51 N. E. 439.

Oklahoma. Madill State Bank v. Weaver (Okla.), 154 Pac. 478.

Oregon. Backhaus v. Buells, 43 Or. 558, 73 Pac. 342.

South Dakota. Minder & Jorgenson Land Co., v. Brustuen, 24 S. D. 537, 124 N. W. 723, 127 N. W. 546.

Virginia. Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368, 122 Am. St. Rep. 860, 13 Am. & Eng. Ann. Cas. 277, 58 S. E. 561; Security Loan & Trust Co. v. Powell, 119 Va. 231, 89 S. E. 91.

Wisconsin. Shuman v. Steinel, 129 Wis. 422, 116 Am. St. Rep. 961, 7 L. R. A. (N.S.) 1048, 109 N. W. 74.

such benefits does not amount to ratification.² If a mortgagee effects insurance upon the mortgaged property to protect his own interest and he does not assume to act as the agent of the mortgagor, the mortgagor's act in endorsing over to the mortgagee a check which the insurance company made payable to the mortgagor is not a ratification of such insurance, and accordingly it does not render invalid other insurance which contained a condition against subsequent insurance.³ Since a forger does not assume to act as agent, it follows, by the better reasoning, that a forgery can not be ratified,⁴ though there is authority to the contrary.⁵ If the party whose name is forged to a contract receives money thereunder, he is estopped to deny his liability.⁶ However, if an agent forges his principal's signature to a certificate of stock, receives the money therefor, deposits it to his principal's account, and then embezzles it, such receipt of money is not a ratification by the principal.⁷ A principal who accepts the benefits of a contract made for him by a duly authorized agent, does not incur liability for the representations of a third person made to the adversary party without the knowledge of the agent.⁸ If an agent does not disclose the fact of his agency to the person with whom he deals, the principal may, nevertheless, enforce the contract,⁹ or may be held liable thereon.¹⁰ So if one who is really an agent does not disclose the fact of his agency and exceeds his authority, his principal may ratify such contract.¹¹

§ 1769. Effect of ratification—Adversary party. If the principal does not ratify the unauthorized contract, no liability attaches to the adversary party.¹ The adversary party may therefore re-

² *Blackwell v. Kercheval*, 29 Ida. 473, 160 Pac. 741.

³ *Gould v. Maine Farmers' Mutual Fire Insurance Co.*, 114 Me. 416, 96 Atl. 732.

⁴ *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606; *Owsley v. Philips*, 78 Ky. 517, 39 Am. Rep. 258; *Workman v. Wright*, 33 O. S. 405, 31 Am. Rep. 546; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702.

⁵ *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Central National Bank v. Copp*, 184 Mass. 328, 68

N. E. 334; *Commercial Bank v. Warren*, 15 N. Y. 577.

⁶ *Campbell v. Campbell*, 133 Cal. 33, 65 Pac. 134. (Forgery of a note.)

⁷ *Fay v. Slaughter*, 194 Ill. 157, 88 Am. St. Rep. 148, 56 L. R. A. 564, 62 N. E. 592.

⁸ *Tecumseh v. Banking House*, 63 Neb. 163, 57 L. R. A. 811, 88 N. W. 186.

⁹ See §§ 2208 and 2209.

¹⁰ See §§ 2208 and 2210.

¹¹ *Hayward v. Langmaid*, 181 Mass. 426, 63 N. E. 912.

¹ *Davis v. Walker*, 131 Ala. 204, 31 So. 554; *Shuttleworth v. Development*

cover from the agent the amount paid by such adversary party to the agent for an option which the agent had no authority to give.² If a written contract has been entered into by an unauthorized agent, the adversary party may have such contract canceled in equity if the principal does not ratify.³

If the adversary party acquiesces in the principal's ratification the contract is binding upon both.⁴ If the agent has made an authorized contract and an unauthorized agreement, giving to the adversary party the right to avoid the contract on the happening of certain events, and the principal accepts the contract without repudiating the condition, he is bound thereby.⁵

The difficulties in this question are found in cases in which the principal attempts to ratify and the adversary party attempts to repudiate. The rule that the principal is not bound by the unauthorized act of his agent is based upon the lack of assent of the principal to such a contract and not, as in the case of the infant or the insane, upon his lack of capacity by reason of which special protection must be given to him for considerations of public policy. Accordingly, the question of the validity of such an unauthorized contract as against the adversary party, whether before or after ratification, on the part of the principal, is one which apparently should not be controlled by principles analogous to those which control the contract of the infant or the insane person. Considerations of public policy give to the infant or to the insane person the right to avoid the contract while no such reasons exist for giving such right to the adversary party. In a contract entered into through an unauthorized agent there are no special reasons for protecting the principal in preference to the adversary party, and in executory contracts, at least, the adversary party has not received what he bargained for, which is a valid and enforceable promise which is binding upon the principal. The divergence of authority upon one phase of this question is caused largely by the attempt of some courts to apply to unauthorized contracts of agents the same general principles which apply to contracts of infants or to contracts of the insane.

If the contract is not executory on the part of the principal, and if the adversary party has in fact received the benefit for which

Co. (Ky.), 61 S. W. 1012; *Kooman v. De Jonge*, 186 Mich. 292, 152 N. W. 1016.

² *Kooman v. De Jonge*, 186 Mich. 292, 152 N. W. 1016.

³ *Board of Trade v. De Bruyn*, 138 Mich. 187, 101 N. W. 262.

⁴ *Soames v. Spencer*, 1 Dowl. & R. 32.

⁵ *Block v. Taylor*, — Mich. —, 168 N. W. 536.

he has bargained, it seems to be held that the principal can affirm such contract and enforce it against the adversary party.⁶ Thus where unauthorized loans have been made by state agents evidenced by notes, it has been held that the state may affirm the loan and enforce the notes.⁷

If the contract is executory on the part of the principal and if the adversary party has not received the consideration for which he bargained, which is a valid and enforceable promise on the part of the principal, it would seem that the adversary party ought to be free to avoid all liability up to ratification either on the ground of lack of consideration or on the ground of mistake; while after ratification on the part of the principal it would seem that the adversary party had received everything for which he had bargained, and accordingly he ought not to be allowed to avoid liability. This view has been adopted by a number of courts, and it has been held that the adversary party may avoid before the principal ratifies, and that if he does so, the subsequent ratification of the principal can not impose any liability upon the adversary party.⁸ Where the principal, A, had given oral authority to an agent, B, to sell realty, which under the local statute was invalid because not in writing, and B makes a contract for the sale of such realty to X, X may disaffirm before A ratifies, and in such case he will not be bound, even if A subsequently attempts to ratify such contract.⁹ Under this theory, on the other hand, if the principal ratifies in a reasonable time and the adversary party has not exercised his right to avoid such contract before the principal has ratified it, the adversary party can not thereafter avoid liability.¹⁰ The result under this theory is the same as if the adversary party had made an offer to the principal through the principal's agent which the principal accepted upon ratification but which might be withdrawn by the adversary party until ratification.

In other jurisdictions, however, the courts have attempted to treat such unauthorized contracts as they would treat contracts

⁶ *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395, 49 N. W. 259.

⁷ *State v. Shaw*, 28 Ia. 67; *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395, 49 N. W. 259.

⁸ *Salfeld v. Sutter County Land Improvement & Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105; *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091.

⁹ *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091.

¹⁰ *Owens v. National Hatchet Co.* (Ia.), 121 N. W. 1076; *McClintock v. South Penn. Oil Co.*, 146 Pa. St. 144, 28 Am. St. Rep. 785, 23 Atl. 211; *Breithaupt v. Thurmond*, 3 Rich. L. R. (S. Car.) 216.

made by an infant or an insane person, and they have held that only the principal has the right to avoid such contract, at least until a reasonable time has elapsed within which he could investigate and elect to affirm or disaffirm. Under this theory the principal may affirm the contract within a reasonable time and thus render it valid and enforceable against the adversary party, although the adversary party has attempted to repudiate it before the principal has ratified it.¹¹ Thus where an insurance agent inserted unauthorized clauses in the policy, it was held that if the insurance company ratified the contract the other party could not avoid it.¹²

In some jurisdictions a third theory has been adopted and it has been held that the adversary party may avoid liability even though the principal has ratified the contract within a reasonable time and although the adversary party has thus received everything for which he bargained.¹³ In jurisdictions in which a contract consisting of executory promises, in which the agent of one party has exceeded his authority, is held not to be binding on the principal and therefore no consideration for the promise of the adversary party, ratification by the principal does not make the contract binding on the adversary party unless he acquiesces therein after such ratification.¹⁴ The courts which adopt this theory do so upon the ground that the contract, if binding at all, must be binding upon both parties from the moment that it is executed, and that if it is not binding at that time the subsequent act of one party with-

¹¹ *Tiedemann v. Ledermann Freres* [1899], 2 Q. B. 66; *Bolton Partners v. Lambert*, L. R. 41 Ch. D. 295; *Andrews v. Aetna Life Insurance Co.*, 92 N. Y. 596.

¹² *Andrews v. Ins. Co.*, 92 N. Y. 596. "So long as the condition of the parties is unchanged he can not be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid." *Andrews v. Ins. Co.*, 92 N. Y. 596, 604. In this case ratification was made as soon as the clause in question was called to the attention of the company; but such attention was called thereto by the adversary party's attempt to avoid the contract.

¹³ *Illinois. Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322.

Louisiana. Union Garment Co. v. Newburger, 124 La. 820, 50 So. 740.

New York. Townsend v. Corning, 23 Wend. (N. Y.) 435. (A case of a sealed instrument, however; signed by the name of the agent alone.)

Oregon. Pacific Mill Co. v. Inman, 50 Or. 22, 90 Pac. 1099.

Wisconsin. Dodge v. Hopkins, 14 Wis. 630; *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110.

¹⁴ *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110. Such a contract is said to be "mere waste paper." *Calvary Baptist Church v. Dart*, 68 S. Car. 221, 47 S. E. 66.

out the assent of the other can not turn it into a valid and enforceable contract.¹⁶ This theory has occasionally been invoked where the original contract was not made by one who purported to act as agent on behalf of the party who attempted to ratify it,¹⁶ and where, accordingly, the doctrine of ratification can not apply.¹⁷ They do not consider the unauthorized contract as amounting even to an offer from the adversary party to the principal through the latter's agent; and indeed the adversary party does not intend to make an offer. He intends to be bound when the contract is made.

Up to this point we have been considering cases which upon ratification the adversary party received everything for which he had bargained. A different principle applies where the ratification of the principal would not give the adversary party that for which he had bargained.¹⁸ In the latter case, the ratification by the principal can not render the contract enforceable as against the adversary party, since ratification and performance will not give him the consideration for which he stipulated.¹⁹ An undisclosed principal can not ratify and affirm a contract made by his agent for the sale of land which contains a personal covenant entered into by the agent to warrant the title.²⁰

§ 1770. Effect of ratification—Third persons. Ratification can not destroy intervening rights of third persons.¹ Thus ratification can not avoid an intervening chattel mortgage,² or attachment.³ So an unauthorized assignment was made, the alleged assignee sued on the claim, and subsequently such assignment was ratified. It was held that such ratification could not avail the assignee in that action as against the original debtor, who had objected to the

¹⁶ *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110.

¹⁶ *Security Loan & Trust Co. v. Powell*, 119 Va. 231, 89 S. E. 91.

¹⁷ See § 1768.

¹⁸ *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L. R. A. (N.S.) 156, 44 So. 642.

¹⁸ *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L. R. A. (N.S.) 156, 44 So. 642.

²⁰ *Birmingham Matinee Club v. Mc-*

Carty, 152 Ala. 571, 13 L. R. A. (N.S.) 156, 44 So. 642.

¹ *Wittenbrock v. Bellmer*, 57 Cal. 12; *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; *Lampson v. Arnold*, 19 Ia. 479; *People, ex rel., v. Board of Education*, 217 N. Y. 470, 112 N. E. 167; *Clendenning v. Hawk*, 10 N. D. 90, 86 N. W. 114.

Contra, Farrand Co. v. Huston, 110 Miss. 40, 69 So. 997.

² *Clendenning v. Hawk*, 10 N. D. 90, 86 N. W. 114.

³ *Pollock v. Cohen*, 32 O. S. 514.

validity of such assignment.⁴ On the other hand, if an affidavit claiming a right of property in goods which had been taken on execution is made by an unauthorized agent, the owner may ratify such act and the affidavit will be regarded as valid from the beginning.⁵

§ 1771. Liability of agent to adversary party—Contract authorized. An agent acting within the scope of his authority is not liable to third persons upon a contract made by him as agent for a principal whom he discloses, which does not by its terms purport to bind the agent personally,¹ as for the sale of a forged note,² or for receiving money which he has not paid over to his principal,³ or for money which he has paid over to his principal.⁴ An auctioneer who purports to act merely as agent for his principal is not liable for damages by reason of the fact that the principal refuses

⁴Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 556.

⁵Farrand Co. v. Huston, 110 Miss. 40, 69 So. 997.

¹England. Mainprice v. Westley, 6 B. & S. 420; Plumpton v. Burkinshaw [1908], 2 K. B. 572.

United States. Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Baldwin v. Black, 119 U. S. 643, 30 L. ed. 530; Monticillo Bank v. Bostwick, 71 Fed. 641.

Alabama. Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105, 22 So. 431; Gulf, etc., Co. v. R. R. Co., 121 Ala. 621, 25 So. 579.

Arkansas. Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575, 164 S. W. 289.

California. Merrill v. Williams, 63 Cal. 70; Tevis v. Savage, 130 Cal. 411, 62 Pac. 611.

Illinois. Stevenson v. Mathers, 67 Ill. 123.

Iowa. Doolittle v. Murray, 134 Ia. 536, 111 N. W. 999.

Kentucky. Lewis v. Harris, 61 Ky. (4 Met.) 333.

Massachusetts. Worthington v. Cowles, 112 Mass. 30.

Michigan. Mercer v. Leihy, 139 Mich. 447, 102 N. W. 972.

Missouri. Huston v. Tyler, 140 Mo. 252, 41 S. W. 795, 36 S. W. 654.

New Hampshire. Sleeper v. Weymouth, 26 N. H. 34.

New York. Hall v. Lauderdale, 40 N. Y. 70; American National Bank v. Wheelock, 82 N. Y. 118; Jones v. Gould, 200 N. Y. 18, 92 N. E. 1071.

Pennsylvania. Kurzawski v. Schneider, 179 Pa. St. 500, 36 Atl. 319.

Tennessee. Siler v. Perkins, 126 Tenn. 380, 47 L. R. A. (N.S.) 232, 149 S. W. 1060.

Washington. Wilson v. Wold, 21 Wash. 398, 75 Am. St. Rep. 846, 58 Pac. 223.

West Virginia. Johnson v. Welch, 42 W. Va. 18, 24 S. E. 585.

Wisconsin. Moody, etc., Co. v. Church, 99 Wis. 49 [sub nomine, Moody, etc., Co. v. Leek, 74 N. W. 572].

²Bailey v. Galbreath, 100 Tenn. 599, 47 S. W. 84.

³Huffman v. Newman, 55 Neb. 713, 76 N. W. 409. (The third person suing to recover it.)

⁴Wilson v. Wold, 21 Wash. 398, 75 Am. St. Rep. 846, 58 Pac. 223.

to sell the property to the highest bidder, although such property was offered "for peremptory sale by auction."⁵

§ 1772. Liability of agent—Contract not authorized—Adversary not misled. If the lack of authority of the agent is actually known to the adversary party,¹ as where the agent discloses his lack of authority and signs the name of his principal,² or if his powers are restricted by law,³ he is not liable to the adversary party unless he has executed the contract in such a way as to incur personal liability. If the capacity of the principal to make a contract is fixed by law, an agent who contracts within the limits of the authority which the principal has attempted to confer upon him does not become liable personally to the adversary party who knows all the material facts, although such contract is not binding upon the principal, since it exceeds his legal capacity.⁴ A contract entered into by an agent on behalf of an executor to sell land belonging to the estate is not a personal obligation of the agent, although the estate is not bound thereby.⁵ The known agent of a corporation who is authorized by it to make ultra vires contracts incurs no personal liability thereby.⁶

§ 1773. Liability of agent—Contract not authorized—Adversary misled. If the powers of the alleged agent are not fixed by law and if he enters into a contract in excess of his authority, knowing the facts which render such contract unauthorized, with one who believes that such agent has authority to represent his principal in making such contract, he is liable to the adversary party who is thus misled,¹ subject to the effect of such subsequent

⁵ *Mainprice v. Westley*, 6 B. & S. 420.

¹ *Kansas National Bank v. Bay*, 62 Kan. 692, 54 L. R. A. 408, 64 Pac. 596; *Martin v. Schuermeyer*, 30 Okla. 735, 121 Pac. 248; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

² *Kansas National Bank v. Bay*, 62 Kan. 692, 54 L. R. A. 408, 64 Pac. 596.

³ *Hedgecock v. Tate*, 168 N. Car. 660, 85 S. E. 34.

⁴ *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

⁵ *Hedgecock v. Tate*, 168 N. Car. 660, 85 S. E. 34.

⁶ *Thilmany v. Bag Co.*, 108 Ia. 357,

75 Am. St. Rep. 259, 79 N. W. 261; *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

¹ *Arkansas*. *Hill v. First National Bank*, 129 Ark. 265, 195 S. W. 678.

Illinois. *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480.

Indiana. *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404.

Missouri. *Duffy v. Mallinkrodt*, 81 Mo. App. 449.

Georgia. *Luden v. Enterprise Lumber Company*, 146 Ga. 284, L. R. A. 1917C, 485, 91 S. E. 102.

ratification by the principal. The liability of the agent on such a contract is especially clear where the proceeds of such contract have been paid to him personally.² While some courts try to limit this rule to cases in which the agent acted in bad faith or carelessly,³ the weight of authority as shown by the cases cited is to ignore such distinction. Thus an agent with authority only to arbitrate disputes about insurance policies issued by the principal, who submits other disputes to arbitration, is personally liable for the amount of the award.⁴

If the agent has no authority to enter into such contract and he has in his possession money of the adversary party paid in under such supposed contract, the adversary party may recover such money from the agent.⁵

If the agent once possessed full authority to act and subsequent events of which he has knowledge and which he could not have ascertained with due diligence, such as the death of his principal,⁶ have revoked such authority, the agent is not liable personally to the adversary party if by the terms of the contract he has not assumed personal liability.

§ 1774. Liability of agent—Unauthorized contract ratified. If the principal ratifies an unauthorized contract, such ratification is said to relieve the agent from liability to the adversary party,¹ at

New Jersey. *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506.

New York. *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022.

North Carolina. *Hedgecock v. Tate*, 168 N. Car. 660, 85 S. E. 34.

Ohio. (*Farmers', etc., Co.*) *Trust Co. v. Floyd*, 47 O. S. 525, 21 Am. St. Rep. 846, 12 L. R. A. 346, 26 N. E. 110.

West Virginia. *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555.

Wisconsin. *Wisconsin Farm Co. v. Watson*, 160 Wis. 638, 152 N. W. 449.

²*Hill v. First National Bank*, 129 Ark. 265, 195 S. W. 678.

³*Newman v. Sylvester*, 42 Ind. 106.

⁴*Macdonald v. Bond*, 195 Ill. 122, 62 N. E. 881.

⁵*McClellan v. Stansberry*, 151 Ia. 312,

35 L. R. A. (N.S.) 481, 131 N. W. 15; *Simmonds v. Long*, 80 Kan. 155, 23 L. R. A. (N.S.) 553, 101 Pac. 1070.

⁶*Jenkins v. Atkins*, 20 Tenn. (1 Humph.) 294, 34 Am. Dec. 648.

¹*England, Bowen v. Morris*, 2 Taunt. 374.

Idaho. *Blackwell v. Kercheval*, 27 Ida. 537, 149 Pac. 1060.

Illinois. *Roby v. Cossitt*, 78 Ill. 638; *Hale Elevator Co. v. Hale*, 201 Ill. 131, 66 N. E. 249 [affirming, 98 Ill. App. 430].

Massachusetts. *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146.

Missouri. *Lingenfelder v. Leschen*, 134 Mo. 55, 34 S. W. 1089.

Pennsylvania. *Hopkins v. Everly*, 150 Pa. St. 117, 24 Atl. 624; *Harper & Brother Co. v. Jackson*, 240 Pa. St. 312, 87 Atl. 430.

least in jurisdictions in which an agent who has executed an unauthorized contract is held liable for breach of warranty of authority,² except where the agent has so contracted as to incur personal liability in any event.³ In jurisdictions in which it is said that an agent who makes a contract in excess of his authority may be held liable upon his contract, there is a division of authority as to the effect of ratification upon the liability of the agent. In some jurisdictions it is said that ratification by the principal can not deprive the adversary party of his right to hold the agent upon his contract;⁴ but in other jurisdictions in which it is possible to hold the agent as principal,⁵ it is said that a ratification by the principal relieves the agent from liability,⁶ as long as the adversary party has not seen fit to disavow the contract until ratification by the principal.⁷ It is difficult to see any reason for permitting any substantial recovery against the agent after the principal has ratified the agent's unauthorized contract and the adversary party has thus obtained all that he bargained for and all that he was led to believe he would secure.

§ 1775. Liability of agent of undisclosed principal. The agent is personally liable where he fails to disclose the fact of his agency,¹

² *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Harper & Brothers Co. v. Jackson*, 240 Pa. St. 312, 87 Atl. 430.

³ See §§ 2091 et seq. and 2205.

⁴ *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

⁵ *Wisconsin Farm Co. v. Watson*, 160 Wis. 638, 152 N. W. 449.

⁶ *Moody v. M. E. Church*, 99 Wis. 49, 74 N. W. 572.

⁷ See § 1769.

¹ **Arkansas.** *Williams v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S. W. 899.

California. *Murphy v. Helmrich*, 68 Cal. 69, 4 Pac. 958.

Illinois. *Bickford v. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Morris v. Malone*, 200 Ill. 132, 93 Am. St. Rep. 180, 65 N. E. 704; *Scaling v. Knollin*, 94 Ill. App. 443.

Iowa. *Stevenson v. Polk*, 71 Ia. 278, 32 N. W. 340; *Blackmore v. Fairbanks*, 79 Ia. 282, 44 N. W. 548; *Lull v. Ana-*

mosa National Bank, 110 Ia. 537, 81 N. W. 784; *Thompson v. Investment Co.*, 114 Ia. 481, 87 N. W. 438; *Fritz v. Kennedy*, 119 Ia. 628, 93 N. W. 603.

Kentucky. *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Jutt v. Brown*, 15 Ky. (5 Litt.) 1, 15 Am. Dec. 33.

Maine. *Nolan v. Clark*, 91 Me. 38, 39 Atl. 344.

Massachusetts. *Bartlett v. Raymond*, 139 Mass. 275, 30 N. E. 91; *Brighan v. Herrick*, 173 Mass. 460, 53 N. E. 906; *Gavin v. Durden-Coleman Lumber Co.*, 229 Mass. 576, 118 N. E. 897.

Michigan. *Mitchell v. Beck*, 88 Mich. 342, 50 N. W. 305.

Minnesota. *Amans v. Campbell*, 70 Minn. 493, 68 Am. St. Rep. 547, 73 N. W. 506.

Missouri. *Porter v. Merrill*, 138 Mo. 355, 39 S. W. 798.

Nebraska. *Jackson v. McNatt* (Neb.), 93 N. W. 425.

or the identity of his principal.² If the agent has not disclosed his agency or the identity of his principal, he can not avoid personal liability on the ground that the adversary party had the means of ascertaining the identity of the principal and might have discovered it if he had used due diligence.³ The liability of the agent of an undisclosed principal is especially clear where he has made a contract in such form as to render himself personally liable in any event.⁴ If the agent of the undisclosed principal has received property under a contract which the adversary party has a right to rescind, the action for rescission of the contract and for the recovery of such property may be brought against such agent.⁵ An agent of an undisclosed principal who has sold the stock of his principal through a broker, is liable for commissions for such sale.⁶ The agent of an originally undisclosed principal is not personally liable on contracts made after his principal is disclosed.⁷

New Jersey. *Elliott v. Bodine*, 59 N. J. L. 567, 36 Atl. 1038.

New York. *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022; *McClure v. Trust Co.*, 165 N. Y. 108, 53 L. R. A. 153, 58 N. E. 777; *De Remer v. Brown*, 165 N. Y. 410, 59 N. E. 129.

Oklahoma. *Keokuk, etc., Co. v. Mfg. Co.*, 5 Okla. 32, 47 Pac. 484; *Deming Investment Co. v. McGrady*, — Okla. —, 157 Pac. 734; *Letcher v. Maloney*, — Okla. —, 172 Pac. 972.

South Dakota. *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726.

Vermont. *Royce v. Allen*, 28 Vt. 234.

West Virginia. *Poole v. Rice*, 9 W. Va. 73; *Morris v. Grocery Co.*, 46 W. Va. 197, 32 S. E. 997; *Curtis v. Miller*, 73 W. Va. 481, 50 L. R. A. (N.S.) 601, 80 S. E. 774.

²**Alabama.** *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284.

Massachusetts. *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24.

New York. *Meyer v. Redmond*, 205 N. Y. 478, 41 L. R. A. (N.S.) 675, 98 N. E. 906.

South Carolina. *Long v. McKissick*,

50 S. Car. 218, 27 S. E. 636; *Hughes v. Settle* (Tenn. Ch. App.), 36 S. W. 577.

Tennessee. *Siler v. Perkins*, 126 Tenn. 380, 47 L. R. A. (N.S.) 232, 149 S. W. 1060.

Virginia. *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291.

West Virginia. *Curtis v. Miller*, 73 W. Va. 481, 50 L. R. A. (N.S.) 601, 80 S. E. 774.

³*Harmon v. Parker*, 193 Mich. 542, 160 N. W. 380; *William Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314 [overruling, *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227]; *Curtis v. Miller*, 73 W. Va. 481, 50 L. R. A. (N.S.) 601, 80 S. E. 774.

⁴*Harmon v. Parker*, 193 Mich. 542, 160 N. W. 380; *Meyer v. Redmond*, 205 N. Y. 478, 41 L. R. A. (N.S.) 675, 98 N. E. 906; *Siler v. Perkins*, 126 Tenn. 380, 47 L. R. A. (N.S.) 232, 149 S. W. 1060; *Poole v. Camden*, 79 W. Va. 310, L. R. A. 1917E, 988, 92 S. E. 454.

⁵*Poole v. Camden*, 79 W. Va. 310, L. R. A. 1917E, 988, 92 S. E. 454.

⁶*Siler v. Perkins*, 126 Tenn. 380, 47 L. R. A. (N.S.) 232, 149 S. W. 1060.

⁷*Brackenridge v. Claridge*, 91 Tex. 527, 43 L. R. A. 593, 44 S. W. 819 [re-

§ 1776. Election of adversary party to hold agent or undisclosed principal. In most jurisdictions it is held that the adversary party who has dealt with an agent who has not disclosed the fact of his agency or the identity of his principal may elect, upon learning the material facts, whether he will hold the agent or the principal upon such contract, and that his election to hold the one operates as a discharge of the other,¹ since the rights are alternative and not concurrent. He can not hold both.² There is, however, some authority for the view that the principal may hold them both;³ and that accordingly his joining principal and agent as defendants is at most a mere technical error.⁴ This does not, of course, mean that he can have more than one satisfaction; and in its practical results it is not very different from the rule which is enforced in some jurisdictions that a final election is not made until the adversary has obtained full satisfaction.⁵ As in other cases of election,⁶ the acts or conduct of an adversary party do not amount to an election unless he has full knowledge of the material facts,⁷ including knowledge of the identity of the principal.⁸ It

versing, 42 S. W. 1005]. Some authorities tend to restrict the liability of one who discloses his agency but conceals the identity of his principal to cases where the contract shows the intention of the agent to bind himself, a distinction, however, generally repudiated.

¹ England. *Thompson v. Davenport*, 9 B. & C. 78.

Iowa. *McLean v. Ficke*, 94 Ia. 283.

Massachusetts. *Reid v. Miller*, 205 Mass. 80, 91 N. E. 223; *Gavin v. Durden-Coleman Lumber Co.*, 229 Mass. 576, 118 N. E. 897.

Minnesota. *Lindquist v. Dickson*, 98 Minn. 369, 6 L. R. A. (N.S.) 729, 107 N. W. 958.

Mississippi. *Murphy v. Hutchinson*, 93 Miss. 643, 21 L. R. A. (N.S.) 785, 17 Am. & Eng. Ann. Cas. 611, 48 So. 178.

North Carolina. *Horton v. Southern Ry. Co.*, 170 N. Car. 383, 86 S. E. 1020.

Tennessee. *Phillips v. Rooker*, 134 Tenn. 457, 184 S. W. 12.

Utah. *Love v. St. Joseph Stock Yards Co.*, — Utah —, 169 Pac. 951.

Virginia. *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 67 S. E. 281.

Washington. *Le Vette v. Hardman*, 77 Wash. 320, 137 Pac. 454. The effect of the parol evidence rule upon the right to hold the principal upon the written contract to which he is not a party is discussed elsewhere. See § 2209.

² *Marsch v. Southern New England R. Corporation*, 230 Mass. 483, 120 N. E. 120.

³ *Williams v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S. W. 899.

⁴ *Williams v. O'Dwyer & Ahern Co.*, 127 Ark. 530, 192 S. W. 899.

⁵ See § 1776.

⁶ See § 1766.

⁷ *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Reid v. Miller*, 205 Mass. 80, 91 N. E. 223; *Estes v. Aaron*, 227 Mass. 96, 116 N. E. 392; *Gavin v. Durden-Coleman Lumber Co.*, 226 Mass. 576, 118 N. E. 897; *Lindquist v. Dickson*, 98 Minn. 369, 6 L. R. A. (N.S.) 729, 107 N. W. 958; *Greenburg v. Palmieri*, 71 N. J. L. 83, 58 Atl. 297.

⁸ *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Estes v. Aaron*, 227 Mass. 96, 116 N. E. 392; *Gavin v. Dur-*

has, however, been held that in a judicial sale, election to hold the agent who has failed to pay the purchase price is made when the sale is ratified and the property is resold at the risk of such agent;⁶ and the principal can not thereafter be charged for the deficiency caused by such resale.⁷

§ 1777. What constitutes election. If the adversary party has the right to hold the agent personally or the principal at the election of such adversary party, the question of what constitutes such election becomes important. It is generally said that conduct which shows unequivocally the intention of the adversary party to hold the one operates as a waiver of his right against the other.¹ The attempt of the creditor to hold both principal and agent is not an election.²

What specific acts or conduct amounts to such an election is a matter upon which there is a lack of unanimity. It is generally said that accepting the note of one with knowledge of the facts operates as a waiver of the right of the adversary party against the other.³ Making a settlement in full with the agent, with knowledge of the facts, is an election.⁴ Charging goods to the agent and billing them to him is not a final election.⁵

It is generally held that bringing an action against one is not of itself an election,⁶ unless the claim is reduced to judgment.⁷ In

den-Coleman Lumber Co., 229 Mass. 576, 118 N. E. 897. (Even if judgment is taken against the agent.) Chase v. Robinson, 86 Vt. 240, 84 Atl. 867.

² Continental Trust Co. v. Baltimore Refrigerating & Heating Co., 120 Md. 450, 46 L. R. A. (N.S.) 887, 87 Atl. 947.

³ Continental Trust Co. v. Baltimore Refrigerating & Heating Co., 120 Md. 450, 46 L. R. A. (N.S.) 887, 87 Atl. 947.

⁴ England. Curtis v. Williamson, L. R. 10 Q. B. 57.

Iowa. McLean v. Ficke, 94 Ia. 283.

Maryland. Codd Co. v. Parker, 97 Md. 319, 55 Atl. 623.

Massachusetts. Paige v. Stone, 51 Mass. (10 Met.) 160, 43 Am. Dec. 420; Kingsley v. Davis, 104 Mass. 178.

New Jersey. Coles v. McKenna, 80 N. J. L. 48, 76 Atl. 344.

Utah. Love v. St. Joseph Stock Yards Co., — Utah —, 169 Pac. 951.

² Reid v. Miller, 205 Mass. 80, 91 N. E. 223.

³ Paige v. Stone, 51 Mass. (10 Met.) 160, 43 Am. Dec. 420.

⁴ Love v. St. Joseph Stock Yards Co., — Utah —, 169 Pac. 951.

⁵ Yates v. Repetto, 65 N. J. L. 294, 47 Atl. 632.

⁶ See, also as to charging items to agent, where creditor thought that he could hold both. Jones v. Johnson, 86 Ky. 530, 6 S. W. 582.

⁷ Curtis v. Williamson, L. R. 10 Q. B. 57 (filing affidavit of proof of claim in bankruptcy); Raymond v. Crown & Eagle Mills, 43 Mass. (2 Met.) 319; Gavin v. Durden-Coleman Lumber Co., 229 Mass. 576, 118 N. E. 897; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51.

⁷ Gavin v. Durden-Coleman Lumber Co., 229 Mass. 576, 118 N. E. 897.

some jurisdictions the bringing of the action is held to be an election, such as a proceeding in attachment against the agent.⁸ Whether judgment against one, without satisfaction, is an election, is a question upon which there is a divergence of authority. The fairer rule would seem to be that satisfaction, not judgment, made the final election; and that an unsatisfied judgment against one was not a bar to an action against the other.⁹ This rule, however, is not based on the strict theory of alternative, inconsistent rights, but rather on the theory of the right of the adversary party to full satisfaction. If this is a true case of election, taking judgment against one would seem to be an unequivocal expression of intention to look to the judgment debtor. It is accordingly held in many jurisdictions that taking judgment against one operates as a discharge of the other, even though the adversary party may wish to hold both.¹⁰ The injustice that often follows from the application of this rule is due to the theory that an election is necessary and that the interest of the adversary party in the satisfaction of his claim is not the paramount interest to be considered.

If final judgment on the merits is rendered in favor of either principal or agent against the adversary party, such judgment is held to be a bar to an action by the adversary party against the other of such parties.¹¹

§ 1778. Liability of agent of non-existent principal. One who purports to contract as agent for a principal who has no legal existence or status is personally liable thereon,¹ except where there is

⁸ *McLean v. Ficke*, 94 Ia. 283, 62 N. W. 753.

⁹ *Krolik v. Curry*, 148 Mich. 214, 111 N. W. 761; *Maple v. Railroad*, 40 O. S. 313, 48 Am. Rep. 685.

¹⁰ *England*. *Kendall v. Hamilton*, 4 App. Cas. 504.

Maryland. *Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623.

Massachusetts. *Kingsley v. Davis*, 104 Mass. 178; *Weil v. Raymond*, 142 Mass. 206, 7 N. E. 860.

Minnesota. *Lindquist v. Dickson*, 98 Minn. 369, 6 L. R. A. (N.S.) 729, 107 N. W. 958 (fact of agency known when judgment is taken).

New Jersey. *Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344.

¹¹ *Oklahoma*. *Krolik v. Curry*, 148 Mich. 214, 111 N. W. 761; *Callahan v. Graves*, 37 Okla. 503, 46 L. R. A. (N.S.) 350, 132 Pac. 474 (a case of tort).

¹ *Arkansas*. *Little Rock Furniture Co. v. Kavanaugh*, 111 Ark. 575, 51 L. R. A. (N.S.) 406, 164 S. W. 289.

Illinois. *Union Brewing Co. v. Interstate Bank & Trust Co.*, 240 Ill. 454, 88 N. E. 997.

Iowa. *Lewis v. Tilton*, 64 Ia. 220, 52 Am. Rep. 436, 19 N. W. 911.

Missouri. *Blakely v. Bennecke*, 59 Mo. 193; *Queen City Furniture & Car-*

an express agreement against personal liability.² A personal liability rests on an agent or a committee appointed by undetermined principals,³ as a committee of citizens who have charge of constructing a highway as agents of a citizens' meeting,⁴ or on an agent of an unincorporated military company.⁵ On the other hand, an executive committee which is placed in charge of the entertainment of guests of the municipal corporation and which has dealt honestly with all the funds contributed for such purpose, has been held not to be liable for supplies which it has ordered in excess of the amounts thus contributed.⁶ Special illustrations of this doctrine are given elsewhere.⁷

§ 1779. Nature of liability of agent to adversary party. The nature of the liability of an agent who has knowingly entered into an unauthorized contract on behalf of a principal who had a legal existence is a question upon one phase of which there is a sharp conflict of authority. If the agent has contracted in such a way as to bind himself personally, he can be held upon the contract in any event,¹ and the additional fact that he acted without authority should not relieve him from personal liability.²

If the contract does not purport to bind the agent personally, the logical view, entertained by a majority of the courts is that his liability is not on the contract as a principal in violation of its terms, but on the breach of the implied warranty of his authority, or in tort for his fraud and deceit.³ Some authorities hold that the

pet Co. v. Crawford, 127 Mo. 356, 30 S. W. 163.

Nebraska. Codding v. Munson, 52 Neb. 580, 66 Am. St. Rep. 524, 72 N. W. 846.

South Dakota. Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107.

Tennessee. Steele v. McElroy, 33 Tenn. (1 Sneed) 341.

Wisconsin. Fredendall v. Taylor, 23 Wis. 538, 99 Am. Dec. 203.

² Codding v. Munson, 52 Neb. 580, 66 Am. St. Rep. 524, 72 N. W. 846; Comfort v. Graham, 87 Ia. 295, 54 N. W. 242; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Button v. Winalow, 52 Vt. 430.

³ Ryerson v. Shaw, 277 Ill. 524, 115

N. E. 650; Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107.

⁴ Learn v. Upstill, 52 Neb. 271, 72 N. W. 213.

⁵ Blakely v. Bennecke, 59 Mo. 183.

⁶ Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575, 51 L. R. A. (N.S.) 406, 164 S. W. 289.

⁷ See executors, guardians, surviving partners, trustees, receivers.

¹ See § 2091.

² Terwilliger v. Murphy, 104 Ind. 32, 3 N. E. 404; Andrews v. Tedford, 37 Ia. 314; Solomon v. Penoyar, 89 Mich. 11, 50 N. W. 644; Walker v. Bank, 9 N. Y. 582.

³ England. Starkey v. Bank of England [1903], A. C. 114.

remedy is exclusively on the breach of warranty of authority,⁴ while others insist on the liability in tort.⁵ In some jurisdictions, however, it is said that an agent, who knowingly makes a contract for a principal in excess of his authority, is personally liable upon such contract,⁶ on the theory that he must have intended to bind some one, and since he has not bound his principal he must have intended to bind himself. This theory is, of course, a sheer fiction. The agent probably hopes that the principal will ratify the contract. Whatever his intention, it is clear that he does not intend to incur a personal liability. If A assumes to act for both himself and B in buying land from C, and A is not authorized to represent B in such transaction, A is liable upon such contract to C.⁷ In some cases the theory that the unauthorized agent is liable personally upon his contract is suggested where his contract is such as to render him personally liable in any event.⁸ In some jurisdictions the rule that the unauthorized agent is personally liable has been adopted by statute.⁹

California. *Wallace v. Bently*, 77 Cal. 19, 11 Am. St. Rep. 231, 18 Pac. 788.

Connecticut. *Chieppo v. Chieppo*, 89 Conn. 233, 90 Atl. 940.

Illinois. *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Hancock v. Yunker*, 83 Ill. 208.

Iowa. *Groeltz v. Armstrong*, 125 Ia. 39, 99 N. W. 128.

Massachusetts. *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

Nebraska. *Cole v. O'Brien*, 34 Neb. 68, 33 Am. St. Rep. 616, 51 N. W. 316; *Brong v. Spence*, 56 Neb. 638, 77 N. W. 54.

New Jersey. *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506.

New York. *Whitt v. Madison*, 26 N. Y. 117.

Ohio. (*Farmers', etc., Co.*) *Trust Co. v. Floyd*, 47 O. S. 525, 21 Am. St. Rep. 846, 12 L. R. A. 346, 26 N. E. 110.

Oklahoma. *American Surety Co. v. Morton*, 32 Okla. 687, 39 L. R. A. (N.S.) 702, 122 Pac. 1103.

Wisconsin. *Oliver v. Morawetz*, 97 Wis. 332, 72 N. W. 877.

⁴ *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 346; *Cochran v. Baker*, 34 Or. 555, 56 Pac. 641, 52 Pac. 520; *Kroeger v. Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718.

⁵ *Illinois. Hancock v. Yunker*, 83 Ill. 208.

Maine. *Gilmore v. Bradford*, 82 Me. 547, 20 Atl. 92.

Massachusetts. *Jefts v. York*, 64 Mass. (10 Cush.) 392.

Nebraska. *Cole v. O'Brien*, 34 Neb. 68, 33 Am. St. Rep. 616, 51 N. W. 316.

Vermont. *Clark v. Foster*, 8 Vt. 98.

Wisconsin. *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468.

⁶ *Bank v. Wray*, 4 Strob. L. (S. Car.) 87, 51 Am. Dec. 659; *Wisconsin Farm Co. v. Watson*, 160 Wis. 638, 152 N. W. 449.

⁷ *Wisconsin Farm Co. v. Watson*, 160 Wis. 638, 152 N. W. 449.

⁸ *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404.

⁹ *Kennedy v. Stonehouse*, 13 N. D. 232, 100 N. W. 258.

§ 1780. Personal liability of agent by terms of contract. Even if the agent discloses the fact of his agency and the identity of his principal he may nevertheless so contract as to bind himself individually.¹ If an agent has deposited his principal's money in a bank in the agent's name and has drawn checks thereon, such agent is personally liable for an overdraft and upon his personal check drawn on another bank to make up such overdraft, even if his agency was known and his principal was disclosed.² The fact that the principal subsequently gave his own notes together with collateral security to the bank for such overdraft did not operate as a discharge of the agent.³ The question of the wording of the contract which shows the agent's intention to bind himself personally is discussed later.⁴ A promissory note which an officer of a corporation has executed in the name of the corporation and which is made payable to himself without consideration is in law the personal obligation of such officer.⁵

§ 1781. Rights of principal on contract. A principal may, as a rule,¹ enforce by action in his own name contracts entered into for him by his agent,² even if the identity of the principal,³ or the

¹ *Luden v. Enterprise Lumber Co.*, 146 Ga. 284, L. R. A. 1917C, 485, 91 S. E. 102; *Dockarty v. Tillotson*, 64 Neb. 432, 89 N. W. 1050; *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1223, 158 Pac. 480; *Lutz v. Williams*, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

² *Lutz v. Williams*, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

³ *Lutz v. Williams*, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

⁴ See § 2092.

⁵ *Luden v. Enterprise Lumber Co.*, 146 Ga. 284, L. R. A. 1917C, 485, 91 S. E. 102.

¹ For the exceptions see § 2312.

² *Alabama. Western Union Telegraph Co. v. Hicks*, 197 Ala. 81, 72 So. 356.

Connecticut. Sullivan v. Shallor, 70 Conn. 733, 40 Atl. 1054.

Indiana. Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359.

Kentucky. Donahoe v. McDonald, 92 Ky. 123, 17 S. W. 195.

Massachusetts. Foster v. Graham, 166 Mass. 202, 44 N. E. 129.

Minnesota. Davidson v. Hurty, 116 Minn. 280, 39 L. R. A. (N.S.) 324, 133 N. W. 862.

³ *Alabama. Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915, 19 So. 500; *Manker v. Telegraph Co.*, 137 Ala. 292, 34 So. 839; *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

Georgia. Central, of Georgia, Ry. v. James, 117 Ga. 832, 45 S. E. 223.

Minnesota. Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251.

Missouri. Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300 [reversing in banc, 37 S. W. 516].

North Carolina. Williams v. Honeycutt, 176 N. Car. 102, 96 S. E. 730.

Oklahoma. Shenners v. Adams, 46 Okla. 368, 148 Pac. 1023.

Oregon. Levy v. Nevada-California-Oregon Ry., 81 Or. 673, 160 Pac. 808; *Mercer v. Germania Fire Insurance Co.*, 88 Or. 410, 171 Pac. 412.

Washington. Jones v. Mfg. Co., 32 Wash. 375, 73 Pac. 359; *Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602.

fact of the agency,⁴ were not disclosed when the contract was entered into. The adversary party can not treat such non-disclosure as fraud.⁵ An undisclosed principal may enforce a warranty in a sale to himself through his agent.⁶ The right of the undisclosed principal to enforce the contract has been denied where the agent has made affirmative representations that he was the real party in interest,⁷ as by making an affidavit that he was the owner of the consideration which was furnished to the adversary party and by giving his own note in such transaction.⁸ If there is no actual denial of the existence of the principal, the adversary party can not treat such non-disclosure as fraud, although the principal may have employed an agent because he believes that the adversary party would not deal with him.⁹ If, however, the adversary party will not receive what he contracted for if the undisclosed principal is permitted to enforce the contract, he will not be permitted to enforce it.¹⁰

If the agent has entered into a personal covenant,¹¹ as to warrant the title to land sold by him on behalf of his principal,¹² the undisclosed principal can not enforce such contract.

West Virginia. *Donahue v. Rafferty*, — W. Va. —, 96 S. E. 935.

⁴**United States.** *Great Lakes Towing Co. v. Mills Transportation Co.*, 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N.S.) 769.

Alabama. *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874; *Western Union Telegraph Co. v. Hicks*, 197 Ala. 81, 72 So. 356.

Connecticut. *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054.

Illinois. *Conklin v. Leeds*, 58 Ill. 178.

Massachusetts. *Isley v. Merriam*, 61 Mass. (7 Cush.) 242, 54 Am. Dec. 721; *National Life Ins. Co. v. Allen*, 116 Mass. 398; *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129.

New York. *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835.

North Carolina. *Williams v. Honeycutt*, 176 N. Car. 102, 96 S. E. 730.

Oklahoma. *Shenners v. Adams*, 46 Okla. 368, 148 Pac. 1023.

Oregon. *Levy v. Nevada-California-Oregon Ry.*, 81 Or. 673, 160 Pac. 808.

Rhode Island. *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

Tennessee. *Foster v. Smith*, 42 Tenn. (2 Coldw.) 474, 88 Am. Dec. 604.

⁵*Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 N. Y. 68, L. R. A. 1915C, 256, 105 N. E. 88; *Cowan v. Fairbrother*, 118 N. Car. 406, 54 Am. St. Rep. 733, 32 L. R. A. 829, 24 S. E. 212; *Nicholson v. Dover*, 145 N. Car. 18, 13 L. R. A. (N.S.) 167, 58 S. E. 444; *Williams v. Honeycutt*, 176 N. Car. 102, 96 S. E. 730.

⁶*Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602.

⁷*Crowder v. Yovovich*, 84 Or. 41, 164 Pac. 576.

⁸*Crowder v. Yovovich*, 84 Or. 41, 164 Pac. 576.

⁹*Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 N. Y. 68, L. R. A. 1915C, 256, 105 N. E. 88.

¹⁰*Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L. R. A. (N.S.) 156, 44 So. 642.

¹¹*Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L. R. A. (N.S.) 156, 44 So. 642.

¹²*Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L. R. A. (N.S.) 156, 44 So. 642.

The undisclosed principal is subject to such defenses, counter-claims and set-offs as would be valid against the agent,¹³ though notice before payment, of a principal previously undisclosed, binds the adversary party from that time.¹⁴ If the agent has become invested with the apparent ownership of property which belongs to the principal, and if he transfers such property to a third person for value, it is said that such third person can not resist the claim of the principal for the proceeds of such property unless he is able to show that he did not know and had no means of knowing that the party with whom he was dealing was merely an agent.¹⁵ If the agent has transferred non-negotiable notes belonging to the principal, the title to which the agent had taken in his own name, to a third person who has the means of knowing that he is dealing with an agent, the principal may recover the proceeds of such notes.¹⁶ This right does not exist where the property is not in the agent's possession.¹⁷ Thus where the agent had not possession of the goods, he can not agree that his debt shall be set off on the purchase price.¹⁸ If the adversary party has notice that he is dealing with an agent he can not set off against his liability to the principal personal debts due to such adversary party from the agent, although he does not know of the identity of the principal.¹⁹ If the agent has deposited his principal's funds in a bank in his own name with the word "agent" added thereto, the bank can not set off against such deposit a debt due from such agent personally.²⁰

¹³ *United States*. *Lane v. Leiter*, 237 Fed. 149, 150 C. C. A. 295.

California. *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618.

Georgia. *Allison v. Sutlive*, 99 Ga. 151, 25 S. E. 11; *McConnell v. Land Co.*, 100 Ga. 129, 28 S. E. 80.

Illinois. *Stinson v. Gould*, 74 Ill. 80.

Kentucky. *Tutt v. Brown*, 15 Ky. (5 Litt.) 1, 15 Am. Dec. 33.

Minnesota. *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631, 76 N. W. 211.

New Jersey. *Bernshouse v. Abbott*, 45 N. J. L. 531, 46 Am. Rep. 789.

Ohio. *Miller v. Sullivan*, 39 O. S. 79.

Oklahoma. *Eldridge v. Finnegar*, 25 Okla. 28, 28 L. R. A. (N.S.) 227, 105

Pac. 334; *Houghton v. Hundley Co.*, — Okla. —, 157 Pac. 1142.

Pennsylvania. *Belfield v. Supply Co.*, 189 Pa. St. 189, 69 Am. St. Rep. 799, 42 Atl. 131.

¹⁴ *Rice, etc., Co. v. Bank*, 185 Ill. 422, 56 N. E. 1062.

¹⁵ *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

¹⁶ *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

¹⁷ *Crosby v. Hill*, 39 O. S. 100.

¹⁸ *Bertoli v. Smith*, 69 Vt. 425, 38 Atl. 76.

¹⁹ *Bank v. Crayter*, — Ala. —, L. R. A. 1917F, 460, 75 So. 7.

²⁰ *Bank v. Crayter*, — Ala. —, L. R. A. 1917F, 460, 75 So. 7.

CHAPTER LV

OFFICERS AND AGENTS OF PUBLIC CORPORATIONS

- § 1782. Powers of public officers and agents—General nature.
- § 1783. Nature and construction of grant of power.
- § 1784. Powers of specific officers.
- § 1785. Action as board, council, etc.
- § 1786. Liability of public corporation upon authorized contracts.
- § 1787. Liability of public corporation on unauthorized contracts—Estoppel.
- § 1788. Liability of adversary party on unauthorized contracts.
- § 1789. Personal liability of public officer or agent.
- § 1790. Ratification—Who may ratify.
- § 1791. What amounts to ratification.
- § 1792. Liability in quasi-contract for benefits.

§ 1782. Powers of public officers and agents—General nature.

A public corporation or quasi-corporation can act only through an officer or agent.¹ In this respect, except for the difference in the nature of the powers of the public corporation or quasi-corporation and the method in which its agents or officers are to exercise their power, the liability of a public corporation is much like that of a private corporation. If a contract is made on behalf of a corporation by one who is not an officer or authorized agent or who is acting in excess of his authority, the liability of the corporation or of the unauthorized agent or officer is determined in most jurisdictions by principles which are very different from those which apply to the liability of private corporations or of its officers or agents. The powers of the officers and agents of a public corporation or quasi-corporation are usually conferred by statute,² either expressly or by implication from the powers which are con-

¹ *Acme Lumber Co. v. Board of Commissioners*, 137 La. 899, 69 So. 739. It is liable for the acts of its officers or agents within the scope of their authority. *Haynes v. Police Jury* (La.), 71 So. 244.

² *Connecticut. Heublein v. New Haven*, 75 Conn. 545, 54 Atl. 298.

Indiana. State v. Goldthart, 172 Ind. 210, 19 Am. & Eng. Ann. Cas. 737, 87 N. E. 133.

Kansas. Wichita Water Co. v. Wichita, 98 Kan. 256, 158 Pac. 49.

Kentucky. Owen County v. Walker, 141 Ky. 516, 133 S. W. 236; *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 52

ferred upon them.³ The powers which are conferred upon public officials are usually conferred in language which is so restricted or so detailed that such grant of power should be construed strictly.⁴ A contract entered into by a de facto public officer is as valid as if he were also an officer de jure.⁵

§ 1783. Nature and construction of grant of power. Power to bind the public corporation by contracts may be conferred upon designated executive or administrative officers.¹ Power to represent counties or improvement districts is frequently conferred upon special boards of commissioners.² The power of an officer to borrow money will ordinarily not be implied from other powers, but must be conferred expressly.³ If power is given to a certain officer to make contracts of a certain class the council has no power to make a contract of such class.⁴ In some parts of the United States the power to make contracts on behalf of a township or town is vested in the town meeting.⁵ In other parts of the United States such power ordinarily is vested in the township trustees. The selectmen have been held to have implied authority to borrow money on behalf of the town.⁶ In the absence of specific statutory

L. R. A. (N.S.) 880, 167 S. W. 922; *Mills v. Lantrip*, 170 Ky. 81, 185 S. W. 514.

Louisiana. *Haynes v. Police Jury* (La.), 71 So. 244.

Massachusetts. *Adams v. Essex County*, 205 Mass. 189, 91 N. E. 557; *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764.

Minnesota. *Jewell Belting Co. v. Bertha*, 91 Minn. 9, 97 N. W. 424.

Montana. *Hersey v. Neilson*, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30.

Ohio. *Wellston v. Morgan*, 65 O. S. 219, 62 N. E. 127.

Wisconsin. *Wahl v. Milwaukee*, 23 Wis. 272.

³ For convenience no attempt will be made to distinguish between public corporations, such as cities, and quasi-corporations, such as counties, except in cases in which specific constitutional or statutory provisions make such distinction necessary. In other cases the

term "public corporations" will be used to include public quasi-corporations.

⁴ *Mills v. Lantrip*, 170 Ky. 81, 185 S. W. 514; *Higginson v. Fall River*, 226 Mass. 423, 2 A. L. R. 1209, 115 N. E. 764.

See also, *Irwin v. Klamath County*, — Or. —, 183 Pac. 780.

See also, *Pocasset Ice Co. v. Burton*, 35 R. I. 57, 85 Atl. 277.

⁵ *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. ed. 552; *Lake Charles, etc., Co. v. Lake Charles*, 106 La. 65, 30 So. 289.

¹ *Francis v. Troy*, 74 N. Y. 338.

² *American Pipe & Construction Co. v. Westchester County*, 225 Fed. 947, 141 C. C. A. 71; *Board of Improvement Commissioners v. Galbraith*, 123 Ark. 619, 185 S. W. 474.

³ *Luther v. Wheeler*, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

⁴ *Francis v. Troy*, 74 N. Y. 338.

⁵ *Jackman v. New Haven*, 42 Vt. 591.

⁶ *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

authority, the treasurer of a town has no implied or inherent power to borrow money.⁷ A board which is authorized to grant or to refuse licenses to deal in intoxicating liquors has no authority to employ attorneys at the expense of the town.⁸ Under many statutes the board of education has authority to make contracts on behalf of the school district.⁹ If authority is granted to a board to enter into a contract, the approval of other authorities,¹⁰ such as the president of the board,¹¹ or a different board,¹² is not necessary unless it is specifically required by statute. An officer who has power to enter into a contract on behalf of a public corporation has implied authority to modify such contract.¹³

§ 1784. Powers of specific officers. Until comparatively recently the statutes which provided for the organization of municipal corporations ordinarily conferred the great bulk of legislative, executive and administrative power upon the council and it was accordingly held that the power to represent a municipal corporation in making contracts was *prima facie* vested in the council.¹ Power to act on behalf of a public corporation is frequently conferred upon the council by specific statutory provisions.² If the statute provides that a contract must be entered into by an ordinance, it can not be entered into in any other way.³ A grant of power to county commissioners to allow or reject claims, does not authorize them to make a binding contract to arbitrate a claim against the county.⁴ General power to do such acts as are necessary to the exercise of the corporate powers of the county does not

⁷ *York v. Stewart*, 110 Me. 523, 87 Atl. 372; *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

⁸ *Gibson v. Vernon*, 90 Vt. 160, 97 Atl. 356.

See also, *Higginson v. Fall River*, 226 Mass. 423, 2 A. L. R. 1209, 115 N. E. 764.

⁹ *Knaack v. School Township*, 179 Ia. 410, 161 N. W. 446.

¹⁰ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562; *Thrift v. Ammidon*, 126 Md. 126, 94 Atl. 532.

¹¹ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

¹² *Thrift v. Ammidon*, 126 Md. 126, 94 Atl. 532.

¹³ *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 141 C. C. A. 202.

¹ *Ryan v. Patterson*, 66 N. J. L. 533, 49 Atl. 587; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

² *City of Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187; *McClendon v. State, ex rel.*, 129 Ark. 286 [sub nomine, *McClendon v. Hot Springs*, 195 S. W. 686].

³ *Astoria v. American La France Fire Engine Co.*, 225 Fed. 21, 139 C. C. A. 80.

⁴ *Good Roads Machinery Co. v. Henry County*, 236 Fed. 730, 150 C. C. A. 62.

confer upon the county commissioners power to employ a tax inquisitor if they are not given general power with reference to assessing property for taxation and collecting taxes.⁵ The mayor has ordinarily no implied power to act on behalf of a municipal corporation;⁶ and his contract on behalf of the city does not bind the city unless statutory authority to make such contract has been conferred upon him or unless the council has determined to make such contract and has authorized him to execute it as the agent of the city.⁷ A grant of power to the mayor to execute written contracts does not authorize him to make an oral modification thereof.⁸ The clerk of a city has no implied power to bind it by contract.⁹ The city solicitor has the same power to bind the city by contracts on its behalf with reference to pending litigation as an attorney possesses with reference to his client.¹⁰ The county attorney has no implied power to bind the county by a contract for arbitration.¹¹ A county is not liable for the services of a surgeon in performing an operation upon a prisoner who is in the custody of the sheriff, although the sheriff requested such operation.¹² A city commissioner who is charged with the duty of supervising work has ordinarily no power to bind the city by a contract.¹³

§ 1785. Action as board, council, etc. If a council or board or other corporate body is authorized to make contracts on behalf of the public corporation or quasi-corporation, it must act as a body and not as separate individuals.¹ An individual county commissioner can not represent the county in transactions which are

⁵ *Stevens v. Henry County*, 218 Ill. 468, 4 L. R. A. (N.S.) 339, 75 N. E. 1024.

⁶ *Meacham Contracting Co. v. Hopkinsville*, 164 Ky. 703, 176 S. W. 187; *Glisson v. Biggio*, 141 La. 209, 74 So. 907.

⁷ *Glisson v. Biggio*, 141 La. 209, 74 So. 907.

⁸ *Meacham Contracting Co. v. Hopkinsville*, 164 Ky. 703, 176 S. W. 187.

⁹ *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 52 L. R. A. (N.S.) 880, 167 S. W. 922.

¹⁰ *Bank of Commerce v. Louisville*, 88 Fed. 398.

¹¹ *Kelly v. Board of Commissioners*, 24 Wyom. 386, 159 Pac. 1086.

He has no implied power to employ agents to obtain evidence of violation

of criminal laws. *Irwin v. Klamath County*, — Or. —, 183 Pac. 780.

¹² *Nolan v. Cobb County*, 141 Ga. 385, 50 L. R. A. (N.S.) 1223, 81 S. E. 124.

¹³ *Wichita Water Co. v. City of Wichita*, 98 Kan. 256, 158 Pac. 49.

¹ *Arkansas. Barton v. Hines*, 123 Ark. 619, 185 S. W. 455.

Kansas. Wichita Water Co. v. Wichita, 98 Kan. 256, 158 Pac. 49.

Kentucky. Board of Trustees v. Board of Education, 172 Ky. 424, 189 S. W. 433.

Maine. Prest v. Farmington, 116 Me. 8, 99 Atl. 653.

Mississippi. Gilchrist-Fordney Co. v. Keyes, 113 Miss. 742, 74 So. 619.

Oklahoma. Ryan v. Humphries, 50 Okla. 343, L. R. A. 1915F, 1047, 150

entrusted to the board of county commissioners.² If by statute power to sell certain public land is conferred upon a board of supervisors, such power can be exercised only at a meeting, and a contract signed by the individual members of the board does not bind the public corporation.³ A contract between the officers of different schools must be adopted officially in order to bind the school districts.⁴ If a school board is authorized to elect teachers it can do so only at a meeting and not by the individual action of its members.⁵ If a county is authorized to act, it must act as a body and not as a number of individuals.⁶ If authority is conferred upon a council or a board, it can not delegate its power to a committee in the absence of statutory authority therefor,⁷ especially if such committee has, without authority, added a number of individuals to its membership.⁸

§ 1786. Liability of public corporation upon authorized contracts. If the public officers or agents act within the limits of their powers, the public corporation is bound by their acts.¹ It can not avoid liability on the ground that its officers or agents acted unwisely.² The honest discretion of the duly authorized officers or agents of a public corporation can not, in the absence of statutory provision therefor, be controlled by any other officer or by the court.³

Pac. 1106; *Nolan v. Board of Commissioners*, 51 Okla. 320, 152 Pac. 63; *Cross Township v. Wallace*, 57 Okla. 726, 157 Pac. 898; *State v. Liberty Township*, 22 O. S. 144.

² *Nolan v. Board of Commissioners*, 51 Okla. 320, 152 Pac. 63.

³ *Gilchrist-Fordney Co. v. Keyes*, 113 Miss. 742, 74 So. 619.

⁴ *Board of Trustees v. Board of Education*, 172 Ky. 424, 189 S. W. 433.

⁵ *Ryan v. Humphries*, 50 Okla. 343, L. R. A. 1915F, 1047, 150 Pac. 1106.

⁶ *Kavanaugh v. Wausau*, 120 Wis. 611, 98 N. W. 550.

⁷ *School District v. Castell*, 105 Ark. 106, 150 S. W. 407; *Kinney v. Howard*, 133 Ia. 94, 110 N. W. 282; *Jewell Belting Co. v. Bertha*, 91 Minn. 9, 97 N. W. 424; *Sroka v. Halliday*, 39 R. I. 119, 97 Atl. 965.

⁸ *Sroka v. Halliday*, 39 R. I. 119, 97 Atl. 965.

¹ *United States. American Pipe & Construction Co. v. Westchester County*, 225 Fed. 947, 141 C. C. A. 71; *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 141 C. C. A. 202.

Arkansas. *City of Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187.

Louisiana. *Acme Lumber Co. v. Board of Commissioners*, 137 La. 899, 69 So. 739.

North Carolina. *Wilson v. Holding*, 170 N. Car. 352, 86 S. E. 1043.

Pennsylvania. *Nicely v. Raker*, 250 Pa. St. 386, 95 Atl. 556.

South Dakota. *Scott v. Minnehaha County*, 35 S. D. 447, 152 N. W. 699.

² *Acme Lumber Co. v. Board of Commissioners*, 137 La. 899, 69 So. 739.

³ *Ensley Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

§ 1787. Liability of public corporation on unauthorized contracts—Estoppel. Where the powers and duties of the public officer or agent are prescribed by law, all who deal with the public corporation or quasi-corporation through such agent are charged with knowledge of his powers, whether in fact such persons have such knowledge or not.¹ If the facts upon which the power of an officer or agent to represent a public corporation are known, the question of his authority is a question of law, and accordingly the acts or representations of the agents of such public corporation can not estop the public corporation from denying the authority of such officers or agents.² It has been said, however, that there may be an agency by implication as between a public corporation and one who assumes to represent it, which arises out of the conduct of the agent and the acquiescence of the public corporation there-

¹ **Florida.** *Madison v. Newsome*, 39 Fla. 149, 22 So. 270.

Illinois. *Marshall County v. Cook*, 38 Ill. 44, 87 Am. Dec. 282.

Indiana. *Oppenheimer v. Greencastle School District*, 164 Ind. 99, 72 N. E. 1100.

Iowa. *Fries v. Porch*, 49 Ia. 351; *Independent School District v. McClure*, 136 Ia. 122, 113 N. W. 554.

Indiana. *McCaslin v. State*, 99 Ind. 428.

Kentucky. *Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S. W. 1074; *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122.

Maine. *Morse v. Montville*, 115 Me. 454, 99 Atl. 438.

Massachusetts. *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764.

Michigan. *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

Minnesota. *Jewell Belting Co. v. Bertha*, 91 Minn. 9, 97 N. W. 424.

Nebraska. *Lincoln v. McNeal*, 60 Neb. 613, 83 N. W. 847.

New Hampshire. *Smith v. Epping*, 69 N. H. 558, 45 Atl. 415; *Lawrence v. Toothaker*, 75 N. H. 148, 23 L. R. A. (N.S.) 428, 71 Atl. 534.

Oklahoma. *In re Town of Afton*, 43

Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184; *New Butler v. Tucker* (Okla.), 153 Pac. 628.

Oregon. *Coos Bay Times Publishing Co. v. Coos County*, 81 Or. 626, 160 Pac. 532.

Texas. *Day, etc., Co. v. State*, 68 Tex. 526, 4 S. W. 865.

² **California.** *Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670.

Indiana. *Silver v. Indiana State Board of Education*, 35 Ind. App. 438, 71 N. E. 667, 72 N. E. 829.

Kentucky. *Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S. W. 1074.

Massachusetts. *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841; *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764.

Michigan. *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

New Hampshire. *Lawrence v. Toothaker*, 75 N. H. 148, 23 L. R. A. (N.S.) 428, 71 Atl. 534 (obiter, as action was against officer personally).

Rhode Island. *Dube v. Peck*, 22 R. I. 443, 467, 48 Atl. 477.

South Carolina. *Carolina National Bank v. State*, 60 S. Car. 465, 85 Am. St. Rep. 865, 38 S. E. 629.

in.³ Where this agency is recognized it is treated as a genuine agency existing in fact; and it is distinguished from estoppel.⁴ Since there can be no estoppel as against a municipal corporation to set up want of power of officers or agents whose authority is fixed by law, no liability is imposed upon a government or a public corporation by reason of a contract which is entered into on its behalf by an agent who is acting without authority or in excess of the authority which has been conferred upon him by law.⁵ Hence, if a council has no authority to let contracts, an ordinance directing to whom a contract for printing shall be let is void.⁶ A statute

³Clark v. Washington, 25 U. S. (12 Wheat.) 40, 6 L. ed. 544; Frank v. Board of Education, 90 N. J. L. 273, L. R. A. 1917D, 206, 100 Atl. 211.

⁴Clark v. Washington, 25 U. S. (12 Wheat.) 40, 6 L. ed. 544; Frank v. Board of Education, 90 N. J. L. 273, L. R. A. 1917D, 206, 100 Atl. 211.

⁵United States. Good Roads Machinery Co. v. Henry County, 236 Fed. 730, 150 C. C. A. 62.

Arkansas. Board of Improvement Commissioners v. Galbraith, 123 Ark. 619, 185 S. W. 474.

Colorado. Mulnix v. Ins. Co., 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123.

Connecticut. Driscoll v. New Haven, 75 Conn. 92, 52 Atl. 618.

Illinois. Stevens v. Henry County, 218 Ill. 468, 4 L. R. A. (N.S.) 339, 75 N. E. 1024.

Indiana. Fairplay School Township v. O'Neal, 127 Ind. 95, 26 N. E. 686; Board of Commissioners of Jay County v. Pike Civil Township, 168 Ind. 535, 81 N. E. 489.

Iowa. Cedar Rapids Water Co. v. Cedar Rapids, 117 Ia. 250, 90 N. W. 746.

Kansas. Wichita Water Co. v. Wichita, 98 Kan. 256, 158 Pac. 49.

Kentucky. Worrell Mfg. Co. v. Ashland, 159 Ky. 656, 52 L. R. A. (N.S.) 880, 167 S. W. 922.

Maine. Blaisdell v. York, 110 Me. 500, 87 Atl. 361; Morse v. Inhabitants of Montville, 115 Me. 454, 99 Atl. 438.

Massachusetts. Goddard v. Lowell, 179 Mass. 496, 61 N. E. 53; Murphy v. Clinton, 182 Mass. 198, 65 N. E. 34; Higginson v. Fall River, 226 Mass. 423, 115 N. E. 764.

Minnesota. Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105.

New York. Wadsworth v. Board of Supervisors, 217 N. Y. 484, 112 N. E. 161.

Oklahoma. In re Town of Afton, 43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184; City of Enid v. Warner-Quinlan Asphalt Co., — Okla. —, 161 Pac. 1092.

Oregon. Coos Bay Times Publishing Co. v. Coos County, 81 Or. 626, 160 Pac. 532.

Pennsylvania. Farrell v. Coatsville Borough, 214 Pa. St. 296, 63 Atl. 742.

South Carolina. Carolina National Bank v. State, 60 S. Car. 465, 85 Am. St. Rep. 865, 38 S. E. 629; Luther v. Wheeler, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

Tennessee. Nash v. Knoxville, 108 Tenn. 68, 64 S. W. 1062.

Vermont. Gibson v. Vernon, 90 Vt. 160, 97 Atl. 356.

Wisconsin. McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468.

Wyoming. Kelly v. Board of Commissioners, 24 Wyom. 386, 159 Pac. 1086.

⁶Goddard v. Lowell, 179 Mass. 496, 61 N. E. 53.

providing that selectmen shall have their expenses when engaged in public business gives them no power to bind the city by a contract for their meals.⁷ So a contract entered into by a mayor without authority does not bind the city.⁸ Power to collect convict hire is not power to accept notes therefor and then to bind the state by indorsing them over.⁹ If a clerk is authorized to indorse on mortgage bonds issued by a waterworks company, the statement that the city will pay interest on such bonds in lieu of hydrant rentals up to the amount of three thousand dollars, the amount of rentals contracted for, his certificate that the city will pay interest as it matures does not impose any liability on the city.¹⁰ If a board or other corporate body has power to bind the public corporation it must do so by action as a board. Hence, a member of a council has no authority to retain an attorney for the city.¹¹ So knowledge of a member of a school board that a given surety has signed the treasurer's bond to take effect only if other sureties sign is not notice to the board of that fact, where such member acquired such knowledge while acting in a private capacity to secure sureties for such bond.¹²

§ 1788. Liability of adversary party on unauthorized contracts.

The rule that a contract by an unauthorized officer has no binding effect operates against the municipality as well as for it. If a contract is tendered which is not approved by the council as required by statute, such contract has no validity. Therefore, if a bidder refuses to accept such contract he does not thereby forfeit a deposit made by him to secure his bid.¹ If a contract is not binding upon the public corporation because it is entered into by an officer who has no authority to bind the public corporation by such contract, it is not binding upon the adversary party.² A surety of the adversary party may avoid liability upon a bond by

⁷ *Heublein v. New Haven*, 75 Conn. 545, 54 Atl. 298.

⁸ *Indiana Road Machine Co. v. Sulphur Springs* (Tex. Civ. App.), 63 S. W. 908; (*City of*) *Tyler v. Adams* (Tex. Civ. App.), 62 S. W. 119.

⁹ *Carolina National Bank v. State*, 60 S. Car. 465, 85 Am. St. Rep. 865, 38 S. E. 629.

¹⁰ *Painter v. Norfolk*, 62 Neb. 330, 87 N. W. 31.

¹¹ *Root v. Topeka*, 63 Kan. 129, 65 Pac. 233.

¹² *Board of Education v. Robinson*, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105.

¹ *Chicago, etc., Co. v. West Bay City*. 129 Mich. 65, 87 N. W. 1032.

² *City of Hutchinson v. Kansas Bituminous Co.*, 239 Fed. 659, 152 C. C. A. 493.

showing that the contract upon which he was a surety was not binding upon the public corporation.³

§ 1789. Personal liability of public officer or agent. Since all who deal with public officers and agents are charged with knowledge of their authority, and of the limitations thereon, the public officer or agent who acts in good faith, who does not misrepresent any of the facts upon which his want of authority depends, and who does not contract in such a way as to render himself liable personally,¹ is not liable upon a contract which is made in excess of his authority.² No liability attaches to public officers who have assumed to buy goods,³ or to contract for services,⁴ on behalf of the public corporation in excess of their authority. Certain bonds were issued under a statute which was subsequently held unconstitutional. It was held that no liability attached personally to the public agents who sold such bonds, received the money therefor, and applied it as provided for by such statute.⁵ In the absence of fraud the public officers are not liable to the public corporation for entering into contracts in excess of their authority.⁶

No personal liability exists if the contract is within the powers of the officers who make it on behalf of the public corporation.⁷

§ 1790. Ratification—Who may ratify. If a contract has been entered into on behalf of a public corporation or quasi-corporation which is within the power of such corporation or quasi-corporation, but in excess of the authority of the agent who entered into it on

³ *City of Hutchinson v. Kansas Bituminous Co.*, 239 Fed. 659, 152 C. C. A. 493.

¹ See § 2096.

² *Arkansas. Southern Seating & Cabinet Co. v. Gladish*, 124 Ark. 419, 185 S. W. 287.

Indiana. Oppenheimer v. Greencastle School Township, 164 Ind. 99, 72 N. E. 1100.

Kansas. Hupe v. Sommer, 88 Kan. 361, 43 L. R. A. (N.S.) 565, 129 Pac. 136.

New Hampshire. Lawrence v. Toothaker, 75 N. H. 148, 23 L. R. A. (N.S.) 428, 71 Atl. 534.

North Dakota. Kenmare School District No. 28 v. Cole, 36 N. D. 32, L. R. A. 1917D, 516, 161 N. W. 542.

Oklahoma. Martin v. Schuermeyer, 30 Okla. 735, 121 Pac. 248.

See also, *Wagner v. Board of Commissioners*, — Kan. —, 176 Pac. 665.

³ *Southern Seating & Cabinet Co. v. Gladish*, 124 Ark. 419, 185 S. W. 287; *Kenmare School District No. 28 v. Cole*, 36 N. D. 32, L. R. A. 1917D, 516, 161 N. W. 542.

⁴ *Lawrence v. Toothaker*, 75 N. H. 148, 23 L. R. A. (N.S.) 428, 71 Atl. 534.

⁵ *Powell v. Heisler*, 45 Minn. 549, 48 N. W. 411.

⁶ *Kenmare School District v. Cole*, 36 N. D. 32, L. R. A. 1917D, 516, 161 N. W. 542.

⁷ *Mullen v. Dwight*, — S. D. —, 173 N. W. 645.

behalf of the public, such contract may be ratified thereafter by the public corporation or quasi-corporation.¹ In order that such ratification may be operative, the officer or agent who ratifies the contract must have been authorized to make it.² The officer who entered into the contract has no power to ratify it.³ An officer who has no power to make the contract has no power to ratify it.⁴ The officer by whom the contract is ratified must know the material fact.⁵ If a contract which should have been made by a council or a board has been made by an individual member thereof, the entire council or board may ratify such contract.⁶ If a county judge has appointed an attorney,⁷ or an expert accountant,⁸ the

¹ **United States.** *Supervisors v. Schenck*, 72 U. S. (5 Wall.) 772, 18 L. ed. 556; *Little Rock v. Merchants' National Bank*, 98 U. S. 308, 25 L. ed. 108.

Arkansas. *Leathem v. Jackson County*, 122 Ark. 114, 182 S. W. 570; *Spence v. Clay County*, 122 Ark. 157, 182 S. W. 573; *Greenburg Iron Co. v. Dixon*, 127 Ark. 470, 192 S. W. 379; *Dell Special School District v. Johnson*, 129 Ark. 211, 195 S. W. 373.

Arizona. *Hermance v. Public School District*, — Ariz. —, 180 Pac. 442.

Idaho. *Moore v. Hupp*, 17 Ida. 232, 105 Pac. 209.

Illinois. *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 520.

Iowa. *Hansen v. Anthon*, — Ia. —, 173 N. W. 939.

Kentucky. *Carter v. Krueger*, 175 Ky. 399, 194 S. W. 553.

Maine. *Brown v. Winterpart*, 70 Me. 305, 9 Atl. 844.

Michigan. *Darling v. Manistee*, 166 Mich. 35, 131 N. W. 450.

New Jersey. *Frank v. Board of Education*, 90 N. J. L. 273, L. R. A. 1917D, 206, 100 Atl. 211.

Oklahoma. *Ryan v. Humphries*, 50 Okla. 343, L. R. A. 1915F, 1047, 150 Pac. 1106; *Nolan v. Board of Commissioners*, 51 Okla. 320, 152 Pac. 63.

Oregon. *Cunningham v. Umatilla County*, 57 Or. 517, 37 L. R. A. (N.S.) 1051, 112 Pac. 437; *McKenna v. McHaley*, 67 Or. 443, 136 Pac. 340.

Vermont. *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

Washington. *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820.

² **Arkansas.** *Leathem v. Jackson County*, 122 Ark. 114, 182 S. W. 570; *Spence v. Clay County*, 122 Ark. 157, 182 S. W. 573; *Greenburg Iron Co. v. Dixon*, 127 Ark. 470, 192 S. W. 379; *Dell Special School District v. Johnson*, 129 Ark. 211, 195 S. W. 373.

Idaho. *Moore v. Hupp*, 17 Ida. 232, 105 Pac. 209.

Oklahoma. *Ryan v. Humphries*, 50 Okla. 343, L. R. A. 1915F, 1047, 150 Pac. 1106.

Oregon. *Cunningham v. Umatilla County*, 57 Or. 517, 37 L. R. A. (N.S.) 1051, 112 Pac. 437.

³ *First National Bank v. Whisenhunt*, 94 Ark. 583, 127 S. W. 968.

⁴ *Niland v. Bowron*, 193 N. Y. 180, 85 N. E. 1012.

⁵ *Hermance v. Public School District*, — Ariz. —, 180 Pac. 442; *Taylor v. Wayne*, 25 Ia. 447.

⁶ *Hermance v. Public School District*, — Ariz. —, 180 Pac. 442; *Ryan v. Humphries*, 50 Okla. 343, L. R. A. 1915F, 1047, 150 Pac. 1106; *Nolan v. Board of Commissioners*, 51 Okla. 320, 152 Pac. 63.

⁷ *Spence v. Clay County*, 122 Ark. 157, 182 S. W. 573.

⁸ *Leathem v. Jackson County*, 122 Ark. 114, 182 S. W. 570.

officers who had authority in the first instance may ratify it. If the public attorney of a county has appointed a detective without authority, such appointment may be ratified by the officers who would have had authority in the first instance to employ such detective.⁸ If extras are ordered on behalf of a county by an unauthorized agent, such contract may be ratified by the officers by whom it could have been made.¹⁰ If money has been borrowed on behalf of a town by a town treasurer in excess of his authority, such loans may be ratified by the officers,¹¹ such as the selectmen,¹² who might have made such loan in the first instance. If the officers who are authorized to represent a public corporation repudiate an unauthorized contract upon notice, the act of an unauthorized agent in making use of the benefits received under such contract can not amount to ratification.¹³ If the state has authorized a county to aid in canal or harbor improvements only where the United States has proposed the construction of such improvements, the unauthorized act of county officials in making contracts for such improvements before the United States has taken action thereon, can not be ratified by Congress.¹⁴ A public corporation is not bound by ratification unless the contract was originally made by one who purports to act on behalf of the public corporation.¹⁵

§ 1791. What amounts to ratification. Conduct on the part of the officers who have power to ratify a contract which shows that with full knowledge of the facts they elect to treat such contract as valid, amounts to ratification.¹ A contract may be ratified by allowing a claim based thereon and directing payment thereof,² or by payment of interest,³ at least if other persons have acted in

⁸ *Cunningham v. Umatilla County*, 57 Or. 517, 37 L. R. A. (N.S.) 1051, 112 Pac. 437.

¹⁰ *Carter v. Krueger*, 175 Ky. 399, 194 S. W. 553.

¹¹ *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

¹² *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

¹³ *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 52 L. R. A. (N.S.) 880, 167 S. W. 922.

¹⁴ *Osborne v. King County*, 76 Wash. 277, 136 Pac. 138.

¹⁵ *Van Buren Light & Power Co. v. Van Buren*, 116 Me. 119, 100 Atl. 371.

¹ *Athearn v. Independent District*, 33 Ia. 105; *Frank v. Board of Education*, 90 N. J. L. 273, L. R. A. 1917D, 206, 100 Atl. 211; *Cunningham v. Umatilla County*, 57 Or. 517, 37 L. R. A. (N.S.) 1051, 112 Pac. 437; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820.

² *Darling v. Manistee*, 166 Mich. 35, 131 N. W. 450; *Cunningham v. Umatilla County*, 57 Or. 517, 37 L. R. A. (N.S.) 1051, 112 Pac. 437; *McKenna v. McHaley*, 67 Or. 443, 136 Pac. 340.

See also, *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 529.

³ *State v. Scott County*, 58 Kan. 491, 49 Pac. 663.

reliance upon such acquiescence in the validity of such contract.⁴ An agreement to submit a claim for extras to arbitration operates as a ratification of an unauthorized contract for extras.⁵ A ratification of one contract does not operate as a ratification of distinct though similar contracts.⁶ If an entire contract requires attorneys to represent the county in several different actions, a payment of part of the claim of such attorneys for their services in one action operates as a ratification of the entire contract.⁷

§ 1792. Liability in quasi-contract for benefits. If an agent of a public corporation has attempted to bind it by a contract in excess of his authority and the benefits of such contract have subsequently been accepted on behalf of the public corporation by an agent of such public corporation who had authority to bind it by accepting such benefits, the public corporation is liable for at least reasonable compensation for the benefits thus received.¹ A public corporation may be liable for property which has been purchased on its behalf by an unauthorized agent,² or for money which has been borrowed on its behalf by an unauthorized agent but has subsequently been expended for purposes for which the public corporation had authority to expend its funds.³

⁴ *State v. Scott County*, 58 Kan. 491, 49 Pac. 663. (A negotiable instrument in the hands of a bona fide holder.)

⁵ *Carter v. Krueger*, 175 Ky. 399, 194 S. W. 553.

⁶ *Tullock v. Webster County*, 46 Neb. 211, 64 N. W. 705; *Weil v. Newbern*, 126 Tenn. 223, L. R. A. 1915A, 1009, 148 S. W. 680.

⁷ *Spence v. Clay County*, 122 Ark. 157, 182 S. W. 573.

¹ *Georgia. Butts County v. Jackson Bkg. Co.*, 129 Ga. 801, 15 L. R. A. (N.S.) 567, 60 S. E. 149.

Indiana. Boyd v. Black School Township, 123 Ind. 1, 23 N. E. 862.

Kansas. Watkins v. School District, 85 Kan. 760, 118 Pac. 1069.

Minnesota. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

Nebraska. Miles v. Holt County, 86 Neb. 238, 27 L. R. A. (N.S.) 1130, 125 N. W. 527.

New Jersey. Frank v. Board of Education, 90 N. J. 273, L. R. A. 1917D, 206, 100 Atl. 211.

Vermont. New Haven v. Weston, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

² *Boyd v. Black School Township*, 123 Ind. 1, 23 N. E. 862; *Frank v. Board of Education*, 90 N. J. 273, L. R. A. 1917D, 206, 100 Atl. 211.

It may be liable for reasonable compensation for publishing notices, although the contract therefor has not been entered into regularly. *Miles v. Holt County*, 86 Neb. 238, 27 L. R. A. (N.S.) 1130, 125 N. W. 527.

³ *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 15 L. R. A. (N.S.) 567, 60 S. E. 149; *First National Bank v. Goodhue*, 120 Minn. 362, 43 L. R. A. (N.S.) 84, 139 N. W. 599; *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

A board empowered to take charge of some municipal work and pay for the same out of certain funds has no power to bind the city generally by its contracts for machinery and the like, but it may make valid charges against such funds.⁴ Whether a public corporation is liable to repay money which has been borrowed on its behalf by an unauthorized agent and which has been paid by him into the public treasury so as to make up a shortage in his own accounts with the public corporation, is a question upon which there has been a conflict of authority. In some jurisdictions it is held that the public corporation receives the benefits of the money thus advanced, since if it had not been thus advanced the shortage of the public officer would have been so much the greater; and, accordingly, it has been held that the public corporation should repay the amount thus advanced.⁵ In other jurisdictions it has been held that the public corporation has a right to receive from the public official the entire amount which he owes to the public corporation upon the final settlement of his accounts, and that, since the public corporation is not bound by the unauthorized contract, it is not concerned in the source from which such officer has received such funds. Accordingly, it is held that the public corporation is not obliged to repay the money thus advanced.⁶

The liability of the public corporation to make restitution for the benefits which have been received by an officer who is authorized to bind a public corporation by the receipt of such benefits, has been spoken of as ratification.⁷ If the officer who receives such benefits knows the facts and intends to bind the public corporation by the ratification of the contract, and if he has power to bind it by such contract, his acceptance of benefits under the contract will operate as ratification.⁸ The circumstances, however, may be such that the transaction does not amount to ratification and yet charges the public corporation with the duty to make restitution or to pay a reasonable compensation for what has been received under such contract. The acceptance of benefits by an officer who is not authorized to bind the public corporation by the receipt of such benefits does not impose upon it the duty to make compensation

⁴ *Kerr v. Bellefontaine*, 59 O. S. 446, 52 N. E. 1024. 224 Pa. St. 285, 132 Am. St. Rep. 779, 73 Atl. 331.

⁵ *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

⁷ *New Haven v. Weston*, 87 Vt. 7, 46 L. R. A. (N.S.) 921, 86 Atl. 996.

⁶ *First National Bank v. Newcastle*,

⁸ See §§ 1790 and 1791.

therefor,⁹ and such act on his part can not be held to amount to ratification.¹⁰

In a number of cases it is said that a public corporation is not liable to make reasonable compensation for what it has received under a contract which has been entered into by an officer in excess of his authority.¹¹ In some cases this principle is necessarily involved in the decision of the case and actually is applied.¹² Money which has been borrowed on behalf of a public corporation by an unauthorized officer and which has been applied to the payment of the valid debts of the public corporation, can not be recovered under this theory by the party who advances such money.¹³ He is treated as if he actually knew the lack of authority of the officer or agent of the public corporation and as if he were a mere volunteer who had paid money voluntarily into the treasury of the public corporation with full knowledge of all the facts.¹⁴

In other cases in which this rule has been stated it has really not been involved, since the contract in question was not merely

⁹ *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 52 L. R. A. (N.S.) 880, 167 S. W. 922 [overruling, *Frankfort Bridge Co. v. Frankfort*, 57 Ky. (18 B. Mon.) 41; *Nicholasville Water Co. v. Nicholasville*, — Ky. —, 18 Ky. L. Rep. 592, 36 S. W. 549, 38 S. W. 430; *Providence v. Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664; *Frankfort v. Capital Gas & Electric Light Co.*, — Ky. —, 29 Ky. L. Rep. 1114, 96 S. W. 870].

¹⁰ *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 52 L. R. A. (N.S.) 880, 167 S. W. 922 [overruling, *Frankfort Bridge Co. v. Frankfort*, 57 Ky. (18 B. Mon.) 41; *Nicholasville Water Co. v. Nicholasville*, — Ky. —, 18 Ky. L. Rep. 592, 36 S. W. 549, 38 S. W. 430; *Providence v. Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664; and *Frankfort v. Capital Gas & Electric Light Co.*, — Ky. —, 29 Ky. L. Rep. 1114, 96 S. W. 870]; *Cross Township v. Wallace*, 57 Okla. 726, 157 Pac. 898. See § 1790.

¹¹ *Georgia. Nolan v. Cobb County*, 141 Ga. 385, 50 L. R. A. (N.S.) 1223, 81 S. E. 124.

Indiana. Moss v. Sugar Ridge Township, 161 Ind. 417, 68 N. E. 896.

Kansas. Salt Creek Township v. King Iron Bridge Co., 51 Kan. 520, 33 Pac. 303.

Kentucky. City of Princeton v. Princeton Electric Light & Power Co., 166 Ky. 730, 179 S. W. 1074; *Floyd County v. Allen*, 137 Ky. 575, 27 L. R. A. (N.S.) 1125, 126 S. W. 124.

Massachusetts. Agawam National Bank v. South Hadley, 128 Mass. 503.

Oklahoma. Cross Township v. Wallace, 57 Okla. 726, 157 Pac. 898.

As for performing a surgical operation on a prisoner in the custody of the sheriff. *Nolan v. Cobb County*, 141 Ga. 385, 50 L. R. A. (N.S.) 1223, 81 S. E. 124.

As for repairing a road. *Floyd County v. Allen*, 137 Ky. 575, 27 L. R. A. (N.S.) 1125, 126 S. W. 124.

¹² *Agawam National Bank v. South Hadley*, 128 Mass. 503.

¹³ *Agawam National Bank v. South Hadley*, 128 Mass. 503.

¹⁴ *Agawam National Bank v. South Hadley*, 128 Mass. 503.

See also, §§ 1519 and 1520.

beyond the authority of the officer who entered into it on behalf of the public corporation, but it was also in violation of some specific statutory provision which was intended to protect the public corporation against all liability except that which was incurred in compliance with such statutory provisions.¹⁵ This principle has been invoked where the contract was invalid, because the contract was not let upon competitive bidding,¹⁶ or because it incurred a liability in excess of the debt limit of the public corporation.¹⁷ While it is true that no officer of the public corporation is authorized to enter into contracts of this sort, the difficulty is one of the powers of the public corporation and of specific prohibitions placed upon the action of the public corporation by any of its officers, rather than the question of lack of power of the particular officer through whom the contract was entered into. In cases of this sort no liability in quasi-contract can be enforced against the public corporation without defeating the intentions of the legislature.¹⁸

In any event, there is no liability for benefits which are no greater than those which would have been received had the officer done his duty. Thus an agent who was authorized to collect convict-hire in money accepted notes therefor, payable to the state, and indorsed them, depositing the money thus received to the credit of the state. It was held that on non-payment of the notes the state was not liable as indorser, since the agent had no authority so to indorse; nor was it liable in quasi-contract for money had and received.¹⁹

¹⁵ *Moss v. Sugar Ridge Township*, 161 Ind. 417, 68 N. E. 896; *Salt Creek Township v. King Iron Bridge Co.*, 51 Kan. 520, 33 Pac. 303; *Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S. W. 1074.

¹⁶ *Moss v. Sugar Ridge Township*, 161 Ind. 417, 68 N. E. 896; *Princeton*

v. Princeton Electric Light & Power Co., 166 Ky. 730, 179 S. W. 1074.

¹⁷ *Salt Creek Township v. King Iron Bridge Co.*, 51 Kan. 520, 33 Pac. 303.

¹⁸ See §§ 1962 and 1963.

¹⁹ *Carolina National Bank v. State*, 60 S. Car. 465, 85 Am. St. Rep. 865, 38 S. E. 629.

CHAPTER LVI

AGENTS AND OFFICERS OF PRIVATE CORPORATIONS

- § 1793. Application of general principles of agency to private corporations.
- § 1794. Notice of termination of authority.
- § 1795. Stockholders.
- § 1796. Directors.
- § 1797. President.
- § 1798. Vice president.
- § 1799. Secretary, treasurer, cashier and teller.
- § 1800. General and special managers.
- § 1801. Estoppel.
- § 1802. Liability in quasi-contract.
- § 1803. Ratification—General principles.
- § 1804. Who may ratify.
- § 1805. What amounts to ratification.
- § 1806. Effect of ratification.
- § 1807. Personal liability of agent or officer of corporation.

§ 1793. Application of general principles of agency to private corporations. It is sometimes said that an officer of a corporation is to be distinguished from an agent of a corporation, and that when a corporation acts through certain of its officers, it is acting directly; while in other cases it is acting through an agent and the ordinary principles of agency apply.¹ This statement may be correct in cases in which the act is the act of those who in law amount to the corporation and who are therefore acting on their own behalf and not in a representative capacity.² For most purposes, however, the general principles of agency apply to cases in which a private corporation is represented in a transaction by its officers or agents,³ and the corporation is bound whenever a natural person

¹ *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 127 Am. St. Rep. 822, 16 L. R. A. (N.S.) 703, 68 Atl. 1078; *Bullock-Beresford Manufacturing Co. v. Hedges*, 76 O. S. 91, 81 N. E. 171.

² Compare § 1795 as to the power of the stockholders to act directly on be-

half of the corporation, and § 1796 as to the power of the directors to act directly on behalf of the corporation.

³ *Southern Electric Securities Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785; *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 127 Am. St. Rep. 822, 16 L. R. A.

would be bound under similar circumstances; and it is not bound by the acts of its officers and agents if the circumstances are such that a natural person would not be bound.

There are, however, certain peculiarities in the application of the ordinary doctrines of agency to contracts of corporations, some of which grow out of the fact that a corporation is an artificial person and some of which grow out of the fact that business usages and customs have built up a number of rules which are generally understood by those who deal with corporations and which accordingly operate as implied grants of power or implied restrictions upon power. The chief peculiarities in applying the ordinary rules of agency are as follows: 1. A corporation is an artificial person and it can act only through its officers or agents, except in the cases in which it acts directly through those who in legal contemplation constitute the corporation. Accordingly, every contract into which a corporation enters, except the contracts which are entered into directly by those who constitute the corporation, presents some question of agency in some form. If the contract into which a corporation enters through an agent is within the scope of his authority, the corporation is bound thereby.⁴ Notice to the agent in transactions within the scope of his authority is notice to the corporation,⁵ unless the agent is representing himself in dealing with the corporation and his interests are adverse to those of the corporation.⁶ A mercantile corporation is liable for the acts of its agents in notifying its customers that a certain corporation has been sued for money advanced in an amount in excess of its

(N.S.) 703, 68 Atl. 1078; *First National Bank v. Burns*, 88 O. S. 434, 103 N. E. 93; *Brace v. Northern Pacific Ry.*, 63 Wash. 417, 38 L. R. A. (N.S.) 1135, 115 Pac. 841.

⁴ *United States. McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 146 C. C. A. 623, 1 L. R. A. 1127.

Illinois. Bank v. Griffin, 66 Ill. App. 577; *Nichols v. R. R.*, 24 Utah 83, 91 Am. St. Rep. 778, 66 Pac. 768.

Iowa. Wood v. Chicago, Milwaukee & St. Paul Ry., 68 Ia. 491, 56 Am. St. Rep. 861, 27 N. W. 473.

Washington. Hoffman v. Gottstein

Investment Co., 101 Wash. 428, 172 Pac. 573.

Wisconsin. Mitchell Street State Bank v. Froedtert, — Wis. —, 170 N. W. 822.

On this subject in general, see, *Officers of Private and Public Corporations*, by D. T. Watson, 2 *Yale Law Journal*, 228.

⁵ *First National Bank v. Burns*, 88 O. S. 434, 103 N. E. 93.

⁶ *Rusmissett v. White Oak Stave Co.*, 80 W. Va. 400, L. R. A. 1917F, 453, 92 S. E. 672. See, however, *First National Bank v. Burns*, 88 O. S. 434, 103 N. E. 93.

capital.⁷ If the contract is within the scope of the agent's authority and the adversary party acts in good faith, the fact that the agent misappropriates the proceeds does not prevent the contract from being binding on the corporation.⁸ If a corporation enters into a contract through an agent who does not disclose the fact of his agency the corporation may bring an action upon such contract,⁹ as a natural person may.¹⁰

On the other hand, if the contract is beyond the powers of the agent of the corporation and no considerations of estoppel exist, no recovery can be had against the corporation.¹¹ If an officer of a corporation has no power to indorse commercial paper in its possession belonging to another corporation, his indorsement does not change title thereto.¹² If an officer of a corporation has no authority to deliver mortgaged property to the mortgagees, his act in delivering it does not affect the legal rights of the parties.¹³ If A is employed by an insurance company to examine the account of B, a local agent of such company, and to settle such account, A has no implied authority to institute criminal proceedings against B for embezzlement; and the insurance company is accordingly not liable for malicious prosecution if A institutes such proceedings.¹⁴ 2. All who deal with a corporation are, as is said elsewhere,¹⁵ bound to take notice of its charter. This may include the general

⁷ *Pacific Packing Co. v. Bradstreet Co.*, 25 Ida. 696, 51 L. R. A. (N.S.) 893, 139 Pac. 1007.

⁸ *Reagan v. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575; *Havens v. Bank*, 132 N. Car. 214, 95 Am. St. Rep. 627, 43 S. E. 639; *Mitchell Street State Bank v. Froedtert*, — Wis. —, 170 N. W. 822.

⁹ *First National Bank v. Marietta & Cincinnati Railroad Co.*, 20 O. S. 259. (No liability existed for other reasons, however.)

¹⁰ See § 1781.

¹¹ *United States. Emerson v. Fisher*, 246 Fed. 642, 158 C. C. A. 598.

Alabama. Sullivan v. Ry., 128 Ala. 77, 30 So. 528.

Georgia. Savannah, etc., Ry. v. Humphreys, 114 Ga. 681, 40 S. E. 711.

Iowa. Bristol Savings Bank v. Judd, 116 Ia. 26, 89 N. W. 93.

New Jersey. Hall v. Passaic Water Co., 83 N. J. L. 771, 43 L. R. A. (N.S.) 750, 85 Atl. 349.

Washington. Jones v. North Pacific Fish & Oil Co., 42 Wash. 332, 6 L. R. A. (N.S.) 940, 84 Pac. 1122.

West Virginia. Thompson v. Laboringman's Mercantile & Mfg. Co., 60 W. Va. 42, 6 L. R. A. (N.S.) 311, 53 S. E. 908.

See also, *Alabama City, G. & A. Ry. Co. v. Kyle*, — Ala. —, 81 So. 54.

¹² *Emerson v. Fisher*, 246 Fed. 642, 158 C. C. A. 598.

¹³ *Jones v. North Pacific Fish & Oil Co.*, 42 Wash. 332, 6 L. R. A. (N.S.) 940, 84 Pac. 1122.

¹⁴ *Russell v. Palatine Insurance Co.*, 106 Miss. 290, 51 L. R. A. (N.S.) 471, 63 So. 644.

¹⁵ See §§ 1969 et seq.

laws concerning corporations. If the power of certain classes of agents of corporations is specified in the charter persons dealing with the corporation are bound to take notice of such powers.¹⁶ If the power of the agent depends on the construction of the articles of incorporation, the question of his authority is one of law, for the court.¹⁷ Strangers are not charged with presumptive knowledge of the by-laws of a corporation, either of a foreign¹⁸ or of a domestic corporation.¹⁹ Accordingly, by-laws of a corporation, not in fact known to a person dealing with such corporation, can not limit the apparent authority of an agent of such corporation.²⁰ A member of a corporation, such as a beneficial organization,²¹ is charged with knowledge of the by-laws. Thus a member of a benevolent association is bound to know that the secretary can not waive a constitutional requirement and excuse such member from paying assessments on a benefit certificate issued in favor of such member on her husband's life, while she does not know whether such husband, being absent, is alive or dead.²² Secret limitations on the apparent authority of an agent can not affect a contract entered into by a stranger with the corporation in reliance on the apparent authority of such agent.²³ A superintendent who has acted as agent of the corporation in employing men, may bind it by a contract of employment for a year, although his actual authority is only to employ orally from day to day.²⁴ 3. The general business of most corporations is managed in about the same general way. Accordingly, custom and usage have annexed incidents to particular forms of corporate agency. These customs and usages have in

¹⁶ *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337; *Groeltz v. Real Estate Co.*, 115 Ia. 602, 89 N. W. 21; *Bocock v. Iron Co.*, 82 Va. 913, 3 Am. St. Rep. 128, 1 S. E. 325.

¹⁷ *Groeltz v. Real Estate Co.*, 115 Ia. 602, 89 N. W. 21.

¹⁸ *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67.

¹⁹ *Ashley Wire Co. v. Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410; *Smith v. Smith*, 62 Ill. 493.

²⁰ *Domestic Building Association v. Guadiano*, 195 Ill. 222, 63 N. E. 98; *Groeltz v. Armstrong*, 129 Ia. 39, 99 N. W. 128; *Rathbun v. Snow*, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; *Moyer v. Terminal Co.*, 41 S. Car. 300,

44 Am. St. Rep. 709, 25 L. R. A. 48, 19 S. E. 651.

²¹ *Kocher v. Benevolent Legion*, 65 N. J. L. 649, 86 Am. St. Rep. 687, 52 L. R. A. 861, 48 Atl. 544.

²² *Kocher v. Benevolent Legion*, 65 N. J. L. 649, 86 Am. St. Rep. 687, 52 L. R. A. 861, 48 Atl. 544.

²³ *Domestic Building Association v. Guadiano*, 195 Ill. 222, 63 N. E. 98; *Heinze v. Dock Co.*, 109 Wis. 99, 85 N. W. 145; *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 39 L. R. A. (N.S.) 435, 121 Pac. 67.

²⁴ *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 39 L. R. A. (N.S.) 435, 121 Pac. 67.

some cases become so well established as to be recognized by the law. In such cases the incidental powers of certain classes of agents are defined with greater accuracy as matters of law than they are in ordinary classes of agents. 4. In the absence of statute, the ordinary rules which apply to the method of conferring authority upon the agent of a natural person,²⁵ apply to officers and agents of private corporations. Unless the charter or the statutes which regulate corporations, provide to the contrary, an agent to sell personal property may act upon oral authority.²⁶ If a corporation is organized to deal in real property and to take options thereon, an officer may enter into a contract for the sale of such property without written authority.²⁷

Authority may be conferred by acquiescence in the specific transactions,²⁸ or by acquiescence in similar transactions in the past.²⁹ If an agent of a corporation is authorized to make a contract on its behalf, the fact that he does not use his official designation in making such contract does not prevent it from being binding upon the corporation.³⁰

§ 1794. Notice of termination of authority. As in the case of an agent of a natural person,¹ notice of the termination of the authority of an agent of a corporation must be given to those who had known of his authority and had dealt with the corporation through such agent.² If A has taken insurance from B through B's agent, C, A may rely upon C's authority to cancel such policy, and such cancellation is operative although C's authority to represent B has been revoked without notice to A.³ Notice by publication is not sufficient as to persons who had actually dealt with the corporation through such agent, unless such persons had seen such an

²⁵ See §§ 1733 et seq.

²⁶ *Alabama City, G. & A. Ry. Co. v. Kyle*, — Ala. —, 81 So. 54.

²⁷ *Henry v. Black*, 210 Pa. St. 245, 105 Am. St. Rep. 802, 59 Atl. 1070.

²⁸ *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 146 C. C. A. 623, 1 A. L. R. 1127; *In re National Piano Co.*, 252 Fed. 950.

²⁹ *Commonwealth v. Mehler & Eckstenkemper Lumber Co.*, 183 Ky. 11, 208 S. W. 13; *Martin v. Inter-State Lumber Co.*, 260 Pa. St. 218, 103 Atl. 613; *Cook v. American Tubing & Web-*

bing Co., 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641.

³⁰ *Thrailkill v. Crosbyton-South-plains R. Co.*, 246 Fed. 687, 158 C. C. A. 643, L. R. A. 1918C, 90.

¹ See §§ 1743 et seq.

² *Aetna Ins. Co. v. Stambaugh-Thompson Co.*, 76 O. S. 138, 81 N. E. 173; *Union Bank & Trust Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

³ *Aetna Ins. Co. v. Stambaugh-Thompson Co.*, 76 O. S. 138, 81 N. E. 173.

advertisement or had otherwise had actual notice of such resignation.⁴ The rule requiring notice of the termination of the agent's authority applies to cases in which the agent is the president of the corporation.⁵

§ 1795. Stockholders. A corporation consists of its stockholders,¹ and in the absence of statute the common law regards the management and control of the corporation as vesting in the stockholders when duly assembled at a stockholders' meeting.² Relics of this original power persist, even under modern statutes,³ although most of these cases can be explained on the theory that the directors were all present at such meeting and concurred in the result.⁴ The stockholders at a regular meeting are held to have authority to ratify a contract for the employment of an attorney in an accounting suit brought in the name of the corporation.⁵ The stockholders may ratify an unauthorized lease made by the president on behalf of the corporation.⁶

Modern statutes which regulate the control and management of the corporation, whether they are general statutes or special char-

⁴ Union Bank & Trust Co. v. Long Pole Lumber Co., 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

⁵ Union Bank & Trust Co. v. Long Pole Lumber Co., 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

¹ See §§ 1970 et seq.

² Union Pacific Ry. v. Chicago, Rock Island and Pacific Ry., 163 U. S. 564, 41 L. ed. 265.

"Appellants contend that the action of the stockholders and the executive committee was ineffectual because the board of directors was the only body that could authorize the president and secretary to make the contract. The contract appearing on its face to have been duly executed, and the parties having entered upon its execution, necessarily with full knowledge on the part of the board of directors of the Pacific Company, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter. Pittsburgh, etc., Rail-

way Co. v. Keokuk Bridge Co., 131 U. S. 371, 381, 33 L. ed. 157.

"When, by the charter of a corporation, its powers are vested in its stockholders, and this was the common law rule when the charter was silent, the ultimate determination of the management of the corporation affairs rests with its stockholders, and the charter of the Pacific Company did not commit the exclusive control to the board of directors." Union Pacific Ry. v. Chicago, Rock Island and Pacific Ry., 163 U. S. 564 (596), 41 L. ed. 265.

³ Ney v. Eastern Iowa Telephone Co., — Ia. —, 171 N. W. 26; Bundy v. Ophir Iron Co., 38 O. S. 300; Burr's Executor v. McDonald, 44 Va. (3 Gratt) 215.

⁴ See notes 18 to 21, this section.

⁵ Ney v. Eastern Iowa Telephone Co., — Ia. —, 171 N. W. 26.

⁶ Hill v. Atlantic & N. Car. R. Co., 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

ters, usually provide that such control and management of ordinary business, at least, shall be vested in a board of directors or trustees. No contract between the stockholders can take from the directors the right to control the affairs of the corporation.⁷ Under such statutes, it is held, by the great weight of authority, that the stockholders can not assume control of the corporation or exclude the directors from the ordinary management thereof; and, accordingly, their contracts and other transactions on behalf of the corporation do not bind the corporation, even if they are entered into at a lawful stockholders' meeting,⁸ as long as the directors do not concur in such transactions. Accordingly, the stockholders can not

⁷Hocking Valley Ry. Co. v. Toledo Terminal R. Co., — O. S. —, 122 N. E. 35.

⁸Canada. Cann v. Eakins, 23 N. S. 475.

California. Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629; Blood v. La Serena Land & Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

Colorado. Union Gold Mining Co. v. Rocky Mountain National Bank, 2 Colo. 565 [affirmed, Gold Mining Co. v. National Bank, 96 U. S. 640, 24 L. ed. 648].

Illinois. Stoelke v. Hahn, 158 Ill. 79, 42 N. E. 150; Sellers v. Greer, 172 Ill. 549, 40 L. R. A. 589, 50 N. E. 246; Manufacturers' Exhibition Building Co. v. Landay, 219 Ill. 168, 76 N. E. 146; Beardstown Pearl Button Co. v. Oswald, 130 Ill. App. 290.

Montana. Deschamps v. Loiselle, 30 Mont. 565, 148 Pac. 335.

New Jersey. Jackson v. Hooper, 76 N. J. Eq. 592, 27 L. R. A. (N.S.) 658, 75 Atl. 568; Atlantic City & Suburban Gas & Fuel Co. v. Johnson, 81 N. J. Eq. 351, 88 Atl. 163.

"Another reason for rejecting the proceedings of April 5, 1869, is that the affairs of the corporation were in the hands of trustees, or directors, and the stockholders had no authority in the

premises. Gashwiler v. Willis, 33 Cal. 12. Doubtless the stockholders might instruct the trustees as to the course to be pursued, but the power of the corporation was vested in the trustees, and they could only express its will." Union Gold Mining Co. v. Rocky Mountain National Bank, 2 Colo. 565 [affirmed, Gold Mining Co. v. National Bank, 96 U. S. 640, 24 L. ed. 648].

"Whoever may be the owner of the stock of the railroad company, or however many or few such owners there may be, that corporation still continues to exist as a separate and independent corporation. It preserves its corporate existence. It operates its own road. It has its own officers, and makes its own contracts. Although the lime company is the owner of nearly all of its capital stock, that company does not thereby become the owner of the railroad company's road, franchises, or other property. That corporation, whoever may be the owner of its stock, still owns its property. Neither do the stockholders of a corporation control the property of the corporation. Of course, a majority of the stockholders control the election of directors and other officers and agents of the corporation; but the control of the property of the corporation is in the corporation itself, and in its officers and agents who are invested with such control by virtue of the by-

sell the property of the corporation;⁹ they can not pass upon claims for losses, if the corporation is an insurance company;¹⁰ and they can not compel the directors to act under the direction of a

laws of the company." *Ulmer v. Lime Rock Ry.*, 98 Me. 579, 66 L. R. A. 387, 57 Atl. 1001.

"Undoubtedly no trust relation ordinarily exists between the stockholder and the corporation; but the reason is that ordinarily the stockholder is a stranger to the management of the affairs of the corporation, which is the province of the directors. If, however, in any particular case the stockholders have authority to manage the affairs of the corporation—in other words, to discharge the functions of directors, and undertake to do so—they, for all the purposes of the affairs thus managed, become directors in fact, and occupy, for the purposes of such affairs, precisely the same relation of trust which directors ordinarily hold towards the corporation. This trust relation is not a matter of statutory law, or of technical law, but is simply the logical consequence of the impossibility of being judge in one's own case, or of being on both sides of a contract.

"It is therefore a question of no importance whether the stockholders of this company had, or had not, authority under the charter to manage the affairs of the company. The stockholders and the directors were the same five persons, and it is a perfectly plain proposition that they could not assume, or divest themselves of, this trust relation towards the company as they might change their coats. As a matter of fact, however, the stockholders did not have authority to manage the affairs of the company. It is a fundamental principle of the law of corporations that stockholders have no mandate to act for the corporation. 10 *Cyc. Law & Proc.* 760, *Cook, Corp.* 4th ed. p. 34, § 11. A corporation whose affairs could

be managed indifferently by its stockholders or by its directors would be a nondescript and highly anomalous corporation. Of course the charter might so provide; but no charter would be so interpreted unless a construction more in consonance with what ordinarily obtains were impossible. In the present case the charter does contain a clause, which, taken literally, expresses that idea; but the context of that clause shows that its purpose was merely to regulate the proportion of vote that should be required at the meetings of stockholders to decide the different questions with which the stockholders might have to deal, and also, if taken literally, it would conflict with another clause by which it is provided that the affairs of the company are to be conducted by the directors. However, the question, we repeat, is of no importance since the Webbs, no more as stockholders than as directors, could be final judges in their own case, and vote to themselves the money of the corporation, over the objection and protest of their associates in the corporation." *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500, 67 L. R. A. 76, 36 So. 926.

See on this question, *Power of Stockholders to Bind a Corporation*, by Wm. Lloyd Kitchel, 5 *Yale Law Journal*, 83.

⁹ *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

¹⁰ "The charter of the company having provided that the business and affairs of the company shall be under the control of a board of directors, the matter of passing upon claims for losses was committed exclusively to that board, and the annual meeting of the members had no authority in respect thereto. The action of that meeting in

committee of the stockholders.¹¹ A lease of a manufacturing plant which is entered into on behalf of the corporation at a stockholders' meeting, has been held to be invalid on the ground that the lease was not made by the directors in their official capacity; but also on the ground that even if such lease were entered into by persons authorized to bind the corporation, the corporation had no power to make such a lease as would suspend business for more than one year.¹² A contract entered into on behalf of a corporation at a stockholders' meeting, by which such corporation agrees to buy a manufacturing plant, is said to be invalid, and notes given under such contract by the authority of the stockholders and signed by the president and secretary, are said not to be valid obligations of the corporation.¹³ Individual stockholders can not bind the corporation by an agreement to release one of the subscribers in consideration of his purchasing certain property belonging to the corporation.¹⁴ The stockholders can not enter into a contract by which they agree that the corporation is to be operated as a partnership.¹⁵ Although a corporation is formed under such a contract, equity can not treat it as a partnership and it can not dissolve it and it can not enjoin the directors from controlling the corporation.¹⁶

Contracts are sometimes made and other corporate acts transacted at meetings which purport to be stockholders' meetings and at which all the directors are present. If the directors acquiesce in such transaction, it is held in a number of jurisdictions that such contract is binding upon the corporation on the theory that no formal action of the directors is required, and that if they have in fact met and exercised their discretion on behalf of the corporation, the corporation is bound by their united action; and the fact that the stockholders met with them and acquiesced in such contract or transaction, can not render it invalid.¹⁷ If no directors

the premises was therefore nugatory, it being a matter exclusively within the power of the board of directors." *Stoelke v. Hahn*, 158 Ill. 79, 42 N. E. 150.

¹¹ *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85.

¹² *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27.

¹³ *McCullough v. Moss*, 5 Denio (N. Y.) 567. (It was also said that such

notes were not given for a proper purpose, and that they were invalid for that reason.)

¹⁴ *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

¹⁵ *Jackson v. Hooper*, 76 N. J. Eq. 592, 27 L. R. A. (N.S.) 658, 75 Atl. 568.

¹⁶ *Jackson v. Hooper*, 76 N. J. Eq. 592, 27 L. R. A. (N.S.) 658, 75 Atl. 568.

¹⁷ *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524;

have been elected for three years and a general meeting of the stockholders is held, at which the directors are present, and at such meeting new directors and a president are elected, and the president is directed to execute a deed of assignment, such deed is the valid conveyance of the corporation.¹⁸ It is said that the stockholders could authorize any agent to execute such a deed, "as the president of the company," and comparatively little emphasis is placed upon the fact that the directors were present and acquiesced in the transaction.¹⁹ If all the stockholders unite in signing a mortgage upon corporate property to secure a valid debt, and such mortgage is subsequently recognized as a valid instrument by the corporation acting in due form, it will be regarded as having priority over a judgment which became a lien upon the corporate property between the time that the mortgage was signed by the stockholders, and the time that it was recognized in due form by the corporation.²⁰ If all the directors are present at a stockholders' meeting and all acquiesce in the act of the president, secretary and treasurer, in executing a chattel mortgage upon all of the property of the corporation, such mortgage is a valid lien which is prior to a subsequent attachment.²¹

In some cases, however, it seems as though the directors were present at the stockholders' meeting and acquiesced in the transaction; and the court, nevertheless, held that such contract or conveyance was not binding upon the corporation.²² It has, furthermore, been held expressly that if the directors met as stockholders, and not as directors, their acts are to be regarded as the acts of stockholders, and not as directors, and accordingly it is held that the corporation is not bound by such acts.²³

Crossette v. Jordan, 132 Mich. 78, 92 N. W. 782; *Bundy v. Ophir Iron Co.*, 38 O. S. 300; *Burr's Executor v. McDonald*, 44 Va. (3 Gratt.) 215; *Burke v. Sidra Bay Co.*, 116 Wis. 137, 92 N. W. 568; *First Trust Co. v. Miller*, 160 Wis. 336, 151 N. W. 813.

In some of these cases no emphasis is placed upon the fact that the directors were present at the stockholders' meeting.

¹⁸ *Burr's Executor v. McDonald*, 44 Va. (3 Gratt.) 215.

¹⁹ *Burr's Executor v. McDonald*, 44 Va. (3 Gratt.) 215.

²⁰ *Bundy v. Ophir Iron Co.*, 38 O. S. 300.

²¹ *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524.

²² *McCullough v. Moss*, 5 Denio (N. Y.) 567.

²³ *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27.

"The parties executing the instrument, then, if they had any authority in the premises, must have derived it from some corporate act; and the only act proved or relied on is the resolution adopted at the stockholders' meeting

Acts which involve a substantial change in the organization and functions of the corporation can be performed only with the consent of the stockholders, either a majority or all, as the case may be. Whether a majority of the stockholders of a solvent and going concern can sell out its business against the wishes of the minority, is a question upon which there is a conflict of authority. In some jurisdictions it is held that the majority does not possess such

before mentioned. This was a meeting of the stockholders only. It was called as such, and the proceedings all appear to have been conducted as a stockholders' meeting. The resolution authorizing the sale and conveyance of the mine, etc., in question, was adopted by the stockholders, as such, at said meeting, and not by the board of trustees, or at any meeting of said board. The board of trustees do not appear to have ever acted at all upon the matter in the character of a board, but the testimony shows that they acted in pursuance of the said resolution adopted at the meeting of stockholders.

"Section five of the Act authorizing the formation of corporations for mining purposes provides: 'That the corporate powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders,' etc. And section seven provides that: 'A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act.' (Laws, 1863, p. 88, § 5; 7 Hittell's Gen. Laws, Arts. 936, 938.) Conferring authority to sell and convey the corporate property is the exercise of a corporate power, and under these provisions the 'corporate powers of the corporations' are to be exercised by the board of trustees when the majority are 'duly assembled as a board.' When thus assembled and acting the decision of the majority 'shall be valid as a corporate act.' We find

nothing in the Act authorizing the stockholders, either individually or collectively in a stockholders' meeting, to perform corporate acts of the character in question. The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, co-partners or otherwise. (*Gorham v. Gilson*, 28 Cal. 494; *Mickles v. Rochester City Bank*, 11 Paige 128.) This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed to the property, they could have conveyed no title, for the reason that it was not in them (*Wheelock v. Moulton et al.*, 15 Vt. 521); and what they could not do themselves they could not by resolution or otherwise authorize another to do for them. The corporation could only act—could only speak—through the medium prescribed by law, and that is its board of trustees. As well might the citizens of San Francisco in public meeting assembled, by unanimous resolution authorize certain supervisors, designated by name, to sell and convey the City Hall. It is said, however, that the trustees were also all present and participated in the proceedings at the stockholders' meeting and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were

power.²⁴ In other jurisdictions it is held that the majority of the stockholders may sell the business of a going and solvent concern, without the consent of the minority, and that equity will not relieve against such a sale if it is not shown that fraud existed or gross mismanagement,²⁵ at least if the corporation can not conduct, with advantage, the business for the conduct of which it was incorporated.²⁶ Most of the acts which involve a substantial change in the organization and functions of the corporation are not matters of contract, however.

Under some statutes certain specific acts can not be entered into by the corporation without the consent of a majority of the stockholders.²⁷ Such a statute is regarded as enacted for the benefit of the stockholders; and unless the statute expressly provides that such a contract shall be of no effect unless such consent is

acting in their individual characters as stockholders, and not as a board of trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco in public meeting assembled, at which the supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the trustees when assembled and acting as a board. This is the mode prescribed. As a board they could perform valid corporate acts, and confer authority within the province of their powers, upon the trustees individually or upon any other parties to perform acts as the agents of the corporation." *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

²⁴ *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981; *Jones v. Nichols*, — Ala. —, 80 So. 71; *Forrester v. Butte & M. Consoli-*

dated Copper & Silver Mining Co., 21 Mont. 544, 55 Pac. 229, 353; *Kean v. Johnson*, 9 N. J. Eq. 401; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54.

²⁵ *Alabama. Maben v. Gulf Coal & Coke Co.*, 173 Ala. 259, 35 L. R. A. (N.S.) 396, 55 So. 607.

Massachusetts. Treadwell v. Salisbury Mfg. Co., 73 Mass. (7 Gray) 393, 66 Am. Dec. 490.

Missouri. Tanner v. Lindell Ry., 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

New Hampshire. Bowditch v. Jackson Co., 76 N. H. 351, L. R. A. 1917A, 1174, 82 Atl. 1014.

New Jersey. Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 130, (404) [overruling, *Kean v. Johnson*, 9 N. J. Eq. 401].

Tennessee. State v. Chilhowee Woolen Mills Co., 115 Tenn. 266, 2 L. R. A. (N.S.) 493, 112 Am. St. Rep. 825, 89 S. W. 741.

²⁶ *Phillips v. Providence Steam Engine Co.*, 21 R. I. 302, 45 L. R. A. 560, 43 Atl. 598.

²⁷ *Eastman v. Parkinson*, 133 Wis. 375, 13 L. R. A. (N.S.) 921, 113 N. W. 649.

secured, it is regarded as affording a protection to the stockholders which may be waived if they chose to acquiesce in such transaction.²⁸

Even where the power of the stockholders to bind the corporation is held to exist, it is limited to their action at a regular meeting, however. A single stockholder, acting as an individual, has as such no implied power whatever to bind the corporation.²⁹ This is true even if he is the chief stockholder,³⁰ and is also director,³¹ or president.³² The majority of the stockholders, acting separately and not at a meeting, can not bind the corporation.³³ It is said that stockholders can ratify the acts of the directors only at a lawful stockholders' meeting.³⁴ If ratification of acts of directors by stockholders is necessary, directors who are also stockholders may vote, as stockholders, to ratify their acts as directors.³⁵ If it is necessary that a contract should be ratified by the stockholders, only the stockholders who refused to ratify can attack the validity of the contract.³⁶

In some cases, however, the courts refuse to distinguish between the legal entity and the individual stockholders in cases in which practically all of the stock is owned by one person, especially if the distinction between the legal entity and the natural persons will result in the perpetration of a fraud.³⁷ One who has made use of the organization of a corporation as a means of defrauding others, can not avoid his oral promise to make restitution of money

²⁸ *Eastman v. Parkinson*, 133 Wis. 375, 13 L. R. A. (N.S.) 921, 113 N. W. 649.

²⁹ *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; *Nebraska, etc., Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370; *Feenaughty v. Beall*, — Or. —, 178 Pac. 600; *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 Pac. 1120.

³⁰ *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353; *Feenaughty v. Beall*, — Or. —, 178 Pac. 600.

³¹ *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82.

³² *Goodman Mfg. Co. v. Mammoth Vein Coal Co.*, — Ia. —, 168 N. W. 912.

³³ *World's Panama Exposition Co. v. American Brewing Co.*, 134 La. 921, 64 So. 832.

³⁴ *Hyams v. Old Dominion Co.*, 113 Me. 294, L. R. A. 1915D, 1128, 93 Atl. 747.

³⁵ *Russell v. Henry C. Patterson Co.*, 232 Pa. St. 113, 36 L. R. A. (N.S.) 199, 81 Atl. 136.

³⁶ *U. S. Industrial Alcohol Co. v. Distilling Co.*, 87 N. J. Eq. 531, 104 Atl. 216.

³⁷ *Donovan v. Purtell*, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334; *Felsenthal Co. v. Northern Assurance Co.*, 284 Ill. 343, 1 A. L. R. 602, 120 N. E. 268; *Milbrath v. State*, 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252.

thus obtained, on the theory that it is a promise to answer for the debt of another.³³ If the property of a corporation is set on fire by one who is entitled to all the profits of its stock, as a pledgee thereof, the insurance company may set up such facts as a defense against the corporation.³⁴ If all the stock in a corporation, except one share, belongs to A, and that share belongs to A's wife, the attorney who is employed in a divorce suit between A and his wife to adjust their property rights, may recover without showing a formal contract by the corporation.³⁵

§ 1796. Directors. Under modern statutes, the board of directors, acting at lawful meetings, is the chief agency for directing and controlling the ordinary business of the corporation.¹ They have a wide discretion in controlling the ordinary affairs of the corporation.²

The acts of the board of directors at a lawful meeting bind the corporation though no formal resolution to make the contract in question is adopted.³ Whether a resolution adopted by a board of directors is an offer or acceptance on the one hand, or a declaration of intention and an instruction to its agents on the other, is a question of construction which is determined by the general principles of offer and acceptance.⁴ The fact that no written record of

³³ *Donovan v. Purtell*, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334.

³⁴ *Felsenthal Co. v. Northern Assurance Co.*, 284 Ill. 343, 1 A. L. R. 602, 120 N. E. 268.

³⁵ *Clark v. Schwaegler*, — Wash. —, 175 Pac. 300.

¹ *United States. Mahoney Mining Co. v. Bank*, 104 U. S. 192, 26 L. ed. 707.

Colorado. Aliunde Consolidated Mining Co. v. Arnold, — Colo. App. —, 67 Pac. 28.

Massachusetts. Eastern R. R. v. R. R., 111 Mass. 125, 15 Am. Rep. 13.

Michigan. Osborn v. Detroit Kraut Co., 193 Mich. 664, 160 N. W. 442.

Nebraska. Trepfagen v. South Omaha, 69 Neb. 577, 96 N. W. 248.

New York. Beveridge v. R. R., 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489.

Ohio. Sims v. Street Railroad Co., 37 O. S. 556; *Bradford Belting Co. v. Gibson*, 68 O. S. 442, 67 N. E. 888.

Oklahoma. Farmers' State Guaranty Bank v. Cromwell, — Okla. —, 1 L. R. A. 684, 173 Pac. 826.

Oregon. Columbia, etc., Co. v. Transportation Co., 32 Or. 532, 52 Pac. 513.

South Dakota. Wright v. Lee, 2 S. D. 596, 51 N. W. 706; *American National Bank v. Wheeler-Adams Auto Co.*, 31 S. D. 524, 141 N. W. 396.

Utah. Murray v. Beal, 23 Utah 548, 65 Pac. 726.

² *Manufacturers' Land & Improvement Co. v. Cleary*, 121 Ky. 403, 89 S. W. 248; *Sims v. Street Railroad Co.*, 37 O. S. 556.

³ *Salem Iron Co. v. Iron Mines*, 112 Fed. 239, 50 C. C. A. 213; *Columbia, etc., Co. v. Transportation Co.*, 32 Or. 532, 52 Pac. 513.

⁴ See ch. V.

See also, *Timme v. Kopmeier*, 162 Wis. 571, L. R. A. 1916D, 1114, 156 N. W. 961.

the proceedings of the board of directors is kept does not prevent their conduct from binding the corporation.⁵

The directors have no power to make substantial changes in the organization or functions of the corporation.⁶ Under most charters and general statutes, such acts can take effect only with the acquiescence of the majority of the stockholders, or of all of the stockholders.⁷

As in the case of other agents, representatives, and the like, the directors must act in good faith toward the stockholders whose interests they are appointed to represent and protect.⁸ The directors can not arrange for selling to themselves individually a new issue of stock in the corporation, without giving the remaining stockholders the opportunity to subscribe to such stock in proportion to their former holdings.⁹ They have no power to make a contract with a third person which in practical effect amounts to a gift of the corporate property to such third person,¹⁰ such as a contract to pay a large amount for broker's services, in concluding a contract which is practically completed when such contract for compensation is made.¹¹

Under some statutes the directors or trustees can enter into certain transactions on behalf of certain kinds of corporations only upon obtaining an order of court for that purpose.¹² Contracts involving the corpus of the fund of charitable or religious corporations, are illustrations of this statutory requirement.¹³

The power of the directors to act on behalf of the corporation must, however, be exercised at lawful meetings. A single member

⁵ Jones v. Stoddart, 8 Ida. 210, 67 Pac. 650; Murray v. Beal, 23 Utah 548, 65 Pac. 726.

⁶ See § 1795.

⁷ See § 1795.

⁸ United States. Bassick v. Aetna Explosives Co., 246 Fed. 974.

Illinois. Nowak v. National Car Coupler Co., 260 Ill. 260, 103 N. E. 222.

Michigan. In re American Air Compressor Co., 194 Mich. 82, 160 N. W. 388.

New York. Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142.

Pennsylvania. Glenn v. Kittanning Brewing Co., 259 Pa. St. 510, L. R. A. 1918D, 738, 103 Atl. 340.

Wisconsin. Timme v. Kopmeier, 182 Wis. 571, L. R. A. 1918D, 1114, 156 N. W. 961.

⁹ Glenn v. Kittanning Brewing Co., 259 Pa. St. 510, L. R. A. 1918D, 738, 103 Atl. 340.

¹⁰ Bassick v. Aetna Explosives Co., 246 Fed. 974.

¹¹ Bassick v. Aetna Explosives Co., 246 Fed. 974.

¹² Horton v. Tabitha Home, 95 Neb. 491, 51 L. R. A. (N.S.) 161, 145 N. W. 1023.

¹³ Horton v. Tabitha Home, 95 Neb. 491, 51 L. R. A. (N.S.) 161, 145 N. W. 1023.

of the board of directors has not as such any implied power to bind the corporation;¹⁴ nor have any number of members acting individually,¹⁵ even if they amount to a majority of the board.¹⁶

A directors' meeting must be either a regular meeting so that all the directors are charged with notice thereof,¹⁷ or it must be a special meeting of which actual notice has been given to the directors.¹⁸ Such requirement is not a technical formality, but it is intended for the benefit and protection of the stockholders.¹⁹ It is, accordingly, not necessary to give notice to a former director who is merely a nominal stockholder and director, if the remaining directors are present and take part in the transaction;²⁰ nor is it necessary to give notice to a former director who has sold his stock, if a by-law provides that the office of director automatically becomes vacant when the director ceases to be a stockholder.²¹ If all

¹⁴ *New Haven, etc., Co. v. Hayden*, 107 Mass. 525; *Sias v. Lighting Co.*, 73 Vt. 35, 50 Atl. 554; *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 87 Atl. 82. (Even if owning a majority of the stock.) *Timme v. Kopmeier*, 162 Wis. 571, L. R. A. 1916D, 1114, 156 N. W. 961.

¹⁵ *United States, Kansas City, etc., Co. v. Devol*, 72 Fed. 717; *Nevada Nickel Syndicate v. Nickel Co.*, 96 Fed. 133.

California. Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; *Alta Silver Co. v. Mining Co.*, 78 Cal. 629, 21 Pac. 373.

Iowa. Ney v. Eastern Iowa Telephone Co., 162 Ia. 525, 144 N. W. 383.

Maine. Morrison v. Gas Co., 91 Me. 492, 64 Am. St. Rep. 257, 40 Atl. 542; *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523.

Massachusetts. England v. Dearborn, 141 Mass. 590, 6 N. E. 837.

Minnesota. Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725.

Missouri. Calumet Paper Co. v. Printing Co., 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115.

Nevada. Edwards v. Water Co., 21 Nev. 469, 34 Pac. 381.

New York. People's Bank v. Church, 109 N. Y. 512, 17 N. E. 408; *Columbia Bank v. Church*, 127 N. Y. 361, 28 N. E. 29.

Ohio. State v. Ben. Association, 42 O. S. 579.

West Virginia. Limer v. Traders' Co., 44 W. Va. 175, 28 S. E. 730.

¹⁶ *Commercial Brewing Co. v. McCormick*, 225 Mass. 504, 114 N. E. 812; *Thompson v. West*, 59 Neb. 677, 49 L. R. A. 337, 82 N. W. 13; *Honaker v. New River, Holston & Western Railroad Co.*, 116 Va. 662, 82 S. E. 727.

¹⁷ *Gorrill v. Greenlees*, — Kan. —, 180 Pac. 798.

¹⁸ *Waterman v. Chicago & Iowa Ry.*, 139 Ill. 658, 32 Am. St. Rep. 228, 15 L. R. A. 418, 29 N. E. 689; *Gorrill v. Greenlees*, — Kan. —, 180 Pac. 798; *Broughton v. Jones*, 120 Mich. 462, 79 N. W. 691; *Hatch v. Lucky Bill Mining Co.*, 25 Utah 405, 71 Pac. 865.

¹⁹ *Stiewel v. Webb Press Co.*, 79 Ark. 45, 116 Am. St. Rep. 62, 94 S. W. 915.

²⁰ *Stiewel v. Webb Press Co.*, 79 Ark. 45, 116 Am. St. Rep. 62, 94 S. W. 915.

²¹ *Johnson v. York Coal & Coke Co.*, — Ky. —, 206 S. W. 611.

of the directors of the corporation are in fact present, it is not material whether notice was actually given or not.²² In such case the fact that one of the members withdraws before action is taken, does not render the transaction invalid.²³

In order that the full powers of the board may be exercised, it is necessary that a quorum should be present.²⁴ In determining whether a quorum is present, a director who has such an interest in the transaction that he is disqualified from voting, can not be counted.²⁵ If he is necessary to complete the quorum, no quorum exists.²⁶

The board of directors is necessarily a body meeting only occasionally, and accordingly it has been held that it may delegate its power over the routine business of the corporation to a smaller committee of its own members, often known as the "executive committee."²⁷ Discretionary powers can not, however, be delegated.²⁸ The practical difficulty on applying this principle is in determining what powers are routine and what are discretionary within the meaning of this rule.

§ 1797. President. The original view of the position of the president was that he was merely the presiding officer of the board of directors.¹ As such presiding officer, he had no greater power to bind the corporation than any individual director.² Thus if the articles of incorporation provide that the directors shall conduct

²² *Ney v. Eastern Iowa Telephone Co.*, — Ia. —, 171 N. W. 26; *O'Rourke v. Grand Opera House Co.*, 47 Mont. 459, 133 Pac. 965; *Robson v. C. E. Feniman Co.*, 83 N. J. L. 453, 85 Atl. 356.

²³ *Ney v. Eastern Iowa Telephone Co.*, — Ia. —, 171 N. W. 26.

²⁴ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Watts v. Gordon*, 127 Tenn. 96, 153 S. W. 483.

²⁵ *Fields v. Victor Building & Loan Co.*, — Okla. —, 175 Pac. 529.

²⁶ *Flanagan v. Flanagan Coal Co.*, 77 W. Va. 757, 88 S. E. 397.

²⁷ *United States v. Union Pacific Ry.*, 163 U. S. 597, 41 L. ed. 277.

²⁸ *California v. Andres v. Fry*, 113 Cal. 124, 45 Pac. 534.

Massachusetts v. Young v. Canada Atlantic & Pacific Steamship Co., 211 Mass. 453, 97 N. E. 1096.

Utah v. Leavitt v. Mining Co., 3 Utah 265, 1 Pac. 356.

Vermont v. John A. Roebling's Sons Co. v. Barre & Montpelier Traction & Power Co., 76 Vt. 131, 56 Atl. 530.

Texas v. Tempel v. Dodge, 89 Tex. 68, 32 S. W. 514, 33 S. W. 222.

²⁸ *Tempel v. Dodge*, 89 Tex. 68, 32 S. W. 514, 33 S. W. 222.

¹ *Wilkin-Hale Bank v. Hernstein*, 48 Okla. 628, 1 A. L. R. 679, 149 Pac. 1109.

² *Arkansas v. City Electric Street Ry. v. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282, 31 L. R. A. 535, 34 S. W. 89; *Dent v. People's Bank*, 118 Ark. 157, 175 S. W. 1154.

the affairs of the corporation, and that they shall elect from their own number a president who shall have such duties as shall be prescribed by the by-laws, the president has, as such, no authority to bind the corporation in the absence of by-laws authorizing him to contract.³ The president of a corporation under this theory has no inherent power to bind the corporation by borrowing money on its behalf.⁴ He can not bind the corporation by signing its name to a note.⁵ He can not retain an attorney, on behalf of the corporation, to compel an accounting from an employe of the corporation.⁶ A president of a bank can not bind it by employing an attorney at an annual fee.⁷ A president has no implied authority to enter into a contract on behalf of the corporation for selling its stock.⁸

The practical workings of modern corporations have in most cases necessitated a departure from this original view. The president is the chief executive officer of the corporation, in many cases by a special grant of such power to him.⁹ In other cases, without an express grant of power, he has in fact exercised such power with the acquiescence and approval of the corporation that the corporation is bound by his acts on the theory that it has held him out to the world as possessing such authority.¹⁰ It is said that a

Iowa. *Groeltz v. Real Estate Co.*, 115 Ia. 602, 89 N. W. 21; *Ney v. Eastern Iowa Telephone Co.*, 162 Ia. 525, 144 N. W. 383.

Minnesota. *Bloomington v. Cushman*, 134 Minn. 445, 159 N. W. 1078.

New Jersey. *Titus v. R. R.*, 37 N. J. L. 98; *Bangor, etc., Ry. v. Slate Co.*, 203 Pa. St. 6, 52 Atl. 40.

Oklahoma. *Wilkin-Hale Bank v. Hernstein*, 48 Okla. 628, 1 A. L. R. 679, 149 Pac. 1109.

Texas. *Commercial National Bank v. First National Bank*, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601.

Vermont. *Lyndon Mill Co. v. Institution*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

Wisconsin. *Consolidated Water-Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234.

³ *Groeltz v. Real Estate Co.*, 115 Ia. 602, 89 N. W. 21.

⁴ *Ex parte Rickey*, 31 Nev. 82, 100 Pac. 134; *Thompson v. Laboringman's Mercantile & Mfg. Co.*, 60 W. Va. 42, 6 L. R. A. (N.S.) 311, 53 S. E. 908.

⁵ *City Electric Street Ry. v. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282, 31 L. R. A. 535, 34 S. W. 89; *Goodman Mfg. Co. v. Mammoth Vein Coal Co.*, — Ia. —, 168 N. W. 912. (Even if he is also the chief stockholder.) *Gould v. Gould*, 134 Mich. 515, 104 Am. St. Rep. 624, 96 N. W. 576.

⁶ *Ney v. Eastern Iowa Telephone Co.*, 162 Ia. 525, 144 N. W. 383.

⁷ *Dent v. People's Bank*, 118 Ark. 157, 175 S. W. 1154.

⁸ *Rogers v. Southern Fiber Co.*, 119 La. 714, 121 Am. St. Rep. 537, 44 So. 442.

⁹ *McCormick v. R. R.*, 130 Cal. 100, 62 Pac. 267; *National State Bank v. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799.

¹⁰ *United States. Auten v. United States Bank*, 174 U. S. 125, 43 L. ed.

president will be presumed to have the ordinary powers of a chief executive,¹¹ and that the corporation is bound by his contracts in its ordinary business, unless it is shown that he did not possess such power and that the adversary party knew that he did not possess such power.¹²

This view of the power of the president is especially clear where the president, either by express authority or by the acquiescence of the corporation, assumes the powers of the general manager.¹³ Thus the president and manager can agree that the corporation will not plead the Statute of Limitations in consideration of delay;¹⁴ or may give a note, even if he is the payee, as long as the note is given for the benefit of the corporation;¹⁵ or employ a superintendent,¹⁶ or a cook for a mining camp.¹⁷ So a president who by acquiescence of the corporation has executed all the corporate instruments for years has implied power to bind the corporation by a mortgage.¹⁸ The president has implied power to indorse negotiable paper owned by the corporation.¹⁹ The president

920; *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

Illinois. *State National Bank v. Bank*, 168 Ill. 519, 48 N. E. 82.

Indiana. *National State Bank v. Tool Co.*, 157 Ind. 10, 60 N. E. 699.

Iowa. *White v. Creamery Co.*, 108 Ia. 522, 79 N. W. 283.

Missouri. *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353.

West Virginia. *Union Bank & Trust Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

¹¹ *Lloyd v. Matthews*, 223 Ill. 477, 114 Am. St. Rep. 346, 7 L. R. A. (N.S.) 376, 79 N. E. 172; *Iowa National Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12.

¹² *Boyd's Executor v. First National Bank*, 128 Ky. 468, 108 S. W. 360.

¹³ *United States*. *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

California. *Wells Fargo Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Pettibone v. Town Co.*, 134 Cal. 227, 66 Pac. 218.

Michigan. *Ceeder v. Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.

Minnesota. *Africa v. Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019.

Montana. *Hanson Sheep Co. v. Farmers' & Traders' Bank*, 53 Mont. 324, 163 Pac. 1151.

Oregon. *Peek v. Skelley Lumber Co.*, 59 Or. 374, 117 Pac. 413.

Utah. *Sandberg v. Mining Co.*, 24 Utah 1, 66 Pac. 360.

Wisconsin. *Meating v. Lumber Co.*, 113 Wis. 379, 89 N. W. 152.

¹⁴ *Wells Fargo Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

¹⁵ *Africa v. Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019.

¹⁶ *Sandberg v. Mining Co.*, 24 Utah 1, 66 Pac. 360.

¹⁷ *Meating v. Lumber Co.*, 113 Wis. 379, 89 N. W. 152.

¹⁸ *National State Bank v. Tool Co.*, 157 Ind. 10, 60 N. E. 699.

¹⁹ *United States*. *Auten v. United States National Bank*, 174 U. S. 125, 43 L. ed. 920.

may bind the corporation by his acquiescence in a bill of sale executed by the manager.²⁰ The president of a manufacturing corporation may agree to pay a reasonable commission for the sale of its product.²¹ If a corporation has power to bind itself by a contract of guaranty, the president may make such contract on its behalf,²² unless it is shown affirmatively that he did not have the authority of the corporation to make such contract.²³

Notice, to the president, of a matter with reference to which he has authority to bind the corporation, is notice to the corporation.²⁴ If the president of a bank has appropriated the account of a depositor for his own use, his knowledge thereof is equivalent to the knowledge of the bank.²⁵ Knowledge of the president of a corporation which is obtained in his own personal transactions is not notice to the bank.²⁶ The knowledge of the president that he is perpetrating a fraud upon one with whom he is dealing, in agreeing, among other things, that the bank will discount certain negotiable instruments, is not notice to the bank.²⁷

A corporation is not liable for admissions or representations of the president without the scope of his authority,²⁸ as where the president of a bank makes a misrepresentation to one who is about to buy stock in the bank from an existing stockholder with reference to the condition of the bank and the value of its stock.²⁹ The

Colorado. *Burnham Loan & Investment Co. v. Sethman*, — Colo. —, L. R. A. 1918F, 1158, 171 Pac. 884.

Idaho. *Jones v. Stoddart*, 8 Ida. 210, 67 Pac. 650.

South Dakota. *Iowa National Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12.

West Virginia. *Union Bank & Trust Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

²⁰ *Trent v. Sherlock*, 26 Mont. 85, 66 Pac. 700.

²¹ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

²² *Lloyd v. Matthews*, 223 Ill. 477, 114 Am. St. Rep. 346, 7 L. R. A. (N.S.) 376, 79 N. E. 172.

²³ *Lloyd v. Matthews*, 223 Ill. 477, 7 L. R. A. (N.S.) 376, 79 N. E. 172.

²⁴ *Chapman v. First National Bank*, 72 Or. 492, L. R. A. 1917F, 300, 143 Pac. 630.

²⁵ *Chapman v. First National Bank*, 72 Or. 492, L. R. A. 1917F, 300, 143 Pac. 630.

²⁶ *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, L. R. A. 1917F, 303, 71 S. E. 626.

²⁷ *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, L. R. A. 1917F, 303, 71 S. E. 626.

²⁸ *Wilkin-Hale Bank v. Hernstein*, 48 Okla. 628, 149 Pac. 1109; *Farmers' State Guaranty Bank v. Cromwell*, — Okla. —, 1 A. L. R. 684, 173 Pac. 826; *Thompson v. Laboringman's Mercantile & Mfg. Co.*, 60 W. Va. 42, 6 L. R. A. (N.S.) 311, 53 S. E. 908.

²⁹ *Farmers' State Guaranty Bank v. Cromwell*, — Okla. —, 1 L. R. A. 684, 173 Pac. 826.

president of a bank has no power to bind it by a representation that a signature upon a note which has been sent to the bank to be executed is the genuine signature of the party whose signature it purports to be.³⁰ A bank is not liable for fraudulent representations made by its president in a matter outside of his authority.³¹ A president has no implied power to enter into a contract which amounts to his reversing the action upon such subject which the board of directors have already taken.³²

Unusual contracts in whole or in part outside the business of the corporation are without the implied authority of the president. Thus if without the usual business of the corporation he can not sell property of the corporation;³³ nor can he buy property for the corporation outside of its usual business.³⁴ The president of a bank can not bind it by a promise to answer for the debt or default of another, without specific authority to make such promise.³⁵ If a post-dated check is drawn by one who has no funds on deposit, in the drawee bank, at the time, the president of such bank can not bind it by his promise to the payee that such check will be paid at maturity.³⁶ The president and actuary of an insurance company can not employ a medical examiner for life.³⁷ The president has no implied authority to purchase stock of the corporation for the corporation,³⁸ even at a sale of such stock in order to enforce payment of the balance of the subscription.³⁹ General authority to the president of a railway to manage the business of the corporation, subject to the approval and direction of the board of directors, does not confer upon him the power to fix the route and the termini of the railway and to institute proceedings in eminent domain before the directors have approved his acts.⁴⁰ The president has no

³⁰ *Commercial National Bank v. First National Bank*, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601.

³¹ *Wilkin-Hale Bank v. Hernstein*, 48 Okla. 628, 149 Pac. 1109.

³² *Humphrey v. Onaway-Alpena Telephone Co.*, — Mich. —, 170 N. W. 1.

³³ *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Asher v. Sutton*, 31 Kan. 286, 1 Pac. 535.

³⁴ *Blen v. Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132.

³⁵ *Swenson Brothers Co. v. Commercial State Bank*, 98 Neb. 702, L. R. A. 1917F, 1096, 154 N. W. 233.

³⁶ *Swenson Brothers Co. v. Commercial State Bank*, 98 Neb. 702, L. R. A. 1917F, 1096, 154 N. W. 233.

³⁷ *Carney v. Ins. Co.*, 162 N. Y. 453, 76 Am. St. Rep. 347, 49 L. R. A. 471, 57 N. E. 78.

³⁸ *Tiger v. Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 30 L. R. A. (N.S.) 694, 130 S. W. 585.

³⁹ *Tiger v. Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 30 L. R. A. (N.S.) 694, 130 S. W. 585.

⁴⁰ *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 10 L. R. A. (N.S.) 909, 56 S. E. 624.

implied power to bind the corporation the benefits of which are to enure to him personally,⁴¹ or to another corporation in which he is interested as stockholder.⁴² The president of a corporation has no power to pay his personal debts out of its assets,⁴³ even if he owns all of its stock and transacts the entire business of the corporation.⁴⁴ A corporation is not bound by its note given by its president in payment of his own debt.⁴⁵ He has no power to apply to the payment of an alleged debt due from the corporation to himself, a bond of the corporation which has been entrusted to him for sale.⁴⁶ The president of a corporation has no power to bind it by unreasonable and unfair contracts which enure greatly to the benefit of the adversary party,⁴⁷ such as contracts to pay exorbitant commissions for sales which the president could easily have made himself.⁴⁸

§ 1798. Vice-president. The vice-president as such has no implied authority to bind the corporation if the president is capable of acting.¹ In cases of the absence of the president, or his incapacity to act, the vice-president, acting as president, may exercise such powers ordinarily as the president might exercise.²

In many corporations a special grant of power is made to one or more vice-presidents. In such cases they may bind the corporation within the power thus granted to them. Without any express grant of power, the corporation may acquiesce in the assumption of the vice-president of certain powers, so that they are bound by his contracts made within the limits of these powers. If a vice-president is also permitted by the corporation to act as its general manager, he may bind it by contracts in the ordinary scope of its business.³ He may bind it by an express warranty if he has authority

⁴¹ *Bowditch Furniture Co. v. Jones*, 74 Conn. 149, 50 Atl. 41; *Wallace v. Packing-Co.*, 25 Wash. 143, 64 Pac. 938.

⁴² *Bloch Queensware Co. v. Metzger*, 70 Ark. 232, 65 S. W. 929 (even if the two corporations have substantially the same stockholders).

⁴³ *De Baca v. Higgins*, 58 Colo. 75, L. R. A. 1915B, 1091, 143 Pac. 832.

⁴⁴ *De Baca v. Higgins*, 58 Colo. 75, L. R. A. 1915B, 1091, 143 Pac. 832.

⁴⁵ *Hoffman v. M. Gottstein Investment Co.*, 101 Wash. 428, 172 Pac. 573.

⁴⁶ *Greenville Gas Co. v. Reis*, 54 O. S. 549, 44 N. E. 271.

⁴⁷ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

⁴⁸ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

¹ *Shavallier v. Lumber Co.*, 12 Mich. 230, 87 N. W. 212.

² *American Exchange National Bank v. Ward*, 111 Fed. 782, 55 L. R. A. 356, 49 C. C. A. 611; *Fernal v. Telegraph Co.*, 31 Wash. 672, 70 Pac. 462.

³ *Moorhead v. Minneapolis Seed Co.*, 139 Minn. 11, L. R. A. 1918C, 391, 165 N. W. 484.

to make the sale of such article, although such warranty is contrary to the custom of the trade.⁴ A vice-president who is acting as general manager, has no authority to dispose of all the assets of the corporation.⁵ The vice-president has no implied authority to alter a contract which has been made by the duly authorized officers of the corporation.⁶

§ 1799. Secretary, treasurer, cashier, and teller. The secretary of a corporation has, in the absence of special authority, no general power by virtue of his office to bind the corporation.¹ The secretary has no implied power to make a declaration of trust which will bind the corporation.² He has no implied power to execute negotiable instruments on behalf of the corporation,³ even when acting in conjunction with the president, if the president does not possess such power.⁴ It is held that the secretary has no inherent power to notify the adversary party to the contract that the directors have determined not to perform such contract, and have ordered him to give notice to the adversary party of such intention.⁵ Inasmuch as the records of a corporation are ordinarily inaccessible to those who are not members, and as the directors can act only as a body, it is difficult to see how it is possible for a corporation to repudiate a contract under this rule.

If a corporation acquiesces in its secretary's conducting certain kinds of business on behalf of the corporation, it is bound by his acts under such implied authority.⁶ If the secretary indorses negotiable instruments of the corporation, and the corporation receives the benefits thereof, it is liable upon his indorsement.⁷ If a secre-

⁴ *Moorhead v. Minneapolis Seed Co.*, 139 Minn. 11, L. R. A. 1918C, 391, 165 N. W. 484.

⁵ *Empire Coal Mining Co. v. Empire Coal Co.*, 183 Ky. 699, 210 S. W. 474.

⁶ *Navarre Realty Co. v. Coale*, 122 Md. 494, 89 Atl. 728.

¹ *United States. Sheatz v. Markley*, 249 Fed. 315, 161 C. C. A. 323 [certiorari denied, *Kirby-Smith v. Sheatz*, 247 U. S. 518, 62 L. ed. 1245].

California. Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 556.

Kansas. Advance Rumely Thresher Co. v. Evans Metcalf Implement Co., 103 Kan. 532, 175 Pac. 392.

New Jersey. Austin v. Young, — N. J. Eq. —, 106 Atl. 395.

Ohio. Bradford Belting Co. v. Gibson, 68 O. S. 442, 67 N. E. 888.

² *Austin v. Young*, — N. J. Eq. —, 106 Atl. 395.

³ *Gould v. Gould*, 134 Mich. 515, 104 Am. St. Rep. 624, 96 N. W. 576.

⁴ See § 1797.

⁵ *Bradford Belting Co. v. Gibson*, 68 O. S. 442, 67 N. E. 888.

⁶ *Advance Rumely Thresher Co. v. Evans Metcalf Implement Co.*, 103 Kan. 532, 175 Pac. 392.

⁷ *East Coast Lumber & Supply Co. v. Maxwell*, — Fla. —, 80 So. 741.

tary is authorized to indorse, in blank, checks which are payable to the corporation, the corporation is bound by such indorsement,⁸ although the corporation erroneously believes that he deposits such checks with the bank in which the corporation deposits its funds.⁹

The treasurer of a corporation has ordinarily authority to receive payments made to the corporation and to pay out money under the instruction of his superior officers.¹⁰ He is said to have implied authority to extend the time for payment of debts due to the corporation, at least if the directors do not meet regularly, and acquiesce in the management of the corporation by the treasurer.¹¹ It is said that he has power to accept property instead of money, as payment of a debt due to the corporation.¹²

He has no authority, by virtue of his office, to bind the corporation by other transactions.¹³ He has no implied authority to execute negotiable instruments on behalf of the corporation.¹⁴ He has no implied power to compromise claims,¹⁵ or to buy property for the corporation.¹⁶

If the corporation acquiesces in his assumption of authority,¹⁷ such as his assumption of authority to execute negotiable instruments,¹⁸ or his assumption of authority as manager,¹⁹ it is bound by his contracts within the scope of such power.

One who is acting as secretary and treasurer of a corporation, has no inherent authority to act as general manager,²⁰ as in making contracts of employment on behalf of the corporation for a term

⁸ *Santa Marina Co. v. Canadian Bank*, 254 Fed. 391.

⁹ *Santa Marina Co. v. Canadian Bank*, 254 Fed. 391.

¹⁰ *Pearson v. Tower*, 55 N. H. 215.

¹¹ *Franklin Savings Bank v. Cochran*, 182 Mass. 586, 61 L. R. A. 760, 66 N. E. 200.

¹² *First National Bank v. Garretson*, 107 Ia. 196, 77 N. W. 856.

¹³ *Jewett v. West Somerville Cooperative Bank*, 173 Mass. 54, 73 Am. St. Rep. 259, 52 N. E. 1085; *Alexander v. Cauldwell*, 83 N. Y. 480; *Martin v. Inter-State Lumber Co.*, 260 Pa. St. 218, 103 Atl. 613.

¹⁴ *Chemical National Bank v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535; *Martin v. Inter-State*

Lumber Co., 260 Pa. St. 218, 103 Atl. 613; *Pelton v. Spider Lake Sawmill & Lumber Co.*, 132 Wis. 219, 122 Am. St. Rep. 963, 112 N. W. 29.

¹⁵ *Carver Co. v. Manufacturers' Ins. Co.*, 72 Mass. (6 Gray.) 214.

¹⁶ *Alexander v. Cauldwell*, 83 N. Y. 480.

¹⁷ *Quinn v. Quinn Mfg. Co.*, 201 Mich. 664, 167 N. W. 898; *Martin v. Inter-State Lumber Co.*, 260 Pa. St. 218, 103 Atl. 613.

¹⁸ *Quinn v. Quinn Mfg. Co.*, 201 Mich. 664, 167 N. W. 898.

¹⁹ *Magowan v. Gronsgweg*, 14 S. D. 543, 86 N. W. 626.

²⁰ *Laird v. Michigan Lubricator Co.*, 153 Mich. 52, 17 L. R. A. (N.S.) 177, 116 N. W. 534.

exceeding his own term and the term of the board of directors.²¹ He has no implied authority to accept partial assignments of debts which the corporation owes to the assignor.²²

A cashier has no general authority to bind the corporation.²³ The cashier of a bank has no authority to draw a draft in the name of his principal in payment of his own debt.²⁴ He can not bind the bank by representations as to the solvency of a third person in a transaction in which the bank is not concerned.²⁵ Within the scope of his authority in handling the funds of the corporation, he may bind the corporation, although he misappropriates the funds to his own use.²⁶

Continued acquiescence on the part of a bank in a teller's accepting and discounting certain notes confers authority upon him to bind the bank in such transaction.²⁷

§ 1800. General and special managers. A general manager of a corporation is one who has the general management and control of such corporation.¹ In this sense the general manager is to be distinguished from the manager of certain branches of the corporation or from local managers.² The general manager of a corporation has power to bind the corporation by such contracts as are an appropriate means of carrying on the ordinary business of the corporation.³ A general manager has ordinarily implied authority to bind a corporation by contracts which are co-extensive with its

²¹ *Laird v. Michigan Lubricator Co.*, 153 Mich. 52, 17 L. R. A. (N.S.) 177, 116 N. W. 534.

²² *Sheatz v. Markley*, 249 Fed. 315, 161 C. C. A. 323 [certiorari denied, *Kirby-Smith v. Sheatz*, 247 U. S. 518, 62 L. ed. 1245].

²³ *Farmers' State Guaranty Bank v. Cromwell*, — Okla. —, 1 A. L. R. 684, 173 Pac. 826.

²⁴ *Campbell v. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497.

²⁵ *Taylor v. Bank*, 174 N. Y. 181, 95 Am. St. Rep. 564, 66 N. E. 726.

²⁶ *Goshorn v. People's National Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248, 69 N. E. 185.

²⁷ *Iowa National Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12.

¹ *Braman v. Kennebec Gas & Fuel Co.*, 117 Me. 291, 104 Atl. 3.

² *Braman v. Kennebec Gas & Fuel Co.*, 117 Me. 291, 104 Atl. 3.

³ *United States. Sun, etc., Association v. Moore*, 183 U. S. 642, 46 L. ed. 366 [affirming, 101 Fed. 591, 41 C. C. A. 506]; *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 146 C. C. A. 623, 1 A. L. R. 1127.

Alabama. Baird Lumber Co. v. Devlin, 124 Ala. 245, 27 So. 425.

Kansas. Kansas City v. Cullinan, 65 Kan. 68, 68 Pac. 1099.

Maine. Braman v. Kennebec Gas & Fuel Co., 117 Me. 291, 104 Atl. 3.

Massachusetts. Frost v. Machine Co., 133 Mass. 563; *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

business.⁴ The manager of a newspaper may charter a yacht, as a means for obtaining news during war.⁵ A general or local manager may bind a corporation by a covenant to pay rent for offices.⁶ The general manager of a corporation may employ an attorney, where such employment is a proper means of carrying on the business of the corporation.⁷ The general passenger agent and traffic manager of a railway has implied authority to contract for a guide-book to advertise the hunting and fishing in the region which is reached by such railway;⁸ and such implied power is not restricted by secret limitations thereon.⁹ The manager of a storage company has implied power to enter into a contract to effect insurance upon goods which are stored in the warehouse of such company.¹⁰ If a brewery company has power to guaranty the rent of the saloon-keepers to whom it sells its output, the manager of such corporation may bind it by such a contract of guaranty without specific authority from the board of directors.¹¹ It has been held that if a corporation has assumed the debt of another for valuable consideration, the manager may evidence such debt by executing a note of the corporation to the creditor.¹² A manager has ordinarily authority to modify contracts which he had original authority to make.¹³

Ohio. *General Cartage & Storage Co. v. Cox*, 74 O. S. 284, 78 N. E. 371.

Oregon. *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294, 171 Pac. 223.

West Virginia. *Thomas v. Kanawha Valley Traction Co.*, 73 W. Va. 374, 80 S. E. 476; *Producers' Coal Co. v. Mifflin Coal Mining Co.*, — W. Va. —, 95 S. E. 948.

⁴ *Thomas v. Kanawha Valley Traction Co.*, — W. Va. —, 80 S. E. 476; *Producers' Coal Co. v. Mifflin Coal Mining Co.*, — W. Va. —, 95 S. E. 948.

⁵ *Sun, etc., Association v. Moore*, 183 U. S. 642, 46 L. ed. 366 [affirming, 101 Fed. 591, 41 C. C. A. 506].

⁶ *Georgia Casualty Co. v. Massey*, — Ala. —, 79 So. 33.

⁷ *General manager of insurance company. Fidelity, etc., Co. v. Field* (Neb.), 89 N. W. 249 (even if in violation of

his actual instructions from the corporation).

⁸ *Parrot v. Mexican Central Ry. Co.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

⁹ *Parrot v. Mexican Central Ry. Co.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

¹⁰ *General Cartage & Storage Co. v. Cox*, 74 O. S. 284.

¹¹ *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294.

¹² *Andres v. Morgan*, 62 O. S. 236.

¹³ *Thomas v. Kanawha Valley Traction Co.*, 73 W. Va. 374, 80 S. E. 476; *Producers' Coal Co. v. Mifflin Coal Mining Co.*, — W. Va. —, 95 S. E. 948.

The manager may compromise a disputed claim. *Dolman v. Kaw Construction Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

A manager is said to have no authority to indorse a check given to the corporation;¹⁴ or to bind the corporation as an accommodation indorser or surety;¹⁵ nor to borrow money for the corporation;¹⁶ nor has he authority to bind the corporation by a bill of sale of the corporate property,¹⁷ nor to sell all its assets.¹⁸ The managing officer of a corporation has no power to give its property away.¹⁹ A manager of a corporation can not bind it by a contract to deliver property of the corporation to a third person upon the credit of a stockholder, as an anticipation of the expected dividends of the corporation to accrue to such stockholder.²⁰ The superintendent of a railway has no inherent power to bind it by a contract to pay to an injured employe a certain part of his wages during his disability from accidents received in service.²¹ A manager with general powers can not bind the corporation by an agreement to pay the hospital bills of one injured through the fault of the corporation.²² The forewoman of a laundry can not employ a physician for an injured employe,²³ nor can a foreman in charge of carpenter work.²⁴ A superintendent of a water company, who has authority to make contracts for ordinary household purposes and for mill purposes at certain rates has no implied authority to make contracts at the same rates to furnish water at a specified pressure to use in extinguishing fires.²⁵

There is some difference of opinion on this question however. Agents much lower in rank than general manager have been held to have authority to employ medical assistance in emergencies. A conductor may, in the absence of a higher official, employ a physician to render services to an employe injured in the company's business.²⁶ A conductor can not employ additional surgeons if the

¹⁴ Jackson Paper Co. v. Bank, 199 Ill. 151, 93 Am. St. Rep. 113, 39 L. R. A. 657, 65 N. E. 136.

¹⁵ Haupt v. Vint, 68 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

¹⁶ Breed v. Bank, 4 Colo. 481.

¹⁷ Trent v. Sherlock, 26 Mont. 85, 66 Pac. 700.

¹⁸ Empire Coal Mining Co. v. Empire Coal Co., 183 Ky. 699, 210 S. W. 474.

¹⁹ Deutsche Presbyterianische Kirche v. Trustees, 89 N. J. Eq. 242, 104 Atl. 642.

²⁰ Miley v. Heaney, — Wis. —, 169 N. W. 64.

²¹ McAadow v. Kansas City Western

Ry. Co., 100 Kan. 309, L. R. A. 1917E. 539, 164 Pac. 177.

²² King v. Mfg. Co., 183 Mass. 301, 67 N. E. 330; Spelman v. Milling Co., 26 Mont. 76, 91 Am. St. Rep. 402, 55 L. R. A. 640, 66 Pac. 597.

²³ Holmes v. McAllister, 123 Mich. 493, 48 L. R. A. 396, 82 N. W. 220.

²⁴ Godshaw v. Struck, 109 Ky. 285, 51 L. R. A. 668, 58 S. W. 781.

²⁵ Hall v. Passaic Water Co., 83 N. J. L. 771, 43 L. R. A. (N.S.) 750, 85 Atl. 349.

²⁶ Arkansas, etc., Co. v. Loughridge, 65 Ark. 300, 45 S. W. 907; Indianapolis,

first is competent and able to attend to the needs of the injured.²⁷ So one under direction to get the company's surgeon, can not employ additional physicians.²⁸ Even a general manager can not employ a physician to attend to an employe injured outside the scope of his employment;²⁹ and a conductor has no authority from the railroad corporation to employ a physician to attend to a trespasser.³⁰

Acquiescence on the part of the directors in the assumption of authority by a manager, may confer such authority upon him as between the corporation and persons who deal with it in reliance upon its implied authority.³¹ The acquiescence of the directors in the assumption of authority by the manager to employ a broker to make an exchange of corporate property, confers such authority.³² If the directors have acquiesced for a long period of time in the assumption of authority on the part of the manager to borrow money on behalf of the corporation, the corporation is bound by such contracts.³³

A branch manager who is in charge of certain territory is regarded as a general agent with authority to bind his principal by contracts in the scope of his general authority.³⁴ A branch manager of a motion picture company has authority to enter into contracts for advertising certain pictures exhibited by such corporation.³⁵ A sales manager has implied power to make contracts incidental to effecting such sales,³⁶ such as contracts for paying commissions for securing certain business.³⁷ Such authority is not

etc., *Co. v. Morris*, 67 Ill. 295; *Terre Haute, etc., Co. v. McMurray*, 96 Ind. 358, 49 Am. Rep. 752; *Terre Haute, etc., Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650.

Contra. Sevier v. Ry. Co., 92 Ala. 258, 9 So. 405; *Tucker v. Ry. Co.*, 54 Mo. 177.

²⁷ *Louisville, etc., Co. v. Smith*, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775.

²⁸ *Smith v. Ry. Co.*, 104 Ia. 147, 73 N. W. 581.

²⁹ *Chase v. Swift*, 60 Neb. 606, 83 Am. St. Rep. 552, 84 N. W. 86.

³⁰ *Adams v. Ry.*, 125 N. Car. 565, 34 S. E. 642.

³¹ *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 146 C. C. A.

623, 1 A. L. R. 1127; *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641.

³² *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 1 A. L. R. 1127.

³³ *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641.

³⁴ *Malone v. Pathe Exchange*, — Minn. —, 170 N. W. 215.

³⁵ *Malone v. Pathe Exchange*, — Minn. —, 170 N. W. 215.

³⁶ *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517, 18 L. R. A. (N.S.) 680, 116 N. W. 157.

³⁷ *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517, 18 L. R. A. (N.S.) 680, 116 N. W. 157.

limited by a by-law which is not known to the parties who deal with such corporation.²⁸ A station agent may bind a railway by his contract on its behalf to furnish cars.²⁹

§ 1801. Estoppel. As in the case of agents of natural persons,¹ a corporation may be estopped from denying the authority of one who has been permitted to hold himself out as its agent as against persons who have known of such apparent authority and have contracted with the corporation in reliance thereon.² If a corporation has so acted as to induce third persons to believe that its vice-president has authority to execute notes, it is estopped to deny his authority to bind it by the execution of a note.³ If a railway company has permitted its superintendent of dining-cars to enter into contracts for purchasing menu cards, it will be bound by such contract in spite of secret limitations upon the authority of such superintendent.⁴ Since a corporation must necessarily act through its officers and agents, and since it is difficult for a third person who deals with a corporation to ascertain the precise authority conferred upon each officer or agent, principles of estoppel are applied somewhat more readily in cases of corporations than in cases of ordinary agents.⁵

²⁸ Barber v. Stromberg-Carlson Telephone Mfg. Co., 81 Neb. 517, 18 L. R. A. (N.S.) 680, 116 N. W. 157.

²⁹ Wood v. Chicago, Milwaukee & St. Paul Ry. Co., 68 Ia. 491, 56 Am. St. Rep. 861, 27 N. W. 473; Clark v. Ulster & Delaware R. R. Co., 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 81 N. E. 766; Nichols v. Oregon Short Line R. R. Co., 24 Utah 83, 91 Am. St. Rep. 778, 66 Pac. 768.

¹ See §§ 1760 et seq.

² Alabama City, G. & A. Ry. Co. v. Kyle, — Ala. —, 81 So. 54; Martin v. Inter-State Lumber Co., 260 Pa. St. 218, 103 Atl. 613.

³ Alabama City, G. & A. Ry. Co. v. Kyle, — Ala. —, 81 So. 54.

⁴ Brace v. Northern Pacific Ry. Co., 63 Wash. 417, 38 L. R. A. (N.S.) 1135, 115 Pac. 841.

⁵ "Ordinarily, it would not be difficult for persons dealing with one as-

suming to act as agent of a private individual, to ascertain the nature and extent of his authority; but in dealing with an agent who, as manager or superintendent, controls or is in charge of a department of a great corporation such as appellant, a different condition would be presented. Corporations necessarily act through authorized agents. The more extensive their business, the greater the number of their agents. Departments are created in charge of superintendents with many subordinates, through whom the corporation conducts its business and deals with the public. If each and every individual having business with such a corporation must at his peril ascertain and determine the exact scope and limitation of the agent's authority, it is manifest that he could not safely deal with the acknowledged agent, and that the business of the corporation itself

A corporation is not estopped to deny the authority of its agent unless it has knowledge of the facts which create such estoppel,⁶ or unless it could ascertain such facts with due diligence.⁷

§ 1802. Liability in quasi-contract. If a corporation has received benefits under a contract made by an unauthorized agent, it must make reasonable compensation for the value of such benefits in case it elects to avoid the contract.¹ If a corporation has received services under an unauthorized contract, and it elects to avoid such contract, it must make reasonable compensation for the value of such services.² It is error to give the corporation two years and six months to repay the purchase money when it avoids an unauthorized sale of land, made by its president.³

§ 1803. Ratification—General principles. While the same facts may occasionally amount both to estoppel and to ratification, the two legal concepts must be distinguished as in cases of ordinary agency. The essential characteristic of estoppel is the fact that the adversary party has been misled by the conduct of the corporation into believing that the person who assumes to have authority from the corporations, has such authority in fact.¹ The essential char-

would be materially impaired. The public is compelled to rely upon the apparent authority of the conceded agents of such corporations, especially when, as managers or superintendents, they are placed in control of departmental affairs. The average individual would be justified in believing the superintendent of the dining car department of a railway corporation was authorized to contract for menu cards for exclusive use in its dining cars, the superintendent himself assuming to purchase them. The superintendent should know the limitations placed upon his authority, and it is to be presumed he will not exceed them. But a private individual, not connected with the corporation, could not be aware of such limitations. He would readily sell supplies to such an agent for use in his particular department. If, for its own purposes, a corporation is compelled to employ an agent with such apparent authority as

may mislead the public, it should be required to secure one who will not act in excess of his actual authority, and thereby deceive others." *Brace v. Northern Pacific Ry. Co.*, 63 Wash. 417, 38 L. R. A. (N.S.) 1135, 115 Pac. 841.

⁶ *Schlesinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

⁷ *Schlesinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

¹ *Brooks v. Geo. Q. Cannon Association*, — Utah —, 178 Pac. 589.

² *Brooks v. Geo. Q. Cannon Association*, — Utah —, 178 Pac. 589.

³ *Fitzhugh v. Land Co.*, 81 Tex. 306, 16 S. W. 1078.

¹ *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

acteristic of ratification is that the corporation, with knowledge of the facts, adopts a contract which is made on its behalf, by one who lacks authority to bind the corporation, by entering into such contract.² While the corporation may have held out one as its agent, and may also have ratified his unauthorized acts, either form of liability may exist without the other.³

As in case of ordinary agency, a corporation may be liable for the acts of one who is not its agent, or for the acts of an agent who is acting in excess of his authority by reason of ratification.⁴ A contract which is made on behalf of a corporation by one who is not its duly authorized agent or by one who is its authorized agent but who is acting in excess of his authority, may be ratified by some higher agent who has authority to make such contract.⁵ The acts of a stockholders' meeting which is invalid because notice was not given to all the stockholders, and some of them were absent, may be ratified at a subsequent stockholders' meeting of which due notice is given.⁶ The stockholders of a corporation at a lawful meeting, may ratify the acts of the board of directors in excess of

² *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

³ *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

⁴ See §§ 1764 et seq.

⁵ *United States. Wright v. Barnard*, 248 Fed. 756; *In re National Piano Co.*, 252 Fed. 950.

Colorado. Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 90 Pac. 81.

Connecticut. Smith v. Water-Works, 73 Conn. 626, 48 Atl. 754.

Idaho. Heath v. Potlatch Lumber Co., 18 Ida. 42, 27 L. R. A. (N.S.) 707, 108 Pac. 343.

Illinois. National, etc., Association v. Bank, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

Kentucky. Germania, etc., Co.'s Assignee v. Hargis (Ky.), 64 S. W. 516.

Michigan. Cadillac State Bank v. Heading Co., 129 Mich. 15, 88 N. W. 67.

Minnesota. Dickinson v. Citizens' Ice & Fuel Co., 139 Minn. 201, 165 N. W. 1056.

New York. Seymour v. Association, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365.

Oregon. Depot Realty Syndicate v. Enterprise Brewing Co., 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

Utah. North Point, etc., Co. v. Utah, etc., Co., 16 Utah 246, 67 Am. St. Rep. 607, 40 L. R. A. 851, 52 Pac. 168.

West Virginia. Howard v. Tatum, 81 W. Va. 561, 94 S. E. 965.

⁶ *Howard v. Tatum*, 81 W. Va. 561, 94 S. E. 965.

their authority.⁷ The directors may ratify the acts of some inferior agent of the corporation.⁸ If the general manager of a corporation has authority to make a certain kind of contract on its behalf, he may ratify such a contract though made by a person having no authority to bind the corporation.⁹ If the managing officers of a brewery have authority to guaranty the rent of saloon-keepers who purchase beer from such brewery, they have authority to ratify such contracts which are entered into by unauthorized agents.¹⁰

If the original transaction is not entered into on behalf of the corporation, ratification in the proper sense is impossible.¹¹

§ 1804. Who may ratify. A contract of an agent in excess of his authority can be ratified only by an agent or officer who had authority to make such contract in the first instance.¹ If the unauthorized transaction amounts in legal effect to a gift of the property of the corporation, such transaction can not be ratified by the directors,² since they have no power to give away the property of the corporation.³ If the directors have acted improperly in pre-

⁷ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756; *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 432, 31 L. R. A. 457, 37 N. E. 444. Their receipt of the proceeds of the transaction has been held to have the same effect. *Gorrill v. Greenlees*, — Kan. —, 180 Pac. 798. It has been explained on the theory of estoppel. *Clearwater County State Bank v. Telephone Co.*, 116 Minn. 4, 36 L. R. A. (N.S.) 1132, 133 N. W. 91.

⁸ *United States. Salem Iron Co. v. Iron Mines*, 112 Fed. 239, 50 C. C. A. 213; *Mutual Oil Co. v. Hills*, 248 Fed. 257, 160 C. C. A. 335.

Colorado. Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 90 Pac. 81.

Indiana. Cox v. Baltimore & O. S. W. R. Co., 180 Ind. 495, 50 L. R. A. (N.S.) 453, 103 N. E. 337.

Kentucky. Germania, etc., Co.'s Assignee v. Hargis (Ky.), 64 S. W. 516; *Commonwealth v. Mehler & Eckstenkemper Lumber Co.*, 183 Ky. 11, 208 S. W. 13 (obiter).

Michigan. Cadillac State Bank v. Heading Co., 129 Mich. 15, 88 N. W. 67. *Tennessee. Webster v. Whitworth* (Tenn. Ch. App.), 63 S. W. 290.

⁹ *Braman v. Kennebec Gas & Fuel Co.*, 117 Me. 291, 104 Atl. 3.

¹⁰ *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

¹¹ *Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712.

¹ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974; *Dent v. People's Bank*, 118 Ark. 157, 175 S. W. 1154; *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759; *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915D, 632, 105 N. E. 818.

² *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

³ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

See also, § 1706.

ferring the majority stockholders, the latter can not ratify such preference as against minority stockholders.⁴ If the president of a mining company has no power to employ a physician, he can not ratify such a contract of employment entered into by the superintendent.⁵ If the president of a bank has no power to employ an attorney, at an annual salary, the act of the cashiers and other officers of the bank who had no authority to employ such attorney, in consulting such attorney, does not amount to a ratification.⁶

An agent who has entered into an unauthorized contract, can not ratify his own acts unless authority to enter into such contracts has been given to him subsequently.⁷ If the president and secretary of a corporation have executed a note of the corporation for the personal debt of the president, the act of the president in paying interest upon such note from the funds of the corporation does not amount to ratification.⁸ It is said that the stockholders can ratify the acts of the directors only at a lawful stockholders' meeting.⁹

§ 1805. What amounts to ratification. The express approval of an unauthorized contract and the adoption of it by agents who have authority to enter into such contract on behalf of the corporation, amounts to a ratification.¹ The act of the stockholders in approving the report of a president at a stockholders' meeting, is a ratification of a lease which has been made by the president and which is set forth in such report.²

Conduct on the part of a corporation which is inconsistent with any other theory except its adoption of a contract, amounts to ratification.³ If the corporation acquiesces in the contract with

⁴ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915D, 632, 105 N. E. 818.

⁵ *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759.

⁶ *Dent v. People's Bank*, 118 Ark. 157, 175 S. W. 1154.

⁷ *Sheatz v. Markley*, 249 Fed. 315, 161 C. C. A. 323 [certiorari denied, *Kirby-Smith v. Sheatz*, 247 U. S. 518, 62 L. ed. 1245]; *McAdow v. Kansas City Western Ry. Co.*, 100 Kan. 309, L. R. A. 1917E, 539, 164 Pac. 177; *Hoffman v. M. Gottstein Investment Co.*, 101 Wash. 428, 172 Pac. 573.

⁸ *Hoffman v. M. Gottstein Investment Co.*, 101 Wash. 428, 172 Pac. 573.

⁹ *Hyams v. Old Dominion Co.*, 113 Me. 294, L. R. A. 1915D, 1128, 93 Atl. 747.

¹ *Georgia Casualty Co. v. Massey*, — Ala. —, 79 So. 33; *Hill v. Atlantic & N. Car. R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854; *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 114 Am. St. Rep. 137, 6 L. R. A. (N.S.) 397, 85 Pac. 338.

² *Hill v. Atlantic & N. Car. R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

³ *Wright v. Barnard*, 248 Fed. 756.

full knowledge of the facts, such acquiescence amounts to ratification, if the adversary party is thereby induced to perform such contract, or if he is otherwise induced to alter his position in reliance upon such apparent ratification.⁴ The act of the corporation in retaining the benefits of an unauthorized contract with full knowledge of the facts, amounts to a ratification,⁵ as where with full knowledge of the facts the corporation receives and retains property;⁶ or where it accepts the benefit of serv-

⁴ **United States.** *Domenico v. Packers' Association*, 112 Fed. 554; *Wright v. Barnard*, 248 Fed. 756.

Arkansas. *Newport, etc., Co. v. Lunyon*, 69 Ark. 287, 62 S. W. 1047.

California. *Blood v. Water Co.*, 134 Cal. 361, 66 Pac. 317; *Mills v. Mining Co.*, 132 Cal. 95, 64 Pac. 122; *Illinois, etc., Bank v. Ry.*, 117 Cal. 332, 49 Pac. 197; *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

Connecticut. *Smith v. Water Works*, 73 Conn. 626, 48 Atl. 754.

Indiana. *Marion Trust Co. v. Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

Kansas. *Neosho Valley Investment Co. v. Hannum*, 63 Kan. 621, 66 Pac. 631; *Great Western Mfg. Co. v. Porter*, 103 Kan. 84, 172 Pac. 1018.

Kentucky. *Herring v. Turnpike-Road Co. (Ky.)*, 63 S. W. 576.

Maine. *Braman v. Kennebec Gas & Fuel Co.*, 117 Me. 291, 104 Atl. 3.

Nebraska. *Nebraska, etc., Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370.

Oregon. *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

Utah. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

⁵ **United States.** *Mutual Oil Co. v. Hills*, 248 Fed. 257, 160 C. C. A. 335; *In re National Piano Co.*, 252 Fed. 950.

Alabama. *Georgia Casualty Co. v. Massey*, — Ala. —, 79 So. 33.

Florida. *East Coast Lumber & Supply Co. v. Maxwell*, — Fla. —, 80 So. 741.

Iowa. *Bertholf v. Fisk*, 182 Ia. 1308, 166 N. W. 713.

Minnesota. *Dickinson v. Citizens' Ice & Fuel Co.*, 139 Minn. 201, 165 N. W. 1056.

Nebraska. *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517, 18 L. R. A. (N.S.) 680, 116 N. W. 157.

North Carolina. *Phillips v. Interstate Land Co.*, 176 N. Car. 514, 97 S. E. 417.

Oklahoma. *Rainbow Oil & Gas Co. v. Barton*, — Okla. —, 173 Pac. 1135.

"It seems to us that, whether a contract is ultra vires or not, if the corporation has permitted its execution and allowed innocent parties to surrender property or other things of value thereunder without objection, and it is impossible to restore their status quo and at the same time itself receive and keep the benefits or beneficial effects, it will not then be heard to plead ultra vires or lack of authority of one of its principal officers to bind it in that particular respect." *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

Pennsylvania. *Martin v. Inter-State Lumber Co.*, 260 Pa. St. 218, 103 Atl. 613; *Scouton v. Stony Brook Lumber Co.*, 261 Pa. St. 241, 104 Atl. 548.

⁶ **United States.** *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439.

California. *Mills v. Mining Co.*, 132 Cal. 95, 64 Pac. 122.

ices,⁷ which it would not have received had it not been for the act of the adversary party in relying upon such supposed contract. If the president of a corporation has entered into a contract on its behalf, by which he gives a new note in consideration of its discharge from liability as indorser upon a prior valid note, the corporation can not repudiate his authority to make such new note if it insists it is released from liability upon the original note.⁸

Failure on the part of the corporation to repudiate a contract which is entered into on its behalf after it has full knowledge of the material facts, may amount to ratification,⁹ especially if the adversary party has notified the corporation of the transaction and inquired as to its sufficiency.¹⁰ Such silence is, at least, evidence from which ratification may be inferred.¹¹ The act of a corporation in allowing a default judgment to be taken upon an unauthorized contract,¹² or in making payments under such contract,¹³ or in giving a note in renewal of an unauthorized note,¹⁴ amounts to a ratification thereof.

Indiana. *Marion Trust Co. v. Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

Kansas. *Neosho Valley Investment Co. v. Hannum*, 63 Kan. 621, 66 Pac. 631.

Kentucky. *Herring v. Turnpike-Road Co.* (Ky.), 63 S. W. 576.

North Carolina. *Phillips v. Interstate Land Co.*, 176 N. Car. 514, 97 S. E. 417.

Utah. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

West Virginia. *Union Bank & Trust Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

See also, *Gorrill v. Greenlees*, — Kan. —, 180 Pac. 796.

⁷*Domenico v. Packers' Association*, 112 Fed. 554; *Bostwick v. Mutual Life Insurance Co.*, 251 Fed. 36; *Newport, etc., Co. v. Lunyon*, 69 Ark. 287, 62 S. W. 1047; *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946; *Rainbow Oil & Gas Co. v. Barton*, — Okla. —, 173 Pac. 1135.

⁸*Union Bank & Trust Co. v. Long*

Pole Lumber Co., 70 W. Va. 558, 41 L. R. A. (N.S.) 663, 74 S. E. 674.

⁹*Great Western Mfg. Co. v. Porter*, 103 Kan. 84, 172 Pac. 1018; *Thompson v. Laboringman's Mercantile & Mfg. Co.*, 60 W. Va. 42, 6 L. R. A. (N.S.) 311, 53 S. E. 908.

¹⁰*Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294 [judgment affirmed on petition for rehearing, 87 Or. 560, L. R. A. 1918C, 1001, 171 Pac. 223].

¹¹*Thompson v. Laboringman's Mercantile & Mfg. Co.*, 60 W. Va. 42, 6 L. R. A. (N.S.) 311, 53 S. E. 908.

¹²*Nebraska, etc., Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370.

¹³*Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439; *Heath v. Potlatch Lumber Co.*, 18 Ida. 42, 27 L. R. A. (N.S.) 707, 108 Pac. 343; *Cox v. Baltimore & Ohio Southwestern R. Co.*, 180 Ind. 495, 50 L. R. A. (N.S.) 453, 103 N. E. 337.

¹⁴*Smith v. Water Works*, 73 Conn. 626, 48 Atl. 754.

Conduct on the part of a corporation without full knowledge of the facts does not amount to ratification, even if such conduct is of a character which would amount to ratification if full knowledge existed.¹⁵ If a corporation does not know that its treasurer has made certain authorized arrangements with reference to its funds, its failure to interpose an objection does not amount to a ratification.¹⁶ The fact that a corporation receives from an agent premiums which he has collected after the death of the insured, does not operate as a ratification of his unauthorized act in receiving such premiums, if it does not know that the insured had died before such premiums were collected.¹⁷ If the directors hold in their own names stock which belongs to the corporation, the act of the stockholders who ratify the acts in general of the directors, in ignorance of such wrongful holding, does not operate as a ratification thereof.¹⁸ An unauthorized agreement by the secretary and treasurer to pay a commission if he secured a purchaser for certain property of the corporation, is not ratified by the fact that the president of the corporation, without knowledge of such contract, joins with the assignee for the benefit of creditors in petitioning the court for a sale to a purchaser secured under such contract.¹⁹ An unauthorized contract to pay the house rent of an employe, as well as his wages, is not ratified by payment of such wages if the corporation does not know of the agreement to pay house rent.²⁰

An officer who has represented the corporation in a contract between himself and the corporation, can not ratify such contract.²¹

¹⁵ **United States.** *Emerson v. Fisher*, 246 Fed. 642, 158 C. C. A. 598; *Bassick v. Aetna Explosives Co.*, 246 Fed. 974; *Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712.

California. *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

Colorado. *Extension, etc., Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

Georgia. *Savannah, etc., Ry. v. Humphrey*, 114 Ga. 681, 40 S. E. 711.

Maine. *Hyams v. Old Dominion Co.*, 113 Me. 294, L. R. A. 1915D, 1128, 93 Atl. 747.

Montana. *Spelman v. Mill Co.*, 26 Mont. 76, 91 Am. St. Rep. 402, 55 L. R. A. 640, 66 Pac. 597.

Ohio. *Union Mutual Life Ins. Co. v. McMillen*, 24 O. S. 67.

Virginia. *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, L. R. A. 1917F, 303, 71 S. E. 626.

West Virginia. *Thompson v. Laboringman's Mercantile & Mfg. Co.*, 60 W. Va. 42, 6 L. R. A. (N.S.) 311, 53 S. E. 908.

¹⁶ *Emerson v. Fisher*, 246 Fed. 642, 158 C. C. A. 598.

¹⁷ *Union Mutual Life Ins. Co. v. McMillen*, 24 O. S. 67.

¹⁸ *Hyams v. Old Dominion Co.*, 113 Me. 294, L. R. A. 1915D, 1128, 93 Atl. 747.

¹⁹ *Extension, etc., Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

²⁰ *Savannah, etc., Co. v. Humphreys*, 114 Ga. 681, 40 S. E. 711.

²¹ *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

If a president of a bank has entered into an unauthorized contract by which the bank had agreed to discount certain notes, as a part of a scheme for his individual benefit, and as a means of defrauding the adversary party, the act of the bank in discounting such notes does not amount to a ratification of the entire contract.²²

Partial ratification is impossible.²³ The burden of showing a ratification of an unauthorized contract is on the party alleging it.²⁴

§ 1806. Effect of ratification. On ratification the contract is as binding upon the corporation as if it had been originally within the scope of the agent's authority.¹ If the directors have ratified the acts of their manager, a bank on which the manager has drawn checks on behalf of the corporation is not liable to the corporation or to its assignee for the amount which it has paid out on such checks.² If the corporation has ratified a contract of an unauthorized agent, the adversary party can not, after such ratification, raise the question that such contract was not originally binding upon the corporation.³ If the corporation ratifies a transaction and the adversary party acquiesces in such ratification, a third person who has not acquired rights between the original transaction and

²² *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, L. R. A. 1917F, 303, 71 S. E. 626.

²³ *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Lawrence Coal Co. v. Shanklin*, — N. M. —, 183 Pac. 435.

²⁴ *Alabama National Bank v. O'Neil*, 128 Ala. 192, 29 So. 688.

¹ *United States. Wright v. Barnard*, 248 Fed. 756; *Bostwick v. Mutual Life Insurance Co.*, 251 Fed. 36; *In re National Piano Co.*, 252 Fed. 950.

Alabama. Georgia Casualty Co. v. Massey, — Ala. —, 79 So. 33.

Iowa. Bertholf v. Fisk, 182 Ia. 1308, 166 N. W. 713.

Kansas. Gorrill v. Greenlees, — Kan. —, 180 Pac. 798.

Massachusetts. Citizens' Gaslight Co. v. Wakefield, 161 Mass. 432, 31 L. R. A. 457, 37 N. E. 444.

Nebraska. Barber v. Stromberg-Carlson Telephone Mfg. Co., 81 Neb.

517, 18 L. R. A. (N.S.) 680, 116 N. W. 157.

North Carolina. Hill v. Atlantic & N. Car. R. Co., 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

Pennsylvania. Martin v. Inter-State Lumber Co., 260 Pa. St. 218, 103 Atl. 613; *Scouton v. Stony Brook Lumber Co.*, 261 Pa. St. 241, 104 Atl. 548.

Washington. Western Timber Co. v. Kalama River Lumber Co., 42 Wash. 620, 6 L. R. A. (N.S.) 397, 85 Pac. 338.

² *Joseph v. National Bank*, — Utah —, 173 Pac. 897.

³ *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 6 L. R. A. (N.S.) 397, 85 Pac. 338. The effect on the adversary to set up such original lack of power on the part of the agent, should be the same in cases of agents of corporations as in cases of agents of natural persons. On this subject see § 1769.

the ratification,⁴ such as a subsequent creditor,⁵ can not attack the validity of such transaction.⁶

A corporation can not, by ratifying a contract, destroy rights which have arisen between the making of the unauthorized contract and its ratification.⁷ An unauthorized assignment can not be ratified after the assignee has commenced action thereon so as to prevent the defendant from setting up the invalidity of the assignment.⁸ Ratification of an unauthorized assignment for the benefit of creditors can not defeat the intervening lien of an execution;⁹ nor can ratification of an unauthorized bill of sale defeat the intervening lien of an attachment.¹⁰

§ 1807. Personal liability of agent or officer of corporation.

As in the case of an agent of a natural person,¹ an agent of a corporation who is acting within the scope of his authority and who does not agree to assume personal liability, is not liable personally upon the contracts which he makes on behalf of the corporation.² The fact that such agent is the president of the corporation does not impose any personal liability upon him under such circumstances.³

As in the case of an agent of a natural person,⁴ an agent of a corporation who has exceeded his authority in making a contract on its behalf, may be liable to the adversary party, if the latter did not know of the extent of the authority of the agent, and if he relied upon the authority which the agent held himself out as possessing.⁵ As in the case of agents of natural persons,⁶ there is

⁴ *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

⁵ *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

⁶ See § 1170.

⁷ See § 1170.

⁸ *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555.

⁹ *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255, 64 N. E. 736 (given by the vice-president, the president being dead).

¹⁰ *Trent v. Sherlock*, 26 Mont. 85, 66 Pac. 700 (given by the general manager).

¹ See § 1771.

² *Sampson v. Fox*, 109 Ala. 662, 55 Am. St. Rep. 950, 19 So. 896; *Nalty v.*

Cohn, 117 Miss. 190, 78 So. 3; *Pease v. Francis*, 25 R. I. 226, 55 Atl. 686.

³ *Nalty v. Cohn*, 117 Miss. 190, 78 So. 3.

⁴ See §§ 1773 et seq.

⁵ *England. Weeks v. Propert*, L. R. 8, C. P. 427.

United States. Clinchfield Fuel Co. v. Henderson Iron Works Co., 254 Fed. 411.

Illinois. Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340.

Iowa. Groeltz v. Armstrong, 125 Ia. 39, 90 N. W. 128.

New Jersey. 63 N. J. L. 458.

West Virginia. Haupt v. Vint, 68 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

⁶ See §§ 1779 et seq.

some dispute as to whether the liability of the agent is upon the contract which he has entered into on behalf of the corporation, or upon an implied warranty of his authority, or for his fraud and deceit in representing his authority. If the agent is not contracting in such a way as to impose a personal liability upon himself by the terms of his contract, it seems to be the better view that his liability is either in tort or on a breach of implied warranty.⁷ This is true especially in case of negotiable instruments.⁸ Since the only parties who can be held upon a negotiable instrument are those whose liability is imposed by the terms of such instrument,⁹ an agent or officer of a corporation is not personally liable upon a negotiable instrument which he attempts to execute on behalf of the corporation.¹⁰

If the material facts are known to the adversary party, and his mistake as to the authority of the agent to bind the corporation is due to a mistake of law, the agent is not liable personally to such adversary party.¹¹ Where the adversary party knows all of the facts which determine the authority of the agent, he can not hold the agent liable personally for fraud, since there is no deceit of any sort; and there are no facts which would give rise to an implied warranty of authority, since all the material facts are in the possession of the adversary party. In such case it is held, as in the case of agents of natural persons,¹² that the agent is not liable personally upon any theory.¹³

If the unauthorized act of the agent becomes binding upon the corporation by ratification, the adversary party has obtained everything for which he bargained, and accordingly it is held that he can not hold the agent liable personally.¹⁴ The adversary party may, accordingly, be prevented by the act of the corporation in

⁷ Haupt v. Vint, 68 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

⁸ Haupt v. Vint, 68 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

⁹ See § 2312.

¹⁰ McDonald v. Luckenbach, 170 Fed. 434.

¹¹ State v. F. B. Williams Cypress Co. (La.), 58 So. 1033.

¹² See § 1772.

¹³ United States. McDonald v. Luckenbach, 170 Fed. 434.

¹⁴ Iowa. Smith v. Sherman, 113 Ia. 601, 85 N. W. 747.

Kansas. Abeles v. Cochran, 22 Kan. 405.

Kentucky. Sandford v. McArthur, 57 Ky. (18 B. Mon.) 411.

Mississippi. Merchants' & Planters' Packet Co. v. Streuby, 91 Miss. 211, 124 Am. St. Rep. 651, 44 So. 791.

¹⁴ Chieppo v. Chieppo, 88 Conn. 233, 90 Atl. 940; Shawmut Commercial Paper Co. v. Auerbach, 214 Mass. 363, 101 N. E. 1000.

" * * * There can be no breach of warranty or actionable deceit if the principal is in fact bound by the con-

ratifying a note,¹⁵ or an indorsement,¹⁶ from enforcing a personal liability against the agent who executed such note or such indorsement. While this is in accordance with the general principles of the law of agency, and while a fairly just result is reached in denying to the adversary party the right to enforce a personal liability against an unauthorized agent if the adversary party has ultimately received everything for which he bargained, the application of this principle presents a serious difficulty. When the contract was entered into, the adversary party had apparently a right of action against the agent; and this right of action has been taken from him without his consent by the act of the principal in ratifying the contract of the unauthorized agent. The result may be justified on the theory that if the action is for breach of implied warranty, the warranty has been fulfilled; while if it is for deceit, the damages, at most, are only nominal if the corporation assumes the obligation of its agent.

If the contract is so worded and executed as to purport to impose a personal liability upon the agent, the fact that the agent had no authority to bind the corporation for which he is assuming to act, is important in determining whether a personal liability is imposed on the agent or not.¹⁷

An officer or agent of a corporation who has not authorized his subordinates to commit torts on behalf of the corporation or to enter into unauthorized contracts, is not liable personally for such

tract. If the principal is bound, the other party has no ground of complaint against the agent. And it can make no difference whether the principal is bound because the agent was authorized in advance, or because of a subsequent ratification, or because the principal is estopped to deny that the agent was in fact duly authorized. If for any reason the principal is bound by the contract, the other party, who contracted with the principal and not with the agent, has received all that the agent agreed or assumed to procure for him.

"In the present case the corporation become directly liable on the note, on principles of ratification or estoppel, as soon as its certificate of organization was filed and it was legally

authorized to execute such a note; and although the defendants were bound as corporators to know that they did not have authority until then to execute a note for business purposes in the name of the corporation, yet their liability to answer for the consequences in an action of deceit ended when the liability of the corporation on the note attached." *Chieppo v. Chieppo*, 88 Conn. 233, 90 Atl. 940.

¹⁵ *Chieppo v. Chieppo*, 88 Conn. 233, 90 Atl. 940.

¹⁶ *Shawmut Commercial Co. v. Auerbach*, 214 Mass. 363, 101 N. E. 1000.

¹⁷ *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92.

See also *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

acts of his subordinates.¹⁸ The president of a corporation is not personally liable for the fraudulent misrepresentations of the salesmen of such corporation.¹⁹

An officer or agent of a corporation is liable for his own personal wrongs, even if they were committed for the interests of the corporation.²⁰ He is, accordingly, liable for wrongful conversion of property of a third person,²¹ or for wrongful distribution of the assets of the corporation among the stockholders, leaving the creditors unpaid,²² as well as for fraud.²³ An officer or agent of a corporation is personally liable for his negligence in starting a fire which burns the property of another, although in starting such fire he was acting on behalf of the corporation.²⁴

The fact that the corporation is not yet authorized to do business does not impose any personal liability upon its officers, in the absence of statute.²⁵ Statutes occasionally impose personal liability upon the officers, directors, and the like, of corporations.²⁶ Such liability exists by force of the rules of positive law, without regard to the intention of the parties to assume such liability.²⁷

¹⁸ *Arnold v. Somers*, — Vt. —, 105 Atl. 260.

¹⁹ *Arnold v. Somers*, — Vt. —, 105 Atl. 260.

²⁰ *Massachusetts. Crohon & Roden Co. v. Rudnick*, — Mass. —, 122 N. E. 741.

Michigan. Wines v. Crosby, 169 Mich. 210, 39 L. R. A. (N.S.) 901, 135 N. W. 96.

Minnesota. Moe v. Harris, — Minn. —, 172 N. W. 494.

Mississippi. Gloster Lumber Co. v. Wilkinson, 118 Miss. 289, 79 So. 96.

New York. Darcy v. Brooklyn & N. Y. Ferry Co., 196 N. Y. 99, 26 L. R. A. (N.S.) 267, 89 N. E. 461.

²¹ *Crohon & Roden Co. v. Rudnick*, — Mass. —, 122 N. E. 741.

²² *Darcy v. Brooklyn & N. Y. Ferry Co.*, 196 N. Y. 99, 26 L. R. A. (N.S.) 267, 89 N. E. 461.

²³ *Moe v. Harris*, — Minn. —, 172 N. W. 494.

²⁴ *Gloster Lumber Co. v. Wilkinson*, 118 Miss. 289, 79 So. 96.

²⁵ *Webb v. Rockefeller*, 195 Mo. 57, 6 L. R. A. (N.S.) 872, 93 S. W. 778; *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N.S.) 453, 105 Pac. 630. Such liability may be provided for by statute. *Smith v. Citizens' & Southern Bank*, — Ga. —, 98 S. E. 466.

²⁶ *Baker v. Smith*, — R. I. —, 102 Atl. 721. See §§ 980 et seq.

²⁷ *Baker v. Smith*, — R. I. —, 102 Atl. 721.

CHAPTER LVII

CONTRACTS OF PERSONS ACTING IN FIDUCIARY CAPACITY

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I

TRUSTEES

§ 1808. Trustee can not bind beneficiary personally. A trustee is one in whom is vested the legal title to property, the equitable interest in which belongs to another.¹ A trustee has as such no power to bind a cestui que trust personally.² Thus a cestui que trust is not liable personally to an attorney employed by a trustee.³ If the beneficiaries authorize the trustee to contract on their behalf they are personally liable on his contract.⁴ This liability exists, however, by reason of his character of agent and not by reason of his character of trustee. Thus trustees of a dry trust can not bind their beneficiaries by assuming a mortgage, so as to recover from them for money paid on such mortgage.⁵ If a trustee for the benefit of creditors carries on the business under an express agreement between the debtor and the creditors, the creditors may be held personally liable for debts incurred under such arrangement.⁶

§ 1809. Power to bind trust estate. A trustee has no power to bind the estate by his contracts, if such power is not given to him by the instrument creating the trust.¹ A trustee has no power

¹ "A trustee may be defined generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another." *Ogden Ry. Co. v. Wright*, 31 Or. 150, 49 Pac. 975.

² *Hartley v. Phillips*, 198 Pa. St. 9, 47 Atl. 929.

³ *Truesdale v. Philadelphia, etc., Co.*, 63 Minn. 49, 65 N. W. 133.

⁴ *Hanover National Bank v. Cocke*, 127 N. Car. 467, 37 S. E. 507; *Poland v. Beal*, 192 Mass. 559, 78 N. E. 728; *Furnace Run Saw Mill & Lumber Co. v. Heller Bros. Co.*, 84 O. S. 201, 95 N. E. 771.

⁵ *Winslow v. Young*, 94 Me. 145, 47 Atl. 149.

⁶ *Lumber Co. v. Heller*, 84 O. S. 201, 95 N. E. 771.

¹ *United States. Taylor v. Davis*, 110 U. S. 330, 28 L. ed. 163.

Alabama. Eufaula National Bank v.

Manassas, 124 Ala. 379, 27 So. 258; *Dantzler v. McInnis*, 151 Ala. 293, 125 Am. St. Rep. 28, 13 L. R. A. (N.S.) 297, 44 So. 193.

Georgia. Sanders v. Warehouse Co., 107 Ga. 49, 32 S. E. 610.

Kentucky. Flournoy v. Johnson, 46 Ky. (7 B. Mon.) 693.

Michigan. Feldman v. Preston, 194 Mich. 352, 160 N. W. 655.

Mississippi. Hines v. Potts, 56 Miss. 346.

New York. New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111. "The general rule undoubtedly is that a trustee can not charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable and the remedy is against him personally." *New v. Nicoll*, 73 N. Y. 127, 130, 79 Am. Rep. 111.

to bind the estate by a contract under which he borrows money.² A trustee has no implied power to give a negotiable instrument which will bind the estate.³ A trustee can not bind the estate by a judgment bond given in a matter outside the estate.⁴ This rule is sometimes said not to apply to cases where the consideration is of such a nature as to render the estate liable.⁵ If power to bind the estate is given to the trustee by the instrument creating the trust, his contracts made by virtue of such provision will bind the estate.⁶ Power to a trustee by will to carry on business is power to bind the estate by debts thus incurred.⁷ Power to mortgage authorizes the trustee to bind the estate by a building and loan association contract.⁸ The trustees of a trust created for business purposes may adopt a name.⁹

§ 1810. Personal liability of trustee. Unless a trustee clearly provides against it, he is personally liable on contracts made by him as trustee,¹ even if he refers to himself in the contract as trus-

Oregon. *Ranzau v. Davis*, 85 Or. 26, 185 Pac. 1180, 158 Pac. 279.

West Virginia. *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717.

² *Dantzler v. McInnis*, 151 Ala. 293, 125 Am. St. Rep. 28, 13 L. R. A. (N.S.) 297, 44 So. 193.

³ *Farmers' & Traders' Bank v. Fidelity & Deposit Co.*, 108 Ky. 384, 56 S. W. 671; *Tuttle v. First National Bank*, 187 Mass. 533, 105 Am. St. Rep. 420, 73 N. E. 560.

⁴ *Williams v. Tozer*, 185 Pa. St. 302, 64 Am. St. Rep. 650, 39 Atl. 947.

⁵ *Sanders v. Warehouse Co.*, 107 Ga. 49, 32 S. E. 610.

⁶ *United States. Webb v. Stone*, 201 Fed. 850, 120 C. C. A. 180.

Georgia. *Baillie v. Loan Association*, 100 Ga. 20, 28 S. E. 274; *Wagnon v. Pease*, 104 Ga. 417, 30 S. E. 895; *Riggins v. Adair*, 105 Ga. 727, 31 S. E. 743.

Massachusetts. *Judge v. Pfaff*, 171 Mass. 195, 50 N. E. 524.

Michigan. *Packard v. Kingman*, 109 Mich. 497, 67 N. W. 551.

New York. *United States Trust Co. v. Roche*, 116 N. Y. 120, 22 N. E. 265.

Rhode Island. *Wadsworth v. Arnold*, 24 R. I. 32, 51 Atl. 1041.

⁷ *Turnbull v. Pomeroy*, 140 Mass. 117, 3 N. E. 15; *Woddrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832, 26 Atl. 375; *Wadsworth v. Arnold*, 24 R. I. 32, 51 Atl. 1041.

⁸ *Cottingham v. Loan Association*, 114 Ga. 940, 944, 41 S. E. 72, 74.

⁹ *Rand v. Farquhar*, 226 Mass. 91, 115 N. E. 286.

¹ *England. Prince v. Haworth* [1905], 2 K. B. 768.

United States. *Taylor v. Davis*, 110 U. S. 330, 28 L. ed. 163; *Hewitt v. Phelps*, 105 U. S. 393, 26 L. ed. 1072; *Duvall v. Craig*, 15 U. S. (2 Wheat.) 45, 4 L. ed. 180.

California. *Hall v. Jameson*, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518.

Iowa. *Bloom v. Wolfe*, 50 Ia. 286.

Kentucky. *Farmers' and Traders' Bank v. Deposit Co.*, 108 Ky. 384, 56 S. W. 671.

tee,² or adds "trustee" to his signature.³ A trustee is personally liable upon a covenant to pay a mortgage debt, although he is empowered by the trustee deed to execute such mortgage and although his signature is followed by the word "trustee,"⁴ and he is personally liable upon a deficiency judgment in foreclosure proceedings.⁵ A trustee is personally liable on his indorsement of negotiable paper payable to himself as trustee.⁶ One who covenants in his own name, adding "as trustee," is personally liable.⁷ An as-

Maryland. Gill v. Carmine, 55 Md. 339; Knipp v. Bagby, 126 Md. 461, L. R. A. 1915F, 1072, 95 Atl. 60.

Massachusetts. Odd Fellows Hall Association v. McAllister, 153 Mass. 292, 11 L. R. A. 172, 26 N. E. 862; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Carey Co. v. Pingree, 223 Mass. 352, 111 N. E. 857.

Michigan. Feldman v. Preston, 194 Mich. 352, 160 N. W. 655.

Minnesota. Germania Bank v. Michaud, 62 Minn. 459, 54 Am. St. Rep. 653, 30 L. R. A. 286, 65 N. W. 70.

North Carolina. Mitchell v. Whitlock, 121 N. Car. 166, 28 S. E. 292.

North Dakota. Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911.

Oregon. Ogden Ry. Co. v. Wright, 31 Or. 150, 49 Pac. 975.

Pennsylvania. Fehlinger v. Wood, 134 Pa. St. 517, 19 Atl. 746.

South Carolina. McDowall v. Reed, 28 S. Car. 466, 6 S. E. 300.

Vermont. McIntyre v. Williamson, 72 Vt. 183, 82 Am. St. Rep. 929, 47 Atl. 786.

"When a trustee contracts as such, unless he is bound, no one else is bound, for he has no principal. The taking of the trustee." Taylor v. Davis, 110 U. S. 330, 28 L. ed. 163.

His liability is especially clear if he has no authority to sign an instrument as trustee. Tuttle v. First National Bank, 187 Mass. 533, 105 Am. St. Rep. 420, 73 N. E. 560.

² Hall v. Jameson, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.)

1190, 91 Pac. 518; Feldman v. Preston, 194 Mich. 352, 160 N. W. 655; Gibson v. Gray, 17 Tex. Civ. App. 646, 43 S. W. 922.

³ California. Hall v. Jameson, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518.

Maryland. Knipp v. Bagby, 126 Md. 461, L. R. A. 1915F, 1072, 95 Atl. 60.

Massachusetts. Carey Co. v. Pingree, 223 Mass. 352, 111 N. E. 857.

Oregon. Ogden Ry. Co. v. Wright, 31 Or. 150, 49 Pac. 975.

Vermont. McIntyre v. Williamson, 72 Vt. 183, 82 Am. St. Rep. 929, 47 Atl. 786.

Contra, no personal liability was held to exist where the trustee gave his note for money borrowed for the estate signed, "A, trustee for B." Printup v. Trammel, 25 Ga. 240.

⁴ Hall v. Jameson, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518; Knipp v. Bagby, 126 Md. 461, L. R. A. 1915F, 1072, 95 Atl. 60.

⁵ Hall v. Jameson, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518; Knipp v. Bagby, 126 Md. 461, L. R. A. 1915F, 1072, 95 Atl. 60.

⁶ Tradesmen's National Bank v. Looney, 99 Tenn. 278, 63 Am. St. Rep. 830, 38 L. R. A. 837, 42 S. W. 149 (even if he adds "trustee" to his signature).

⁷ Duvall v. Craig, 15 U. S. (2 Wheat.) 45, 4 L. ed. 180; Knipp v. Bagby, 126 Md. 461, L. R. A. 1915F, 1072, 95 Atl. 60.

signee for the benefit of creditors is personally bound on contracts in which he refers to himself as trustee, unless there is an express provision to the contrary.⁸ Even if the instrument creating the trust gives the trustee power to bind the estate, he is personally liable on such contracts unless he contracts for exemption from personal liability;⁹ and this principle has been applied even where there is a provision in the instrument creating the trust that the trustee is to be free from personal liability.¹⁰ He may contract for freedom from personal liability,¹¹ but such immunity must be contracted for when the original liability is incurred. The trustees of a Massachusetts trust can not be held liable personally upon contracts which contain express provisions against personal liability,¹² although they had failed to execute properly an instrument which it was within their authority to make.¹³ A subsequent promise not to hold the receiver liable personally is unenforceable as without consideration.¹⁴ A trustee is not personally responsible for debts incurred by his predecessor for the benefit of the estate.¹⁵

§ 1811. Liability of estate for benefits received. While a trustee can not create debts against the trust, the creditors can subject the rents and profits of the trust estate to their claims, as far as their loans were advantageous to such trust estate,¹ or they may be remitted by subrogation to the trustee's claim against the estate,² especially if he is insolvent,³ or a non-resident.⁴ In settling ac-

⁸ *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922.

⁹ *Knipp v. Bagby*, 126 Md. 461, L. R. A. 1915F, 1072, 95 Atl. 80; *Connally v. Lyons*, 82 Tex. 664, 27 Am. St. Rep. 935, 18 S. W. 799.

See also, *Hall v. Jameson*, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518.

¹⁰ *American, etc., Co. v. Converse*, 175 Mass. 449, 56 N. E. 594. But where the deed authorizes trustee to borrow money, a covenant by trustee to pay the mortgage debt does not bind him personally. *Glenn v. Allison*, 58 Md. 527.

¹¹ *Rand v. Farquhar*, 226 Mass. 91, 115 N. E. 286; *New v. Nicoll*, 73 N. Y. 127, 79 Am. Rep. 111.

¹² *Rand v. Farquhar*, 226 Mass. 91, 115 N. E. 286 [citing, *Sumner v. Williams*, 8 Mass. 162; *Abbey v. Chase*, 60 Mass. (6 Cush.) 54; *Shoe & Leather*

National Bank v. Dix, 123 Mass. 148; *King v. Stowell*, 211 Mass. 246].

¹³ *Rand v. Farquhar*, 226 Mass. 91, 115 N. E. 286.

¹⁴ *New v. Nicoll*, 73 N. Y. 127, 79 Am. Rep. 111.

¹⁵ *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670, 49 N. E. 667. (A bishop received trust property from his predecessor.)

¹ *Neal v. Bleckley*, 51 S. Car. 506, 29 S. E. 249. To the same effect is *Sanders v. Warehouse Co.*, 107 Ga. 49, 32 S. E. 610; *Kupferman v. McGehee*, 63 Ga. 250.

² *Mosely v. Norman*, 74 Ala. 422; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Ranzau v. Davis*, 85 Or. 26, 165 Pac. 1180.

³ *Clapton v. Gholson*, 53 Miss. 466; *Ranzau v. Davis*, 85 Or. 26, 165 Pac. 1180.

⁴ *Norton v. Phelps*, 54 Miss. 467.

counts the trustee will be allowed his reasonable expenses incurred in managing the trust,⁵ including attorney fees,⁶ or incurred with the consent of the beneficiaries,⁷ and it is held that he has a lien therefor.⁸ The trustee will be allowed credit for amounts expended by him under contracts upon which he was personally liable but which were entered into by him with reasonable care for the benefit of the estate.⁹ If the trustee has made valuable improvements the beneficiary may be given the option to take the land without the improvements, or to take the land with the improvements and to pay for them; but he should not be given the improvements without compensation.¹⁰

II

EXECUTORS AND ADMINISTRATORS

§ 1812. General want of power to bind estate. Executors and administrators are officers of the court appointed for the purpose of settling decedent's estates. In the absence of statutory provision or of authority given by will, they have, in general, no power to bind the estates of their decedents by their own contracts so as to change any pre-existing liability which might have been enforced without such contract, or to incur additional liability,¹ even if for the benefit of such estate. Where no authority to contract on behalf of the estate exists, the order of the court is ineffectual to

⁵ A trustee may deduct reasonable expenses for a foreclosure suit and for investigating the title to property. *Wordin's Appeal*, 71 Conn. 531, 71 Am. St. Rep. 219, 42 Atl. 659. A trustee can not be paid for legal services rendered by himself. *Marks v. Semple*, 111 Ala. 637, 20 So. 791; *Bangor v. Peirce*, 106 Me. 527, 29 L. R. A. (N.S.) 770, 76 Atl. 945.

⁶ *Mitau v. Roddan*, 149 Cal. 1, 6 L. R. A. (N.S.) 275, 84 Pac. 145; *Melson v. Travis*, 133 Ga. 710, 66 S. E. 936; *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 612.

⁷ *Casey v. Lockwood*, 24 R. I. 72, 52 Atl. 803. (Where the remainderman authorized the trustee to pay the funeral expenses of the life-tenant.)

⁸ *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Johnson v. Leman*, 131 Ill. 609, 19 Am. St. Rep. 63, 7 L. R. A.

656, 23 N. E. 435; *Feldman v. Preston*, 194 Mich. 352, 160 N. W. 655.

⁹ *Feldman v. Preston*, 194 Mich. 352, 160 N. W. 655; *Ranzau v. Davis*, 85 Or. 26, 165 Pac. 1180.

¹⁰ *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513.

¹ *United States. Griggs v. Nadeau*, 221 Fed. 381, 137 C. C. A. 189.

Alabama. Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26, 34 So. 905.

Arkansas. Tucker v. Grace, 61 Ark. 410, 33 S. W. 530; *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292, 35 S. W. 212; *Carpenter v. Hazel*, 128 Ark. 416, 194 S. W. 225.

California. Schlicker v. Hemenway, 110 Cal. 579, 52 Am. St. Rep. 116, 42 Pac. 1063; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695.

Connecticut. Taylor v. Mygatt, 26 Conn. 184.

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create such power.² Thus executors can not create debts against the estate,³ even by borrowing money to pay the debts of the estate,⁴ even if for a debt of the decedent,⁵ or by giving their notes therefor,⁶ or by indorsing notes of the estate,⁷ or by accepting a

Illinois. *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134.

Iowa. *Clark v. Ross*, 96 Ia. 402, 65 N. W. 340.

Kansas. *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770, 39 Pac. 694; *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760.

Kentucky. *United States Fidelity & Guaranty Co. v. Levering*, 156 Ky. 110, 160 S. W. 790.

Maine. *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Baker v. Moor*, 63 Me. 443.

Massachusetts. *Luscomb v. Ballard*, 71 Mass. (5 Gray) 403, 66 Am. Dec. 374; *Kingman v. Soule*, 132 Mass. 286; *Durkin v. Langley*, 167 Mass. 577, 46 N. E. 119; *Rosenthal v. Schwartz*, 214 Mass. 371, 101 N. E. 1070.

Michigan. *Smith v. Brennan*, 62 Mich. 349, 4 Am. St. Rep. 867, 28 N. W. 892.

Minnesota. *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352.

Montana. *State v. District Court*, 53 Mont. 210, 162 Pac. 1053.

Missouri. *Stirling v. Winter*, 80 Mo. 141; *Richardson v. Palmer*, 24 Mo. App. 480.

New Jersey. *Doolittle v. Willet*, 57 N. J. L. 398, 31 Atl. 385.

New York. *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 N. Y. 360; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737, 5 N. E. 452.

Ohio. *Lucht v. Behrens*, 28 O. S. 231, 22 Am. Rep. 378.

Oklahoma. *Drinker v. Kepley*, 43 Okla. 686, 144 Pac. 350.

Tennessee. *Patterson v. Craig*, 60 Tenn. (1 Baxt.) 291.

Texas. *Fine v. Freeman*, 83 Tex. 529, 17 S. W. 783, 18 S. W. 963.

Vermont. *Adams v. Adams*, 16 Vt.

228; *Rich v. Sowles*, 64 Vt. 408, 15 L. R. A. 850, 28 Atl. 723.

Virginia. *Fitzhugh v. Fitzhugh*, 52 Va. (11 Gratt.) 300, 62 Am. Dec. 653.

² *Valley National Bank v. Crosby*, 108 Ia. 651, 79 N. W. 383.

³ *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653, 30 L. R. A. 286, 65 N. W. 70; *Curtis v. Bank*, 39 O. S. 579; *McGrath v. Barnes*, 13 S. Car. 328, 36 Am. Rep. 687; *Rich v. Sowles*, 64 Vt. 408, 15 L. R. A. 850, 23 Atl. 723.

⁴ *O'Kelly v. McGinnis*, 141 Ga. 379, 81 S. E. 197; *Putney v. Bryan*, 142 Ga. 118, 82 S. E. 519.

⁵ *Browne v. Fairhall*, 213 Mass. 290, 100 N. E. 556.

⁶ **Alabama.** *Christian v. Morris*, 50 Ala. 585.

California. *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695.

Indiana. *Cornthwaite v. Bank*, 57 Ind. 268.

Iowa. *Valley National Bank v. Crosby*, 108 Ia. 651, 79 N. W. 383.

Kentucky. *Rice v. Strange* (Ky.), 72 S. W. 756; *Ellis v. Merrimann*, 44 Ky. (5 B. Mon.) 297.

Missouri. *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215.

Montana. *First National Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499.

North Carolina. *Morehead Banking Co. v. Morehead*, 122 N. Car. 318, 30 S. E. 331.

Ohio. *Smith v. Hayward*, 5 Ohio N. P. 501.

Tennessee. *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

Texas. *Gregory v. Leigh*, 33 Tex. 813.

Virginia. *Robertson v. Breckenridge*, 98 Va. 569, 37 S. E. 8.

⁷ *Johnston v. Bank*, 37 Miss. 526.

draft,⁸ or by giving a note for a debt barred by limitations in the life of decedent.⁹ An administrator can not prevent the operation and effect of the Statute of Limitations by making a part payment upon a note.¹⁰ The executor can not bind the estate by a contract for legal services,¹¹ as by a contract to pay a contingent fee in the event of the recovery for the death of the decedent.¹² Accordingly, the court can not fix the amount which an administrator must pay for legal services.¹³ Some courts seem to hold that an executor may bind the estate by a reasonable contract for attorney fees,¹⁴ as to pay a reasonable contingent fee for recovery for the death of decedent,¹⁵ or to pay one-third of the amount recovered of a claim against a foreign government.¹⁶ The estate is not liable for the price of property bought for the estate,¹⁷ as on a contract to buy realty;¹⁸ nor on a contract by the executrix to refund money received by her on a sale of her decedent's realty which she could not

⁸ *Perry v. Cunningham*, 40 Ark. 185.

⁹ *Claghorn's Estate*, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918.

¹⁰ *McLaughlin v. Head*, 86 Or. 361, L. R. A. 1918B, 303, 168 Pac. 614.

¹¹ *Arkansas. Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292, 35 S. W. 212; *Carpenter v. Hazel*, 128 Ark. 416, 194 S. W. 225.

Iowa. Argo v. Blondel, 100 Ia. 353, 69 N. W. 534; *In re Munger*, 168 Ia. 372, 150 N. W. 447.

Montana. State v. District Court, 53 Mont. 210, 162 Pac. 1053.

New Hampshire. Wait v. Holt, 56 N. H. 467.

New York. Platt v. Platt, 105 N. Y. 488, 12 N. E. 22; *Parker v. Day*, 156 N. Y. 383, 49 N. E. 1046.

Ohio. McBride v. Brucker, 5 Ohio C. C. 12; 3 Ohio C. D. 7; *Mellen v. West*, 5 Ohio C. C. 89, 3 Ohio C. D. 46; *Trumppler v. Royer*, 95 O. S. 194, 115 N. E. 1018.

Wisconsin. Miller v. Tracy, 86 Wis. 330, 56 N. W. 866.

¹² *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Rickel v. Ry. Co.*, 112 Ia. 148, 83 N. W. 957; *Thomas v. Moore*, 52 O. S. 200, 39 N. E. 803.

¹³ *State v. District Court*, 25 Mont. 33, 63 Pac. 717. A note by brothers of the decedent to an attorney to prosecute the murderer of decedent is not a charge against the estate. *Alexander v. Alexander*, 120 N. Car. 472, 27 S. E. 121.

¹⁴ *Alexander v. Bates*, 127 Ala. 328, 28 So. 415; *McIntire v. McIntire*, 14 D. C. App. 337; *Gairdner v. Tate*, 110 Ga. 456, 35 S. E. 697.

¹⁵ *Lee v. Van Voorhis*, 78 Hun (N. Y.) 575; *In re McCullough's Estate*, 31 Or. 86, 49 Pac. 886.

¹⁶ *Mackie v. Howland*, 3 D. C. App. 461.

¹⁷ *Alabama. Daily v. Daily*, 66 Ala. 266. (Food for stock of estate.)

Arkansas. Yarborough v. Ward, 34 Ark. 204.

Illinois. Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134.

Massachusetts. Durkin v. Langley, 167 Mass. 577, 46 N. E. 119.

Ohio. West v. Dean, 15 Ohio C. C. 261, 8 Ohio C. D. 797.

¹⁸ *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134.

complete;¹⁹ nor on a warranty of property sold;²⁰ nor on a contract to sell realty, not made as provided by statute;²¹ nor on a contract for services for the estate;²² nor for debts incurred by an executor who is carrying on the business in which the decedent was engaged.²³ An executor can not create debt against the estate by accepting a deed to his decedent.²⁴ The beneficiaries of decedent's estate can not, however, affirm the contract of the administrator in part and avoid it in part. Thus where an administrator without order of the court lent money of the estate to a corporation, the beneficiaries could not, in the absence of fraud or collusion, hold the directors of such corporation personally liable for such money as trustees.²⁵ Still less can one who is named as executor in a will bind the estate by incurring expenses in attempting to secure the probate of such will if it is finally decided that such will is invalid.²⁶

§ 1813. Statutory power to bind estate. While some courts use language which seems to admit of a considerably greater power of executors to bind the estate than the preceding authorities recognize,¹ the cases where the contract of the executor is of any force against the estate may be reduced to two classes: First, he may contract as far as the statute gives him power to contract expressly or impliedly.² He may compromise claims;³ he may bind

¹⁹ *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118.

²⁰ *Bauerle v. Long*, 187 Ill. 475, 52 L. R. A. 643, 58 N. E. 458; *Huffman v. Hendry*, 9 Ind. App. 324, 53 Am. St. Rep. 351, 36 N. E. 727; *Dunlap v. Robinson*, 12 O. S. 530; *Lockwood v. Gilson*, 12 O. S. 526; *Arnold v. Donaldson*, 46 O. S. 73, 18 N. E. 540.

²¹ *Bauerle v. Long*, 187 Ill. 475, 52 L. R. A. 643, 58 N. E. 458; *Hedgecock v. Tate*, 168 N. Car. 660, 85 S. E. 34.

²² *In re Page*, 57 Cal. 238; *Dodson v. Nevitt*, 5 Mont. 518, 6 Pac. 358; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

²³ *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760.

²⁴ *Shives v. Johnson* (Ky.), 38 S. W. 664.

²⁵ *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86, 29 So. 678.

²⁶ *Dodd v. Anderson*, 197 N. Y. 466, 27 L. R. A. (N.S.) 336, 90 N. E. 1137.

¹ *Mackie v. Howland*, 3 D. C. App. 461; *Scott v. Meadows*, 84 Tenn. (16 Lea) 290; *Jack v. Cassin*, 9 Tex. Civ. App. 228, 28 S. W. 832; *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835.

² *Alabama*. *Wilburn v. McCalley*, 63 Ala. 436.

Connecticut. *Brown v. Eggleston*, 53 Conn. 110, 2 Atl. 321.

Minnesota. *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352.

Texas. *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558.

Washington. *Lamb-Davis Lumber Co. v. Stowell*, 96 Wash. 46, L. R. A. 1917E, 966, 164 Pac. 593.

³ *Mulville v. Ins. Co.*, 19 Mont. 95, 47 Pac. 650.

the estate by a consent judgment on a just claim;⁴ he may extend the time for paying off a mortgage;⁵ he may ratify an indorsement made for decedent by his wife where the proceeds were part of the estate before the death of decedent;⁶ and as the estate is liable for breach of a contract made by decedent,⁷ he may complete a contract to sell goods,⁸ or a contract for the erection of a building.⁹ So, by statutory provision, he may employ an attorney to defend the will in contest,¹⁰ or he may employ an attorney to represent the estate with leave of court,¹¹ or without leave of court under some statutes.¹² He may give a mortgage for the purpose of borrowing money to pay debts and legacies,¹³ or may take a note and mortgage on realty sold by him.¹⁴ If a statute provides that the administrator is to take the estate of the decedent into his possession and that he is to be allowed all necessary expenses in the care and management of it, the administrator may bind the estate by a contract entered into for the purpose of preserving or selling property belonging to the estate,¹⁵ such as a contract for boxes for the purpose of packing apples belonging to the estate in order to ship them to market.¹⁶ In view of his general power to sell personalty of the estate, he may pledge personalty for a loan advanced by one who, in good faith, believes that the loan is obtained for the benefit of the estate.¹⁷ In short, wherever his promise is co-extensive

⁴ *Shelden v. Warner*, 59 Mich. 444, 26 N. W. 667.

⁵ *Campbell v. Linder*, 50 S. Car. 169, 27 S. E. 648 (though a deed in form).

⁶ *Seaver v. Weston*, 163 Mass. 202, 39 N. E. 1013.

⁷ *Parker v. Barlow*, 93 Ga. 700, 21 S. E. 213.

⁸ *Smith v. Smith*, 105 S. Car. 393, 89 S. E. 1032.

⁹ *Bambrick v. Church Association*, 53 Mo. App. 225.

¹⁰ *Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768.

¹¹ *Wassell v. Armstrong*, 35 Ark. 247.

¹² *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 443, 55 N. E. 963; *Jackson v. Leech*, 113 Mich. 391, 71 N. W. 846. By statute in West Virginia attorney fees are "as binding on the estate as a debt created by the decedent in life—more so." *Crim v.*

England, 46 W. Va. 480, 484, 76 Am. St. Rep. 826, 33 S. E. 310. And giving notes therefor signed as "administrator of the estate" of decedent does not discharge this liability.

¹³ *Hart v. Allen*, 166 Mass. 78, 44 N. E. 116.

¹⁴ *Jelke v. Goldsmith*, 52 O. S. 499, 49 Am. St. Rep. 730, 40 N. E. 167.

¹⁵ *Lamb-Davis Lumber Co. v. Stowell*, 96 Wash. 46, L. R. A. 1917E, 966, 164 Pac. 593.

¹⁶ *Lamb-Davis Lumber Co. v. Stowell*, 96 Wash. 46, L. R. A. 1917E, 966, 164 Pac. 593.

¹⁷ *Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955; *Carter v. Bank*, 71 Me. 448, 36 Am. Rep. 338; *Gottberg v. Bank*, 131 N. Y. 595, 30 N. E. 41; *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863, 78 N. W. 177.

with his liability in his official capacity, his promise is enforceable against the estate.¹⁰

§ 1814. Power created by will to bind estate. Second, the will may confer power to bind the estate by contract,¹ as to borrow money to carry on business.² Power to carry on a plantation,³ to keep an estate together,⁴ to manage a mine,⁵ or to raise money,⁶ or to defer the sale of a business for a certain time,⁷ each confers power to borrow or create debts. Where power is given to carry on business it has been held that trade debts bind only the money in the business—not the estate in general.⁸ Power by will to use the corpus of the property is not power to borrow.⁹ However, a power given by will to an executrix “to conduct for such time as she may see fit the business in which I may be engaged at my death,” has been held to confer power to subject the entire estate to debts contracted for the purpose of continuing such business.¹⁰ If the entire estate is given to testator’s wife as trustee, and in order to support herself and her children she is authorized to carry on testator’s business, debts incurred by her in such business are a charge upon the entire estate.¹¹ A power to the executor to sell is not power to warrant.¹²

¹⁰ *Ashby v. Ashby*, 7 Barn. & C. 444; *Haynes v. Forshaw*, 11 Hare 93; *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352.

¹ *Ames v. Holderbaum*, 44 Fed. 224.

² *Whitman’s Estate*, 195 Pa. St. 144, 45 Atl. 673.

³ *Primm v. Mensing*, 14 Tex. Civ. App. 395, 38 S. W. 382.

⁴ *Brannon v. Ober*, 106 Ga. 168, 32 S. E. 16.

⁵ He may sink a shaft, though it results in loss. *Waddell’s Estate*, 196 Pa. St. 294, 46 Atl. 304.

⁶ *Fletcher v. Banking Co.*, 111 Ga. 300, 78 Am. St. Rep. 164, 36 S. E. 767. Under a power by will “to raise a sufficient amount of money for this purpose in such way as seems best to him,” he can borrow and give a mortgage, even though the amount thus borrowed exceeds the debts, and can

bind the estate by a promise to pay attorney fees. *Fletcher v. Banking Co.*, 111 Ga. 300, 78 Am. St. Rep. 164, 36 S. E. 767.

⁷ *In re Crowther* [1895], 2 Ch. 56.

⁸ *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501 [citing, *Alzheimer v. Hunter*, 56 Ark. 159, 19 S. W. 496; *Laible v. Ferry*, 32 N. J. Eq. 791; *Lucht v. Behrens*, 28 O. S. 231, 22 Am. Rep. 378]; *In re Ennis*, 96 Wash. 352, 165 Pac. 119.

⁹ *McMillan v. Cox*, 109 Ga. 42, 34 S. E. 341.

¹⁰ *Furst v. Armstrong*, 202 Pa. St. 348, 90 Am. St. Rep. 653, 51 Atl. 996.

See also, *Willis v. Sharp*, 113 N. Y. 586, 4 L. R. A. 493, 21 N. E. 705.

¹¹ *Moore v. McFall*, 263 Ill. 596, 105 N. E. 723.

¹² *Bauerle v. Long*, 187 Ill. 475, 52 L. R. A. 643, 58 N. E. 458.

§ 1815. Personal liability of executors. Executors are liable personally upon contracts which they attempt to make in their official capacity when they can not bind the estate, unless they specifically contract against a personal liability.¹ An executor is personally liable for the compensation of an attorney whom the executor has employed on behalf of the estate.² Executors are liable personally on their notes,³ even if they sign in their official capac-

¹ England. *Prince v. Haworth* [1905], 2 K. B. 768.

Arkansas. *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530.

California. *In re Page*, 57 Cal. 238; *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93.

Connecticut. *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169.

Indiana. *De Coudres v. Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95, 58 N. E. 90; *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47.

Iowa. *McFarland v. Howell*, 162 Ia. 110, 143 N. W. 860.

Massachusetts. *Luscomb v. Ballard*, 71 Mass. (5 Gray) 403, 66 Am. Dec. 374; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83.

Minnesota. *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653, 30 L. R. A. 286, 65 N. W. 70.

Mississippi. *Howell v. Myer*, 105 Miss. 771, 63 So. 233.

Montana. *First National Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499.

New Jersey. *Doolittle v. Willet*, 57 N. J. L. 398, 31 Atl. 385.

New York. *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046.

North Carolina. *Moorehead Banking Co. v. Moorehead*, 122 N. Car. 318, 30 S. E. 331.

Ohio. *Thomas v. Moore*, 52 O. S. 200, 39 N. E. 803; *West v. Dean*, 15 Ohio C. C. 261.

Oklahoma. *Drinker v. Kepley*, 43 Okla. 686, 144 Pac. 350.

West Virginia. *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118.

See also, *Lynch v. Coogan*, 89 Conn. 331, 94 Atl. 353.

His liability is especially clear if he is acting in excess of his authority. *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760; *Brown v. Quinton*, 80 Kan. 44, 25 L. R. A. (N.S.) 71, 102 Pac. 242.

If an administrator has borrowed money without authority of the law, or has obtained money wrongfully, the sureties on the administrator's bond are not liable therefor, even though such money was used for the benefit of the state. *Bank v. American Bonding Co.*, 141 Ga. 326, 50 L. R. A. (N.S.) 1089, 80 S. E. 1003.

See also, *Painter v. Kaiser*, 27 Nev. 421, 103 Am. St. Rep. 772, 65 L. R. A. 672, 76 Pac. 747.

² California. *In re Kruger*, 143 Cal. 141, 76 Pac. 891.

Iowa. *Clark v. Sayre*, 122 Ia. 591, 98 N. W. 484.

Kansas. *Brown v. Quinton*, 80 Kan. 44, 25 L. R. A. (N.S.) 71, 102 Pac. 242.

New York. *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046.

Ohio. *Thomas v. Moore*, 52 O. S. 200, 39 N. E. 803.

The executor is personally liable on his promise to pay costs. *Prince v. Haworth* [1905], 2 K. B. 768.

³ Georgia. *Lynch v. Kirby*, 65 Ga. 279.

Iowa. *Winter v. Hite*, 3 Ia. 142; *Dunne v. Deery*, 40 Ia. 251.

ity,⁴ as by signing "As executor,"⁵ or by signing "The Estate of E. Langevin, by Achille Michaud, Administrator,"⁶ or by accepting a draft, "Accepted to be paid when funds are received for the estate, C. Carter, Administrator."⁷ The executor or administrator is liable personally, even if the note signed by him as executor and the like is given to take up a debt of the decedent.⁸ So an executor is personally liable on his acceptance of an order drawn on him payable out of the rentals of the estate.⁹ So where A, as administrator of B's estate, bought a team to operate B's farm, and A signed the letter whereby the contract of sale was made, "A, Administrator," A was held liable personally.¹⁰ If they secure the note by mortgaging part of the estate they are personally liable for a deficiency after foreclosure, this not being a waiver of personal liability.¹¹ Where they sign as executors, "but not personally,"¹² or where there is no new consideration and the note is in the hands of the payee,¹³ there is no personal liability on the contract, if the estate is properly administered. As to payee the executor may be relieved on a note in settlement of his decedent's claim by showing a deficiency in decedent's estate.¹⁴ An executor is liable for commission on a loan which was not consummated because the executor

Maine. *White v. Thompson*, 79 Me. 207, 9 Atl. 118.

Minnesota. *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653, 30 L. R. A. 286, 65 N. W. 70.

Montana. *First National Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499.

⁴ *Dunne v. Deery*, 40 Ia. 251; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

⁵ *Hopson v. Johnson*, 110 Ga. 283, 34 S. E. 848; *Morehead Banking Co. v. Morehead*, 116 N. Car. 410, 21 S. E. 190; *In re Claghorn's Estate*, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

⁶ *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653, 30 L. R. A. 286, 65 N. W. 70.

⁷ *Carter v. Thomas*, 3 Ind. 213.

⁸ *Cornthwaite v. Bank*, 57 Ind. 268; *In re Claghorn's Estate*, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918.

⁹ *Perry v. Cunningham*, 40 Ark. 185.

¹⁰ *Rich v. Sowles*, 64 Vt. 408, 15 L. R. A. 850, 23 Atl. 723.

¹¹ *De Coudres v. Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95, 58 N. E. 90.

¹² *Morehead Banking Co. v. Morehead*, 116 N. Car. 413, 21 S. E. 191.

¹³ *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653, 30 L. R. A. 286, 65 N. W. 70.

See also, *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479, 105 Am. St. Rep. 1032, 99 N. W. 341, where the same result was reached under a note which provided, "I, * * * A, administrator of the estate of B, deceased, acting under an order of the county court, promise to pay * * *."

¹⁴ *McGrath v. Barnes*, 13 S. Car. 328, 36 Am. Rep. 687; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804; *East Tennessee, etc., Co. v. Gaskell*, 70 Tenn. (2 Lea.) 742.

could not get a proper order of court to mortgage the realty.¹⁵ An executor who carries on decedent's business is personally liable for new debts thus incurred.¹⁶ He is personally liable on his contract for sawing decedent's lumber.¹⁷ In some cases the personal liability of the executor may exist even if the executor is authorized by will to carry on a business and to incur debts. Even if the will authorizes the executor to carry on "some legitimate business," the executor is personally liable for debts incurred in such business.¹⁸ The executor is not, however, personally liable unless the contract purports to have been made with him. If an executor signs in his official capacity in indorsing a note owned by decedent, which note the executor is transferring to a vendee thereof under authority of law, he incurs no personal liability.¹⁹ By statute an executor may be free from certain kinds of liability imposed on him.²⁰ An executor who has disclosed all the facts is not liable personally upon a contract for the sale of realty which belongs to the heirs, if he does not specifically undertake a personal liability in such contract.²¹

§ 1816. Liability of estate for benefits received. The rule that an executor can not bind the estate by his contract is intended for the protection of the estate. It is not intended to operate as a confiscation of anything of value which the estate may receive under such contract. In an accounting with the estate the executor must be credited with the value which has actually enured to the estate under such contract. The executors may reimburse themselves for debts of the estate paid by them.¹ Thus if executors who might have sold realty of their decedent to pay his debts which exceed his personalty, pay such debts out of their own funds, they

¹⁵ *Moxon v. Jones*, 128 Cal. 77, 60 Pac. 516.

¹⁶ *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295; *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760.

¹⁷ *Botts v. Barr*, 95 Ind. 243.

¹⁸ *Willis v. Sharp*, 113 N. Y. 586, 4 L. R. A. 493, 21 N. E. 705.

¹⁹ *Grafton Savings Bank v. Wing*, 172 Mass. 513, 70 Am. St. Rep. 303, 43 L. R. A. 831, 52 N. E. 1067.

²⁰ As for costs. *Bruning v. Golden*, 159 Ind. 199, 64 N. E. 657; *Moise's Succession*, 107 La. 717, 31 So. 990.

²¹ *Hedgecock v. Tate*, 168 N. Car. 660, 85 S. E. 34.

¹ *United States. Peter v. Beverly*, 35 U. S. (10 Pet.) 532, 9 L. ed. 522.

Maryland. Elosser v. Fletcher, 126 Md. 244, 94 Atl. 776.

New York. Bolton v. Myers, 146 N. Y. 257, 40 N. E. 737 [affirming, 83 Hun (N. Y.) 259].

Oklahoma. In re McGannon's Estate, 50 Okla. 288, 150 Pac. 1109.

may be reimbursed thereafter out of the proceeds of the realty.² So an executor who pays a judgment against decedent out of his own funds may be reimbursed out of the estate.³ So an executor who has given his own note for a debt of his decedent may be reimbursed out of the estate for the amount paid by him on such note.⁴ Attorneys' fees can not be allowed in a proceeding to contest a will unless the estate is benefited by such services.⁵ An estate is bound to reimburse the owner of a fund for interest upon such fund which has been paid over to such estate.⁶ If the persons who are interested in the estate of the decedent consent to the executor's incurring obligations on behalf of the estate,⁷ as in carrying on the decedent's business,⁸ or performing contracts of the decedent,⁹ he is to be reimbursed, as against the interests of those who have thus consented, for expenses and obligations thus incurred by him. Attorneys' fees for legal advice in preparing an executor's account will not be allowed.¹⁰ Attorneys' fees will not be allowed for services for which the executor has already received compensation.¹¹ Attorneys' fees in an action for the death of the decedent by wrongful act can not be allowed out of the general estate if the creditors will be injured thereby.¹² An executor will be given credit in his accounts for reasonable attorney fees expended for legal services which were reasonably necessary for the administration of the estate.¹³

² *Bolton v. Myers*, 146 N. Y. 257, 40 N. E. 737.

³ *Pursel v. Pursel*, 14 N. J. Eq. 514.

⁴ *Peter v. Beverly*, 35 U. S. (10 Pet.) 532, 9 L. ed. 522; *Douglas v. Fraser*, 2 McCord Eq. (S. Car.) 105.

⁵ *In re Arnold's Estate*, 252 Pa. St. 298, 97 Atl. 415.

See also, *In re Brown*, 93 Wash. 324, 160 Pac. 945.

⁶ *Lynch v. Coogan*, 89 Conn. 331, 94 Atl. 353.

⁷ *England. Dowse v. Gorton* [1891], A. C. 190.

Connecticut. Mathews v. Sheehan, 76 Conn. 654, 100 Am. St. Rep. 1017, 57 Atl. 694.

Michigan. Swaine v. Hemphill, 165 Mich. 561, 40 L. R. A. (N.S.) 201, 131 N. W. 68.

Tennessee. Pearson v. Gillenwaters, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9, 199.

Washington. In re Ennis, 96 Wash. 352, 165 Pac. 119.

⁸ *Swaine v. Hemphill*, 165 Mich. 561, 40 L. R. A. (N.S.) 201, 131 N. W. 68; *In re Ennis*, 96 Wash. 352, 165 Pac. 119.

In absence of such consent, and of an order of court, the executor can not be reimbursed for such expenses. *In re Estate of Delaney*, 41 Nev. 384, L. R. A. 1918D, 1022, 171 Pac. 383.

⁹ *Mathews v. Sheehan*, 76 Conn. 654, 100 Am. St. Rep. 1017, 57 Atl. 694.

¹⁰ *In re Steelman*, 87 N. J. Eq. 270, 99 Atl. 612.

¹¹ *In re Steelman*, 87 N. J. Eq. 270, 99 Atl. 612.

¹² *Davis v. Herbert*, 78 N. H. 179, 97 Atl. 879.

¹³ *Kansas. Brown v. Quinton*, 80 Kan. 44, 25 L. R. A. (N.S.) 71, 102 Pac. 242.

This right, however, is not an indirect means of enforcing the contract. The measure of recovery is the benefit to the estate, and not the contract itself. Thus executors can not recover interest on money borrowed by them to pay debts of the estate before they were due, which did not draw interest.¹⁴ If the property or services furnished by the adversary party has in fact enured to the benefit of the estate, there is some authority for holding that the creditor of the executor may apply to the court of probate powers for an order to the executor to pay the claim out of the estate, which application will, in a proper case, be allowed;¹⁵ and more for holding that equity may enforce payment out of the estate, not strictly speaking on the contract, but for a reasonable compensation for the value of the services to the estate, or the property received by it.¹⁶ Thus if the executor borrows money, giving a note signed with his own name "as executor for" the decedent, and uses such money to pay debts of the estate, the creditor may recover from the estate in such amount as has actually been expended to pay the debts of the estate.¹⁷ The executor will be allowed only reasonable attorney fees and not necessarily the amount of attorney fees for which he has made himself personally liable.¹⁸ The amount of compensation is determined by the learning and skill involved and by the benefits to the estate.¹⁹ Since the amount recovered by the

Kentucky. *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522; *Evans v. McVey*, 172 Ky. 1, 188 S. W. 1075; *Miller v. Keown*, 176 Ky. 117, 195 S. W. 430.

Maryland. *Elosser v. Fletcher*, 126 Md. 244, 94 Atl. 776.

Oklahoma. *In re McGannon's Estate*, 50 Okla. 288, 150 Pac. 1109.

South Carolina. *In re Coleman*, 106 S. Car. 534, 91 S. E. 861.

¹⁴ *Nicholson v. Whitlock*, 57 S. Car. 36, 35 S. E. 412.

¹⁵ *Kasson's Estate*, 119 Cal. 489, 51 Pac. 706; *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 443, 55 N. E. 963; *Long v. Rodman*, 58 Ind. 58.

Contra, *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292, 35 S. W. 212 [overruling, *Turner v. Tapscott*, 30 Ark. 312; *Yarborough v. Ward*, 34 Ark. 204]; *Ferrin v. Myrick*, 41 N. Y. 315.

¹⁶ **United States.** *Hewitt v. Phelps*, 105 U. S. 393, 26 L. ed. 1072.

Alabama. *Mosely v. Norman*, 74 Ala. 422.

Arkansas. *Pike v. Thomas*, 65 Ark. 437, 47 S. W. 110.

Connecticut. *Lynch v. Coogan*, 89 Conn. 331, 94 Atl. 353.

Mississippi. *Norton v. Phelps*, 54 Miss. 467.

New Hampshire. *Thompson v. Smith*, 64 N. H. 412, 13 Atl. 639.

New Jersey. *Leible v. Ferry*, 32 N. J. Eq. 791.

New York. *Willis v. Sharp*, 113 N. Y. 586, 4 L. R. A. 493, 21 N. E. 705.

¹⁷ *Dunne v. Deery*, 40 Ia. 251; *In re Donnelly*, 246 Pa. St. 308, 92 Atl. 306.

¹⁸ *State v. District Court*, 53 Mont. 210, 162 Pac. 1053; *In re Coleman*, 106 S. Car. 534, 91 S. E. 861.

¹⁹ *In re Coleman*, 106 S. Car. 534, 91 S. E. 861.

See also, *McLaughlin v. O'Byrne*, 113 Miss. 335, 74 So. 274.

creditor is not credited to the executor, this is in effect a method of subjecting whatever claim the executor may have against the estate to the payment of such claim. This right usually exists only when the executor is personally insolvent.

III

GUARDIANS

§ 1817. General want of power to bind estate. At modern law a guardian of the estate is an officer of the court who is appointed for the purpose of managing the estates of persons who are in law considered incapable of managing their own property. In the absence of statutory authority a guardian of the estate has no general power to bind the estate of his ward by contract so as to impose a new liability or to modify a pre-existing liability.¹ A guardian can not enter into a contract which will impose a personal liability upon the ward.² A guardian can not by his contract impose a personal liability upon his ward for the fees of an attor-

¹ **Alabama.** *Chestnut v. Tyson*, 105 Ala. 149, 53 Am. St. Rep. 101, 16 So. 723.

California. *Fish v. McCarthy*, 96 Cal. 484, 31 Am. St. Rep. 237, 31 Pac. 529; *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896; *Wright v. Byrne*, 129 Cal. 614, 62 Pac. 176.

Colorado. *Hughes v. Kershow*, 42 Colo. 210, 15 L. R. A. (N.S.) 723, 93 Pac. 1116.

Connecticut. *Brown v. Eggleston*, 53 Conn. 110, 2 Atl. 231.

Florida. *Baird v. Steadman*, 39 Fla. 40, 21 So. 572.

Iowa. *In re Manning*, 134 Ia. 165, 111 N. W. 409.

Illinois. *Sperry v. Fanning*, 80 Ill. 371; *Nichols v. Sargent*, 125 Ill. 309, 8 Am. St. Rep. 378, 17 N. E. 475.

Indiana. *Lewis v. Edwards*, 44 Ind. 333.

Kentucky. *Lindsay v. Stevens*, 35 Ky. (5 Dana) 104.

Massachusetts. *Rollins v. Marsh*, 128 Mass. 116; *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414.

Michigan. *Wood v. Truax*, 39 Mich. 628.

Nebraska. *Bell v. Dingwell*, 91 Neb. 699, 136 N. W. 1128.

New Hampshire. *Hardy v. Bank*, 61 N. H. 34.

New Jersey. *Reading v. Wilson*, 38 N. J. Eq. 446.

New York. *Warren v. Bank*, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256, 51 N. E. 1036.

North Carolina. *Fessenden v. Jones*, 52 N. Car. 14, 75 Am. Dec. 445.

North Dakota. *Shepard v. Hanson*, 9 N. D. 249, 83 N. W. 20.

Oklahoma. *Lee v. Tonsor*, — Okla. —, 161 Pac. 804.

Oregon. *Sturgis v. Sturgis*, 51 Or. 10, 93 Pac. 696.

Utah. *Reams v. Taylor*, 31 Utah 288, 120 Am. St. Rep. 930, 8 L. R. A. (N.S.) 436, 87 Pac. 1089.

² *Wilhelm v. Hendrick*, 167 Ky. 219, 180 S. W. 516; *Oliver v. Truax*, 39 Mich. 628; *Reams v. Taylor*, 31 Utah 288, 120 Am. St. Rep. 930, 8 L. R. A. (N.S.) 436, 87 Pac. 1089.

ney who is employed by the guardian to represent the estate.³ A guardian can not charge the estate by carrying on business on his ward's capital and credit;⁴ or form a corporation on behalf of his ward out of a partnership in which the ward had an interest;⁵ or bind the estate by a covenant of quiet enjoyment;⁶ or subject the estate of the ward to a lien for labor or materials;⁷ or borrow money on the credit of the estate,⁸ even to take up debts of the estate;⁹ nor can he bind the ward's estate by a contract to pay attorneys' fees.¹⁰ If the statute does not authorize such contract to employ an attorney the order of the court can not validate it.¹¹ Money borrowed by a guardian and expended for his ward is not a consideration for a note given by the succeeding guardian.¹² The guardian can not bind the estate by a contract made before his official appointment of record, even if he could have bound the estate by a contract made thereafter.¹³

It has been said, however, that the guardian of the estate has general power to make contracts which are reasonably necessary to preserve or to protect the estate and that such contracts are a charge upon the estate of the ward.¹⁴ The contract of a guardian to pay a contingent fee to an attorney for recovering property for the estate of the ward has been upheld,¹⁵ but the services of the

³ *Wilhelm v. Hendrick*, 167 Ky. 219 180 S. W. 516.

⁴ *Warren v. Bank*, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256, 51 N. E. 1036.

⁵ *Weld v. Mfg. Co.*, 86 Wis. 549, 86 Wis. 552, 57 N. W. 378, 57 N. W. 374.

⁶ *Chestnut v. Tyson*, 105 Ala. 149, 53 Am. St. Rep. 101, 16 So. 723.

Nor by a covenant to repair. *Reams v. Taylor*, 31 Utah 288, 120 Am. St. Rep. 930, 8 L. R. A. (N.S.) 436, 87 Pac. 1089.

⁷ *Fish v. McCarthy*, 96 Cal. 484, 31 Am. St. Rep. 237, 31 Pac. 529; *Hughes v. Kershow*, 42 Colo. 210, 15 L. R. A. (N.S.) 723, 93 Pac. 1116; *Lee v. Tonsor*, — Okla. —, 161 Pac. 804.

⁸ *Wright v. Byrne*, 129 Cal. 614, 62 Pac. 176. (The ward is not personally liable therefor.) *Buie's Estate v. White*, 94 Mo. App. 367, 68 S. W. 101.

⁹ *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888. (The note

was signed, "John Blazzard by Joseph H. Hurd, his general guardian.")

¹⁰ *Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78; *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896; *In re Manning*, 134 Ia. 165, 111 N. W. 409; *Glasgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050; *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937, 86 N. W. 250. For other phases of this litigation, see, *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015; *Tyson v. Richardson*, 103 Wis. 397, 79 N. W. 439.

¹¹ *Glasgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050; *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

¹² *Wright v. Byrne*, 129 Cal. 614, 62 Pac. 176.

¹³ *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965.

¹⁴ *In re Mason (Neb.)*, 94 N. W. 990.

¹⁵ *Taylor v. Bemiss*, 110 U. S. 42, 28 L. ed. 64; *In re Mason (Neb.)*, 94 N. W. 990.

attorney were beneficial to the estate and the compensation was found not to be unreasonable. The contract of one not a guardian is, of course, not binding on the estate.¹⁶ Under a statute which provides that the father is the natural guardian of his child, but which does not define his powers, a father has no general power to make a contract which will bind the estate of his child,¹⁷ such as a contract to agree to the surrender of a policy of life insurance which had been effected for the benefit of the child.¹⁸ So a general judgment against the guardian can not be enforced out of the ward's property.¹⁹ An attorney who acts as guardian ad litem can not have any greater compensation than the allowance made to him by the court having jurisdiction of the case in which such services were rendered.²⁰

§ 1818. Statutory power to bind estate. Statutory provisions may confer upon a guardian power to bind the estate by his contracts with reference thereto.¹ He can contract for the location of a land certificate, the locator to be paid a part of the land,² or he can lease³ or borrow money to discharge liens on order of the court,⁴ or borrow money secured by a mortgage for the purpose of constructing a building upon vacant land which belongs to the ward.⁵ He may employ an attorney at the expense of the ward's estate.⁶

If by statute a guardian is authorized to make a contract which will bind the ward's estate with the approval of the court,⁷ such as a contract for the employment of an attorney,⁸ a contract made

¹⁶ *Columbia, etc., Co. v. Lewis*, 190 Pa. St. 558, 190 Pa. St. 577, 42 Atl. 1094, 42 Atl. 1117.

¹⁷ *Ferguson v. Phoenix Mutual Life Insurance Co.*, 84 Vt. 350, 35 L. R. A. (N.S.) 844, 79 Atl. 997.

¹⁸ *Ferguson v. Phoenix Mutual Life Insurance Co.*, 84 Vt. 350, 35 L. R. A. (N.S.) 844, 79 Atl. 997.

¹⁹ *Baird v. Steadman*, 39 Fla. 40, 21 So. 572.

²⁰ *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 28 L. R. A. 177, 58 N. W. 852.

¹ *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969; *Sears v. Collie*, 148 Ky. 444, 146 S. W.

1117; *Wilhelm v. Hendrick*, 167 Ky. 219, 180 S. W. 516.

² *Ellis v. Stone*, 4 Tex. Civ. App. 157, 23 S. W. 405.

³ *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

⁴ *Ray v. McGinnis*, 81 Ind. 451.

⁵ *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969.

⁶ *Sears v. Collie*, 148 Ky. 444, 146 S. W. 1117; *Wilhelm v. Hendrick*, 167 Ky. 219, 180 S. W. 516.

⁷ *In re Manning*, 134 Ia. 165, 111 N. W. 409.

⁸ *In re Manning*, 134 Ia. 165, 111 N. W. 409.

by the guardian is not binding upon the estate unless the approval of the probate judge is entered upon the record; and the written endorsement of the approval of the judge on the back of the contract is insufficient.⁹

The guardian has the inherent power to sell and reinvest with the approval of the court;¹⁰ and a contract entered into by a guardian for the sale of his ward's land, is valid upon approval by the court.¹¹

The general power of a guardian over personalty, together with the provisions found in most statutes, empower a guardian to compromise claims,¹² though an order of court may be necessary.¹³ A guardian's contract with the stockholders of an insolvent national bank in which the ward holds stock for raising funds to pay the debts of the bank with as little expense as possible,¹⁴ and his surrender of a life insurance policy,¹⁵ have been held valid. It has been said in obiter where an order of the court authorizing the guardian to borrow money for the support of his ward was made, that the inherent power of the guardian and the power conferred upon him by statute were sufficient to authorize him to borrow money for that person without an order of court.¹⁶ A guardian may borrow money for the education¹⁷ of his ward; and the contract under which such money is borrowed will be binding as

⁹ *In re Manning*, 134 Ia. 165, 111 N. W. 409.

¹⁰ *Day v. Devitt*, 79 N. J. Eq. 342, 81 Atl. 368.

¹¹ *Day v. Devitt*, 79 N. J. Eq. 342, 81 Atl. 368.

If the guardian has no statutory power to give an option on his ward's realty, but he has power to lease such realty, he can not make such option binding by putting it in a lease; and, since the lease is valid without such option, the fact that the heirs of the ward accept rents under such lease does not ratify the option. *Storthez v. Sanger*, 108 Ark. 154, 156 S. W. 1020.

¹² *United States. Maclay v. Equitable Life Assurance Society*, 152 U. S. 499, 38 L. ed. 528.

Alabama. Bishop v. Lumber Co., — Ala. —, 74 So. 931.

Arkansas. Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 S. W. 758.

Connecticut. Grievance Committee v. Ennis, 84 Conn. 594, 80 Atl. 767.

Kentucky. Manion v. Ry. Co., 99 Ky. 504, 36 S. W. 530; *Worthington v. Worthington (Ky.)*, 35 S. W. 1039.

New Hampshire. Goodrich v. Webster, 74 N. H. 474, 69 Atl. 719.

¹³ *Johnston's Appeal*, 71 Conn. 590, 42 Atl. 662; *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086.

¹⁴ *Hanover National Bank v. Cocke*, 127 N. Car. 467, 37 S. E. 507.

¹⁵ *Maclay v. Assurance Society*, 152 U. S. 499, 38 L. ed. 528.

See also, *Clare v. Mutual Life Insurance Co.*, 201 N. Y. 492, 35 L. R. A. (N.S.) 1123, 94 N. E. 1075.

¹⁶ *Clare v. Mutual Life Insurance Co.*, 201 N. Y. 492, 35 L. R. A. (N.S.) 1123, 94 N. E. 1075.

¹⁷ *Clare v. Mutual Life Insurance Co.*, 201 N. Y. 492, 35 L. R. A. (N.S.) 1123, 94 N. E. 1075.

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against the estate.¹⁶ He can not arbitrate where his interest is adverse to his ward's.¹⁶

In some cases the guardian has been allowed to bind the estate of his ward without an order of court, as where a guardian employed a doctor to save the ward's life.²⁰

§ 1819. Personal liability of guardian. The guardian is personally liable upon the contracts which he has assumed to make on behalf of his ward's estate, but which do not bind the estate,¹ unless he has expressly relieved himself from personal liability by the terms of the contract.² Even if the guardian designates himself in the contract "as guardian," he is personally liable.³ If he contracts in his personal capacity, his personal liability is even more clear.⁴

A guardian may, however, provide for freedom from personal liability and full effect must be given to such stipulation.⁵ A guardian is not liable on a contract made by the infant even for necessities.⁶

§ 1820. Personal interest of guardian in his contracts. Conversely, the interest of a guardian in a contract which he has made in his own name is a personal interest and not an interest as guar-

¹⁶ *Clare v. Mutual Life Insurance Co.*, 201 N. Y. 492, 35 L. R. A. (N.S.) 1123, 94 N. E. 1075.

¹⁹ *Fortune v. Killebrew*, 86 Tex. 172, 23 S. W. 976.

²⁰ *Williams v. Bonner*, 79 Miss. 664, 31 So. 207.

¹ *Alabama*. *Chestnut v. Tyson*, 105 Ala. 149, 53 Am. St. Rep. 101, 16 So. 723.

California. *Hunt v. Maldonada*, 89 Cal. 636, 27 Pac. 56.

Illinois. *Sperry v. Fanning*, 80 Ill. 371.

Massachusetts. *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Rollins v. Marsh*, 128 Mass. 116.

New Hampshire. *Hardy v. Bank*, 61 N. H. 34.

North Dakota. *Shepard v. Hanson*, 9 N. D. 249, 83 N. W. 20.

Utah. *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

² *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896.

³ *Sperry v. Fanning*, 80 Ill. 371; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

⁴ *Oliver v. Townsend*, 16 Ia. 430.

⁵ *Nichols v. Sargent*, 125 Ill. 309, 8 Am. St. Rep. 378, 17 N. E. 475.

⁶ *Arkansas*. *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610.

Florida. *Baird v. Steadman*, 39 Fla. 40, 21 So. 572.

Indiana. *McNabb v. Clipp*, 5 Ind. App. 204, 31 N. E. 858.

Massachusetts. *Spring v. Woodworth*, 86 Mass. (4 All.) 326.

New Hampshire. *Pendexter v. Cole*, 66 N. H. 556, 22 Atl. 560.

dian.¹ Thus he can sue in his own name on a note payable to himself, the consideration of which was property of the ward;² can release a guarantor on a note payable to himself,³ and the ward can not bring suit thereon.⁴ But in some states the ward may avoid the entire contract and hold the person who borrows money of the estate from the guardian with knowledge of the facts, as trustee.⁵

§ 1821. Liability of estate for benefits received. If the proceeds of the transaction have been applied to the use of the estate, equity may enforce at least a reasonable compensation therefor out of the estate,¹ but this relief will not be given if the property was not applied to the use of the estate.² Attorneys employed by the guardian may receive a reasonable compensation for the benefits which have resulted to the estate from such services.³ One who is employed as attorney by a guardian ad litem may have such compensation as the court, before which such case is tried, may allow if reasonable in amount.⁴ In a proper case the guardian may be

¹ *Thompson v. Duncan*, 85 Ga. 542, 11 S. E. 860; *Day v. Old Colony Trust Co.*, 232 Mass. 207, 2 A. L. R. 1554, 122 N. E. 189.

Contra, that the guardian can not sell notes payable to himself or bearer as guardian, without an order of the court. See *Gillespie v. Crawford* (Tex. Civ. App.), 42 S. W. 621; *Strong v. Strauss*, 40 O. S. 87.

² *McLean v. Dean*, 66 Minn. 369, 69 N. W. 140.

As to the right of the guardian to a bank deposit made by him in his official capacity, see *Day v. Old Colony Trust Co.*, 232 Mass. 207, 2 A. L. R. 1554, 122 N. E. 189.

³ *Ditmar v. West*, 7 Ind. App. 637, 35 N. E. 47.

⁴ *Brewster v. Seeger*, 173 Mass. 281, 53 N. E. 814 [citing, *Hippee v. Pond*, 77 Ia. 235, 42 N. W. 192; *Gard v. Neff*, 39 O. S. 607. (Proposition of text not passed upon in this case.) *Chitwood*

v. Cromwell, 59 Tenn. (12 Heisk.) 658; *Zachary v. Gregory*, 32 Tex. 452].

⁵ *Easton v. Somerville*, 111 Ia. 164, 82 Am. St. Rep. 502, 82 N. W. 475.

¹ *Bank v. Parrish*, 131 Ark. 216, 198 S. W. 689; *James v. Lane*, 33 N. J. Eq. 30; *In re Manning*, 134 Ia. 165, 111 N. W. 409.

So where the order appointing the guardian was invalid, and such supposed guardian borrowed money on behalf of the estate, part of which was expended in necessities for the ward. *Bank v. Parrish*, 131 Ark. 216, 198 S. W. 689.

² *Noble v. Runyon*, 85 Ill. 618.

³ *In re Manning*, 134 Ia. 165, 111 N. W. 409; *Caldwell v. Young*, 21 Tex. 800.

Contra, *Reading v. Wilson*, 38 N. J. Eq. 446.

⁴ *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937, 86 N. W. 250.

reimbursed out of the estate for such expense,⁵ and he has an equitable lien on the estate for such expenses.⁶

IV

RECEIVERS

§ 1822. Contracts under order of court. A receiver is an officer of the court, especially appointed, to whom is committed the control and management of property which is in the custody of the law. As he is not the agent of either party, he can not bind either personally by his contracts;¹ nor can his acts amount to ratification by them.² The only question, then, is as to his right to make contracts which will be a lien on the trust funds in his charge, and will not bind him personally. Contracts made by a receiver in his official capacity and under order of court, are "sui generis."³ Under proper circumstances a receiver acting under order of the court may incur debts, which will not bind him personally but will be a lien upon the fund.⁴ He may employ a broker to sell the property of which the receiver has been placed in charge.⁵ If no rights of lien-holders intervene, the receiver of a private corporation may be authorized to borrow money and make such debt a first lien upon certain trust property, as by pledging collateral to secure a loan.⁶ So the court may by its order make a debt incurred by the receiver a lien upon the product manufactured by the receiver.⁷ The assent of creditors to the appointment of a

⁵Curran v. Abbott, 141 Ind. 492, 50 Am. St. Rep. 337, 40 N. E. 1091. Insurance. Sims v. Billington, 50 La. Ann. 968, 24 So. 637. Money. Merkel's Estate, 154 Pa. St. 285, 26 Atl. 428.

⁶Curran v. Abbott, 141 Ind. 492, 50 Am. St. Rep. 337, 40 N. E. 1091.

¹Farmers' Loan Co. v. R. R. Co., 31 Or. 237, 65 Am. St. Rep. 822, 38 L. R. A. 424, 48 Pac. 706.

²Groveland Improvement Co. v. Supply Co., 25 Wash. 344, 87 Am. St. Rep. 755, 65 Pac 529 (especially if the receiver is ignorant of the facts giving the party a right to avoid).

³Vanderbilt v. R. R., 43 N. J. Eq. 669, 12 Atl. 188.

⁴United States. Girard, etc., Co. v. Cooper, 51 Fed. 332.

Connecticut. Seward v. Seward & Son Co., 91 Conn. 190, 99 Atl. 887.

New Jersey. Vanderbilt v. R. R., 43 N. J. Eq. 669, 12 Atl. 188.

Virginia. State Bank v. Machine Co., 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E. 141.

Washington. Willett v. Janecke, 85 Wash. 654, 149 Pac. 17.

⁵Seward v. Seward & Son Co., 91 Conn. 190, 99 Atl. 887.

⁶Clarke v. Banking Co., 54 Fed. 556; State Bank v. Machine Co., 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E. 141.

⁷American, etc., Co. v. German, 126 Ala. 194, 85 Am. St. Rep. 21, 28 So. 603.

receiver and to the powers conferred upon him may prevent them from attacking the validity of contracts made by him under such powers. If the court, when having power to act, has authorized a receiver to make certain contracts and has properly made the debt arising from such contract a lien upon certain property, the court can not revoke such power after such contract has been made. "Contracts of a receiver made with express or implied authority can not be annulled at the pleasure of the court."⁸ If the receiver of a going concern enters into a contract with a bank for borrowing money and depositing collateral security, and such contract is made under order of court and with consent of the creditors, the court must on the final settlement allow the bank priority as to such collateral.⁹ No personal liability exists against the receiver while acting under order of the court.¹⁰ Thus if the receiver employs an attorney in his official capacity, and the court sanctions such employment and fixes the compensation of the attorney, the latter can not maintain an action against the receiver personally.¹¹ The compensation of an attorney thus employed is to be fixed by the court.¹² If a corporation is dissolved the receiver may, under order of the court, complete a contract entered into by such corporation and collect compensation therefor under the contract.¹³ The receiver of a corporation is not liable officially on a lease made by the corporation unless he adopts such lease.¹⁴ If he takes possession of the leased premises he is liable for a reasonable compensation, but not on the covenants of the lease as an assignee of the term.¹⁵ A creditor who wrongfully procures the appointment of a receiver and prolongs the receivership unreasonably, may be required, if he has received all the funds collected by the receiver, to pay the rent of premises used by the receiver.¹⁶ General authority to operate a business until further order of the court does not con-

⁸ *State Bank v. Machine Co.*, 99 Va. 411, 417, 86 Am. St. Rep. 891, 39 S. E. 141.

⁹ *State Bank v. Machine Co.*, 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E. 141.

¹⁰ *Vanderbilt v. R. R.*, 43 N. J. Eq. 669, 12 Atl. 188.

¹¹ *Walsh v. Raymond*, 58 Conn. 251, 18 Am. St. Rep. 264, 20 Atl. 464; *Willett v. Janecke*, 85 Wash. 654, 149 Pac. 17.

¹² *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568.

¹³ *Florence, etc., Co. v. Hanby*, 101 Ala. 15, 13 So. 343.

¹⁴ *Tradesmen's Publishing Co. v. Car-Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943, 31 L. R. A. 593, 32 S. W. 1097.

¹⁵ *Bell v. Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481, 28 L. R. A. 452, 40 N. E. 857.

¹⁶ *Link Belt Machinery Co. v. Hughes*, 195 Ill. 413, 59 L. R. A. 673, 63 N. E. 186 [affirming, 95 Ill. App. 323].

fer authority to make contracts which will last beyond the period of the receivership;¹⁷ and the court may cancel such contract without liability for damages.¹⁸ A receiver of a railway may make a valid contract for transporting freight.¹⁹

§ 1823. Power to displace prior liens—Receiver of private corporation. Where the receiver is authorized by the court to make contracts and to charge them upon the trust fund, the question is often presented: Can debts incurred by a receiver under order of the court displace specific prior liens upon part or all of the property held by the receiver? If the corporation is a private corporation the court can not authorize the receiver to incur debts which shall displace existing liens unless the lien-holder consents thereto.¹ So if the lien-holder objects to the authority given to the receiver to carry on business,² or if he is not a party to the suit in which the receiver is appointed,³ his lien has priority over debts incurred by the receiver. A prior mortgage, if duly recorded,⁴ or a vendor's

¹⁷ *Delbridge v. Kaukauna Fibre Co.*, 165 Wis. 435, 162 N. W. 478.

¹⁸ *Lehigh Coal & Navigation Co. v. Central Ry. Co.*, 35 N. J. Eq. 426; *Delbridge v. Kaukauna Fibre Co.*, 165 Wis. 435, 162 N. W. 478.

¹⁹ *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439, 49 L. ed. 269.

¹ *United States. Farmers', etc., Co. v. Coal Co.*, 50 Fed. 481, 16 L. R. A. 603; *Fidelity, etc., Co. v. Iron Co.*, 68 Fed. 623; *Hanna v. Trust Co.*, 70 Fed. 2, 30 L. R. A. 201; *Doe v. Transportation Co.*, 78 Fed. 62; *International Trust Co. v. Decker*, 152 Fed. 78, 11 L. R. A. (N.S.) 152, 81 C. C. A. 302.

Colorado. International Trust Co. v. Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; *Belknap Savings Bank v. Land Co.*, 28 Colo. 326, 64 Pac. 212; *Lamar, etc., Co. v. Bank*, 28 Colo. 344, 64 Pac. 210.

Maryland. Hooper v. Trust Co., 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505.

New York. Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456, 13 N. E. 292; *Farmers', etc., Co. v. Telegraph Co.*,

148 N. Y. 315, 51 Am. St. Rep. 690, 31 L. R. A. 403, 42 N. E. 707.

Oregon. Merriam v. Mining Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; *United States Investment Corporation v. Portland Hospital*, 40 Or. 523, 56 L. R. A. 627, 64 Pac. 644, 67 Pac. 194.

Wyoming. First National Bank v. Cook, 12 Wyom. 492, 2 L. R. A. (N.S.) 1012, 76 Pac. 674.

² *Hanna v. Trust Co.*, 70 Fed. 2, 30 L. R. A. 201.

³ *International Trust Co. v. Coal Co.*, 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621.

⁴ *Farmers', etc., Co. v. Coal Co.*, 50 Fed. 481, 16 L. R. A. 603; *Hanna v. Trust Co.*, 70 Fed. 2, 30 L. R. A. 201; *International Trust Co. v. Coal Co.*, 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; *United States Investment Corporation v. Portland Hospital*, 40 Or. 523, 56 L. R. A. 627, 64 Pac. 644, 67 Pac. 194; *First National Bank v. Cook*, 12 Wyom. 492, 2 L. R. A. (N.S.) 1012, 76 Pac. 674.

lien,⁵ have under these circumstances been given priority over the debts incurred by the receiver. Neither his certificates,⁶ nor his simple contract debts,⁷ can be preferred to such prior liens. The court can not authorize a receiver of a private corporation to carry on a business and incur debts which displace prior liens. Thus the court can not so authorize the receiver to carry on the hotel business.⁸ This power has, however, been exercised when it is advantageous to all parties concerned to sell the business as a going concern.⁹ Even in case of private corporations it seems to be held that expenses incurred by the receiver in preserving the property may be given priority over pre-existing liens.¹⁰ However, if certain employes who have not been paid, threaten to burn property of which the receiver has charge, and he thereupon issues certificates for a loan with which he pays such employes, this is not an expense for preserving the property, in the proper sense of the term, since the receiver should invoke the protection of the law.¹¹ On the other hand, if the receiver is appointed at the instance of a lienholder, proper expenses of the receivership have priority over such lien.¹² So if the lienor consents that the debts of the receivership shall have priority over his lien, effect will be given to such agree-

⁵ *Hooper v. Trust Co.*, 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505.

⁶ *Farmers', etc., Co. v. Coal Co.*, 50 Fed. 481, 16 L. R. A. 603; *Hanna v. Trust Co.*, 70 Fed. 2, 30 L. R. A. 201; *Metropolitan Trust Co. v. Ry.*, 100 Fed. 897; *International Trust Co. v. Coal Co.*, 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; *Hooper v. Trust Co.*, 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505.

⁷ *United States Investment Corporation v. Portland Hospital*, 40 Or. 523, 56 L. R. A. 627, 64 Pac. 644, 67 Pac. 194.

⁸ *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524; *Lane v. Hotel Co.*, 190 Pa. St. 230, 42 Atl. 697.

⁹ *United States Hotel. Cake v. Mohun*, 164 U. S. 311, 41 L. ed. 447.

Alabama. *Thornton v. R. R.*, 94 Ala. 353, 10 So. 442.

Illinois. *Knickerbocker v. Mining Co.*, 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330.

Indiana. *Manufacturing Corporation. Blythe v. Gibbons*, 141 Ind. 332, 35 N. E. 557.

Kentucky. *Grainger v. Paper Co.*, 105 Ky. 683, 49 S. W. 477.

Texas. *Ellis v. Water Co.*, 86 Tex. 109, 23 S. W. 858.

¹⁰ *Cake v. Mohun*, 164 U. S. 311, 41 L. ed. 447; *Beckwith v. Carroll*, 56 Ala. 12; *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524 (obiter); *Karn v. Iron Co.*, 86 Va. 754, 11 S. E. 431.

Apparently contra, *First National Bank v. Cook*, 12 Wyom. 492, 2 L. R. A. (N.S.) 1012, 76 Pac. 674.

¹¹ *Raht v. Attrill*, 106 N. Y. 423, 60 Am. Rep. 456, 13 N. E. 282.

¹² *Shelburn Coal Mining Co. v. Delahmutter*, 21 Ind. App. 257, 52 N. E. 102; *Gallagher v. Gingrich*, 105 Ia. 237, 74 N. W. 763; *Ellis v. Water Co.*, 86 Tex. 109, 23 S. W. 858.

ment.¹³ Since contracts of the receiver of a private corporation can not affect the rights of a prior lien-holder who does not acquiesce in the receivership, it follows that such creditor can not take advantage of such contract. So where a receiver took out insurance on certain property and collected such insurance when such property was burned, it was held that a creditor who had levied on such property and had never acquiesced in the receivership or authorized such insurance, can not have the insurance money subjected to his claim as a prior lien thereon.¹⁴

§ 1824. Receiver of quasi-public corporation. The receiver of a quasi-public corporation may, if acting under order of a court having jurisdiction, incur debts in order to carry on the business, which debts may be given priority over prior liens. This principle is most frequently applied to debts created by receivers of railway companies.¹ Thus acting under order of the court he may issue certificates, and the debts thus evidenced may be made a first lien on the trust property displacing prior liens thereon.² Under special circumstances the expenses of completing a road may be made a lien prior to a pre-existing mortgage.³ The receiver should be given authority to issue certificates which displace prior liens only in case the lienor is a party to the suit,⁴ and is given notice of the application.⁵ While this is undoubtedly the safer practice, it seems

¹³ *Reinhard v. Investment Co.*, 94 Fed. 901.

¹⁴ *McLaughlin v. Bank*, 22 Utah 473, 54 L. R. A. 343, 63 Pac. 580.

¹ *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Miltnerberger v. Ry.*, 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Ry.*, 117 U. S. 434, 20 L. ed. 963; *Kneeland v. Trust Co.*, 136 U. S. 89, 34 L. ed. 379; *Morgans, etc., Co. v. R. R.*, 137 U. S. 171, 34 L. ed. 625; *Kneeland v. Luce*, 141 U. S. 491, 35 L. ed. 830; *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743.

² *United States. Shaw v. R. R.*, 100 U. S. 605, 25 L. ed. 757; *Swann v. Clark*, 110 U. S. 602, 28 L. ed. 256; *Union Trust Co. v. Ry.*, 117 U. S. 434, 29 L. ed. 963.

Alabama. Browning v. Kelly, 124 Ala. 645, 27 So. 391.

California. Illinois, etc., Bank v. Ry., 115 Cal. 285, 47 Pac. 60.

Indiana. Fletcher v. Waring, 137 Ind. 159, 36 N. E. 896.

New Jersey. Hoover v. Ry., 29 N. J. Eq. 4.

Pennsylvania. Rutherford v. Pennsylvania-Midland Ry. Co., 178 Pa. St. 38, 35 Atl. 926.

Tennessee. State v. R. R., 74 Tenn. (6 Lea) 353.

Vermont. Vermont, etc., R. R. v. R. R., 50 Vt. 500.

³ *First National Bank v. Ewing*, 103 Fed. 168.

⁴ *Metropolitan Trust Co. v. Ry.*, 100 Fed. 897.

⁵ *American Brake Shoe & Foundry Co. v. Pere Marquette Ry. Co.*, 205 Fed. 14, 123 C. C. A. 322; *Osborne v. Colliery Co.*, 96 Va. 58, 30 S. E. 446.

that if those who furnish money or property to the receiver are willing to take the risk of the final action of the court, prior notice is not necessary, it being sufficient if notice is given before the final order is made.⁶ The general power of a receiver of a railroad to bind the trust fund by his contracts is limited to expenses incurred in the ordinary daily administration of the railroad.⁷ Thus without special authority from the court he can not bind the fund by accepting a lease of general offices for a term of years which extends beyond the receivership;⁸ nor can he be allowed expenditures incurred in defeating a proposed subsidy, from a city to aid in constructing a parallel road.⁹ The power of a court to authorize a receiver to incur obligations which shall incur private liens has been recognized as existing in corporations of a quasi-public character other than railroads, such as electric lighting companies which are under contract to furnish light for the public,¹⁰ or to telephone and telegraph companies.¹¹

§ 1825. Contracts not under order of court—Charge upon fund.

Contracts which a receiver has made in his official capacity are as a rule unenforceable against the fund of which he is receiver, unless such contracts have been authorized by an order of court.¹ It is sometimes said that there is an exception to this rule in the case of necessary expenses which the receiver is obliged to incur in the preservation of the property;² but this power can probably be explained better by saying that it is fairly to be understood that when the court appoints a receiver it thereby authorizes him to incur necessary expenses in preserving and keeping the property until specific order of the court.³ It is generally said that those who deal with the receiver are charged with knowledge of his power;⁴ and this principle is undoubtedly correct as far as the

⁶ Union Trust Co. v. Ry., 117 U. S. 434, 29 L. ed. 963.

⁷ Cowdrey v. R. R., 93 U. S. 352, 23 L. ed. 950.

⁸ Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819.

⁹ Cowdrey v. R. R., 93 U. S. 352, 23 L. ed. 950.

¹⁰ Illinois Trust Co. v. Ry., 89 Fed. 235.

¹¹ Keelyn v. Telegraph Co., 90 Fed. 29.

¹ Hendrie & Bolthoff Mfg. Co. v.

Parry, 37 Colo. 359, 86 Pac. 113; State Central Savings Bank v. Fanning Ball-Bearing Chain Co., 118 Ia. 698, 92 N. W. 712; Pacific Lumber Co. v. Prescott, 40 Or. 374, 67 Pac. 207, 416; Delbridge v. Kaukauna Fibre Co., 165 Wis. 435, 162 N. W. 478.

² Stacey v. McNicholas, 76 Or. 167, 148 Pac. 67.

³ Stacey v. McNicholas, 76 Or. 167, 148 Pac. 67.

⁴ Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819,

power of the receiver to make a contract which shall impose a charge upon the fund is concerned.⁵ A receiver has no power to make a contract by which the person in charge of whose property he has been placed as receiver shall continue to control the business and collect obligations due to such party as before;⁶ and debtors who pay such person may be compelled to pay such amounts again.⁷ A contract which is entered into by a receiver is not ordinarily binding upon his successor.⁸ A contract which has been entered into by a receiver who has been appointed by a court without jurisdiction is merely voidable and not void;⁹ and if a receiver who is appointed thereafter by a court of competent jurisdiction accepts property which is delivered under such contract, he thereby ratifies such contract.¹⁰ The power to reject burdensome contracts is a privilege of the receiver and not of the adversary party.¹¹ By the weight of modern authority the court in its discretion may ratify and approve all contracts which a receiver has entered into in good faith which the court might have authorized in advance.¹²

§ 1826. Contracts not under order of court—Personal liability of receiver. A receiver is personally liable upon his contracts made in his official capacity unless he makes them under order of the

Hendrie & Bolthoff Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113; *Lehigh Coal & Navigation Co. v. Central Ry. Co.*, 35 N. J. Eq. 426; *In re Wilson's Estate*, 252 Pa. St. 372, 97 Atl. 453.

⁵ *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819; *Hendrie & Bolthoff Mfg. Co. v. Parry*, 37 Colo. 359, 86 Pac. 113; *Lehigh Coal & Navigation Co. v. Central Ry. Co.*, 35 N. J. Eq. 426.

⁶ *Buchanan v. Hicks*, 98 Ark. 370, 34 L. R. A. (N.S.) 1200, 136 S. W. 177.

⁷ *Buchanan v. Hicks*, 98 Ark. 370, 34 L. R. A. (N.S.) 1200, 136 S. W. 177.

⁸ *Kansas Pacific Ry. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744; *Lehigh Coal & Navigation Co. v. Central Railroad Co.*, 35 N. J. Eq. 426; *Lehigh Coal & Navigation Co. v. Central Ry. Co.*, 35 N. J. Eq. 175; *Lehigh Coal & Navigation Co. v. Central Ry. Co.*, 41 N. J. Eq. 167, 3 Atl. 134; *Crawford v. Gordon*,

88 Wash. 553, 153 Pac. 363 [sub nomine, *Crawford v. Seattle, Renton & Southern Ry.*, L. R. A. 1916C, 516].

⁹ *Crawford v. Gordon*, 88 Wash. 553, 153 Pac. 363 [sub nomine, *Crawford v. Seattle, Renton & Southern Ry.*, L. R. A. 1916C, 516].

¹⁰ *Crawford v. Gordon*, 88 Wash. 553, 153 Pac. 363 [sub nomine, *Crawford v. Seattle, Renton & Southern Ry.*, L. R. A. 1916C, 516].

¹¹ *Crawford v. Gordon*, 88 Wash. 553, 153 Pac. 363 [sub nomine, *Crawford v. Seattle, Renton & Southern Ry.*, L. R. A. 1916C, 516].

¹² *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568; *Alexander v. Maryland Trust Co.*, 106 Md. 170, 66 Atl. 836; *In re Wilson's Estate*, 252 Pa. St. 372, 97 Atl. 453; *Speiser v. Merchants' Exchange Bank*, 110 Wis. 506, 86 N. W. 243.

court appointing him, or by virtue of statutory authority, or unless there is in his contract an express stipulation against personal liability.¹ Thus he is liable on his notes, though issued for the benefit of the receivership.² Without an order of the court the receiver can not make his contracts a lien on the trust fund,³ though if he is reimbursed therefor his creditors might undoubtedly be subrogated to his rights. A receiver may enter into a contract in such form as to incur a personal liability without regard to his authority from the court to bind the fund.⁴ If the court ratifies an unauthorized contract of a receiver, the adversary party obtains all that he bargained for, and accordingly he can not hold the receiver liable personally upon such contract.⁵ The rule that those who deal with a receiver are bound to take notice of the limits of his authority which applies in cases in which persons who deal with a receiver are seeking to enforce payment out of the fund,⁶ has always been applied to cases in which such persons were seeking to impose a personal liability upon the receiver.⁷ Accordingly, a receiver has been held not to be liable for money borrowed by him without

¹ *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; *Hendrie & Bolthoff Mfg. Co. v. Parry*, 37 Colo. 359, 86 Pac. 113.

² *Peoria, etc., Works v. Hickey*, 110 Ia. 276, 80 Am. St. Rep. 296, 81 N. W. 473. The note was given for property that went into the stock of which receiver had control. The note was signed "Jas. Hickey, Receiver." Reformation was denied. In its opinion the court said: "As the receiver had no authority to execute the notes in suit, he had no principal against whom plaintiff might maintain an action, and, unless he is bound, no one is responsible. If the debt was properly incurred, he will be allowed the amount paid out on his accounting. Plaintiff's right of action, if it has any, is on the defendant's promise. Like the executor, the assignee, the guardian and the administrator, he has no responsible principal behind for whom he may promise, and he alone is liable on the contract." *Peoria, etc., Works v. Hickey*, 110 Ia. 276, 279, 80 Am. St. Rep. 296, 81 N. W. 473.

³ *Cowdrey v. R. R.*, 93 U. S. 352, 23 L. ed. 950; *Union Trust Co. v. Ry. Co.*, 117 U. S. 434, 29 L. ed. 963; *Lehigh, etc., Co. v. R. R.*, 35 N. J. Eq. 426; *Wyckoff v. Scofield*, 103 N. Y. 630, 9 N. E. 498; *Hand v. R. R.*, 17 S. Car. 219.

⁴ *Guimarin v. Southern Life & Trust Co.*, 106 S. Car. 37, 90 S. E. 319.

⁵ *In re Wilson's Estate*, 252 Pa. St. 372, 97 Atl. 453.

⁶ See § 1825.

⁷ *In re Wilson's Estate*, 252 Pa. St. 372, 97 Atl. 453. "In the absence of fraud, or concealment, or an intention or agreement to assume liability, we are unable to agree with the contention that the receiver is personally liable whenever he does an act in excess of his authority. The principle which holds that one dealing with a receiver is bound to know the limits of his authority, and contracts with him at his peril, does not sanction a shifting of the liability to the receiver, so long as he acts fairly and in good faith, and conceals or misrepresents."

authority.⁶ A contract signed by him in his own name with the addition of the word "receiver," imposes a personal liability upon him.⁷

§ 1827. Liability of fund for benefits received. While precaution demands that a receiver have authority of the court for liabilities incurred and expenditures made by him before he acts, no technical rule requires confiscation of the receiver's individual property if he makes proper expenditures or incurs proper liabilities without an order of the court. What the court could authorize in advance it may subsequently ratify if the receiver and those dealing with him are willing to take such risk. Accordingly the receiver should be reimbursed out of the property for his reasonable expenses incurred in such receivership;¹ and he should be reimbursed for contract liabilities incurred by him on contract for the benefit of the estate, if fair and reasonable.² He may be allowed reasonable attorneys' fees for legal services which are rendered for the benefit of the fund.³ If legal services are rendered for the benefit of the fund, compensation for such attorneys should be allowed out of the fund, even though such claims would have been personal liabilities of the receiver if they had not been resisted successfully.⁴ If the legal services are rendered in resisting a claim which is a purely personal one as against the receiver, compensation for such services can not be allowed out of the fund.⁵

sents nothing. The logical result of the principle referred to is the opposite conclusion—that the loss must be borne by the person upon whom it falls, unless the parties expressly, or by the form of the instrument, contracted for personal liability." In *re Wilson's Estate*, 252 Pa. St. 372, 97 Atl. 453. (In this case, however, the contract of the receiver was finally ratified by the court.)

⁶In *re Wilson's Estate*, 252 Pa. St. 372, 97 Atl. 453.

⁷*Guimarin v. Southern Life & Trust Co.*, 106 S. Car. 37, 90 S. E. 319. See § 2092.

¹*Chicago Deposit Vault Co. v. Mc-*

Nulta, 153 U. S. 554, 38 L. ed. 819; *Missouri & K. I. Ry. Co. v. Edson*, 224 Fed. 79, 139 C. C. A. 561; *Knickerbocker v. Mining Co.*, 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

²*Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819; *Missouri & K. I. Ry. Co. v. Edson*, 224 Fed. 79, 139 C. C. A. 561; *Vanderbilt v. R. R.*, 43 N. J. Eq. 669, 12 Atl. 188.

³*Missouri & K. I. Ry. Co. v. Edson*, 224 Fed. 79, 139 C. C. A. 561.

⁴*Missouri & K. I. Ry. Co. v. Edson*, 224 Fed. 79, 139 C. C. A. 561.

⁵In *re Dunn* [1904], 1 Ch. 648.

V

CONTRACTS OF PROMOTERS

§ 1828. **Promoters.** A promoter of a corporation is one who is undertaking to effect its organization, and frequently to sell certain property to it when it is formed.¹ The word is a popular term rather than a technical one.² As long as the corporation is prospective merely, it is not a person in the contemplation of the law, and it can have no agents. Furthermore, the promoter is a self-appointed individual, who is generally not authorized to represent anybody and who is looking after his own interests primarily. For these reasons a promoter is not regarded as an agent of the corporation which he is seeking to organize.³ It is true that the promoter is occasionally referred to as the agent of the corporation,⁴ but such language is used, either to indicate that the promoter occupies a confidential relation to the corporation,⁵ or to justify the theory of ratification in explaining the way in which the corporation may become liable upon such contract in case it elects to adopt it after it is formed.⁶

Notice to the promoters is frequently said to be notice to the corporation.⁷ This theory is occasionally invoked to justify the rule that the corporation, after it is formed, may accept a contract

¹ *Twycross v. Grant*, 2 C. P. D. 469; *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 40 L. R. A. (N.S.) 314, 89 N. E. 193; *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N. J. Eq. 457, 71 Atl. 153.

² *The Telegraph v. Loetscher*, 127 Ia. 383, 101 N. W. 773; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 40 L. R. A. (N.S.) 314, 89 N. E. 193; *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N. J. Eq. 457, 71 Atl. 153.

³ *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400; *Moriarity v. Meyer*, 21 N. M. 521, L. R. A. 1916E, 1165, 167 Pac. 652; *Fuller v. Stoul*, — Okla. —, L. R. A. 1918B, 108, 166 Pac. 898; *Schreyer v. Turner Flouring Co.*, 29 Or. 1, 43 Pac. 719.

⁴ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423; *Caffee v. Berkley*, 141 Ia. 344, 118 N. W. 267; *Richlands Oil Co. v. Morriss*, 108 Va. 288, 61 S. E. 762; *Wallace v. Eclipse Pocahontas Coal Co.*, — W. Va. —, 98 S. E. 293 [adopting language in *McCullough v. Clark*, 81 W. Va. 743, 95 S. E. 787; and citing, *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423; and *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 3 L. R. A. 563, 9 S. E. 543].

⁵ See § 417.

⁶ See § 1830.

⁷ *Mulverhill v. Vicksburg Railway Power & Mfg. Co.*, 88 Miss. 689, 40 So. 647; *Barksdale v. Finney*, 55 Va. (14 Gratt.) 338; *Wallace v. Eclipse Pocahontas Coal Co.*, — W. Va. —, 98 S. E. 293.

made on its behalf by its promoters.⁸ If the promoters actually organize the corporation and assume control of it, this theory is undoubtedly correct in fact.⁹ Even if the promoters do not assume control of the corporation, the corporation should not be permitted to adopt that part of the contract which the promoters have made on its behalf, which is beneficial to it, and reject the rest,¹⁰ although the theory that notice to the promoters is notice to the corporation may not be necessary to enable the courts to reach this result. Knowledge on the part of the promoters is not always knowledge on the part of subscribers to stock in the corporation,¹¹ especially if the promoters are taking an unfair advantage of such subscribers.¹²

Promoters occupy a relation of trust and confidence to the prospective corporation, and owe to it substantially the same duties that fiduciaries ordinarily owe to their beneficiaries.¹³

§ 1829. Contracts of promoters not binding on corporation. For the reasons given in the preceding section,¹ a contract which is entered into by a promoter of a prospective corporation on behalf of such corporation, can not of itself impose any obligation upon the corporation in the absence of subsequent ratification, adoption, acceptance, estoppel, and the like.² A contract to locate the place

⁸ *Mulverhill v. Vicksburg Railway, Power & Mfg. Co.*, 88 Miss. 689, 40 So. 647; *Wallace v. Eclipse Pocahontas Coal Co.*, — W. Va. —, 98 S. E. 293.

⁹ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063. See § 1830.

¹⁰ See § 1830.

¹¹ *Macey Co. v. Macey*, 143 Mich. 138, 5 L. R. A. (N.S.) 1036, 106 N. W. 722.

¹² *Macey Co. v. Macey*, 143 Mich. 138, 5 L. R. A. (N.S.) 1036, 106 N. W. 722.

¹³ *Lomita Land & W. Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N.S.) 1106, 97 Pac. 10; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 40 L. R. A. (N.S.) 314, 89 N. E. 193; *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 996, 153 Pac. 97. See § 417.

¹ See § 1828.

² *United States. Winters v. Mining Co.*, 57 Fed. 287.

Alabama. *Moore, etc., Co. v. Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; *Stone v. Walker*, — Ala. —, L. R. A. 1918C, 839, 77 So. 554.

California. *San Joaquin, etc., Co. v. West*, 94 Cal. 399, 29 Pac. 785.

Colorado. *Ruby, etc., Co. v. Gurley*, 17 Colo. 199, 29 Pac. 668; *Miser Gold Mining & Mill Co. v. Moody*, 37 Colo. 310, 86 Pac. 335.

Connecticut. *New York, etc., R. R. v. Ketchum*, 27 Conn. 170.

Florida. *Summer-May Hardware Co. v. Scally* (Fla.), 62 So. 900.

Illinois. *Western, etc., Mfg. Co. v. Cousley*, 72 Ill. 531; *Gent v. Ins. Co.*, 107 Ill. 652; *Park v. Woodmen of America*, 181 Ill. 214, 54 N. E. 932; *Hladovec v. Paul*, 222 Ill. 254, 78 N. E. 619.

Indiana. *Davis, etc., Co. v. Creamery Co.*, 10 Ind. App. 42, 37 N. E. 549; *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770.

of business of the corporation, made by the promoters,³ or to lease a place of business for the prospective corporation,⁴ or to appoint a custodian of corporate funds,⁵ or to pay a bonus for selling stock,⁶ does not bind the corporation of its own force; nor can such a contract be enforced by the corporation.⁷ An executory agreement to take a certain amount of the capital stock,⁸ or a contract giving a refusal to the corporation of all stock sold by promoters,⁹ can not be enforced by the corporation, without further action on its part. A contract by the creditors of a corporation to take in payment of

Iowa. *Carey v. Mining Co.*, 81 Ia. 674, 47 N. W. 882; *First National Bank v. Church Federation*, 129 Ia. 268, 105 N. W. 578.

Kansas. *Tryber v. Cold Storage Co.*, 67 Kan. 489, 73 Pac. 83.

Maine. *Tuttle v. George A. Tuttle Co.*, 101 Me. 287, 8 Am. & Eng. Ann. Cas. 260, 64 Atl. 496.

Massachusetts. *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22; *Abbott v. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193, 5 L. R. A. 586, 22 N. E. 907; *Holyoke Envelope Co. v. Envelope Co.*, 182 Mass. 171, 65 N. E. 54.

Michigan. *Durgin v. Smith*, 133 Mich. 331, 94 N. W. 1044.

Minnesota. *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327.

Missouri. *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181.

Nebraska. *Davis v. Creamery Co.*, 48 Neb. 471, 67 N. W. 436.

New Jersey. *Hudson Milling Co. v. Higgins*, 85 N. J. L. 268, 88 Atl. 1079.

New Mexico. *Moriarity v. Meyer*, 21 N. M. 521, L. R. A. 1916E, 1165, 157 Pac. 652.

New York. *Munson v. R. R.*, 103 N. Y. 58, 8 N. E. 355.

Oklahoma. *Fuller v. Stout*, — Okla. —, L. R. A. 1918B, 108, 166 Pac. 898.

Pennsylvania. *Tift v. Bank*, 141 Pa. St. 550, 21 Atl. 660.

Texas. *Weatherford, etc., Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795.

Utah. *Tanner v. Sinaloa Land & Fruit Co.*, 43 Utah 14, 134 Pac. 586.

Washington. *Bash v. Mining Co.*, 7 Wash. 122, 34 Pac. 462.

Wisconsin. *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776; *Standard, etc., Co. v. Publishing Co.*, 87 Wis. 127, 58 N. W. 238.

³*Park v. Woodmen of America*, 181 Ill. 214, 54 N. E. 932.

⁴*Moriarity v. Meyer*, 21 N. M. 521, L. R. A. 1916E, 1165, 157 Pac. 652.

⁵*San Joaquin, etc., Co. v. West*, 94 Cal. 399, 29 Pac. 785.

⁶*Tift v. Bank*, 141 Pa. St. 550, 21 Atl. 660; *Weatherford, etc., Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795.

⁷*Plaquemines, etc., Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Ireland v. Reduction Co.*, 20 R. I. 190, 38 L. R. A. 299, 38 Atl. 116. A deed to the "incorporators" does not vest the legal title in the corporation. *McCandless v. Acid Co.*, 112 Ga. 291, 37 S. E. 419.

⁸*Dayton, etc., Co. v. Coy*, 13 O. S. 84.

Contra, a contract of subscription to stock may be enforced by the corporation even if not in compliance with the statute. *Marysville, etc., Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

⁹*Ireland v. Milling, etc., Co.*, 20 R. I. 190, 38 L. R. A. 299, 38 Atl. 116.

their debts, notes to be issued by a corporation to be formed, is without consideration.¹⁰ A promoter can not bind a prospective corporation by a contract of novation which he assumes to make on its behalf.¹¹ A contract between two or more promoters which fixes the number of shares of stock which any stockholder may own in the prospective corporation, may be binding upon the parties to such contract, but it is not binding upon the corporation.¹² A contract by which a promoter agrees that a prospective corporation shall release a debt due from a third person to an existing corporation on its taking over the assets of such existing corporation, is not binding upon the new corporation when it is formed, unless it is adopted in some way after its formation.¹³ A contract by which a promoter attempts to prevent the stockholders from electing the trustees or directors, after the corporation is formed, is invalid not only because it is not the contract of the corporation,¹⁴ but also because it interferes with the provision of the law concerning the management and control of corporations.¹⁵ If the promoter makes a contract on behalf of the corporation for the purchase of certain property, and countermands it subsequently, and, accordingly, the corporation does not ratify such contract and does not receive anything of value under it, the corporation is not liable for such breach.¹⁶

§ 1830. Theory that corporation may adopt contract of promoter. After the corporation is formed, it may elect to take advantage of a contract which was made by its promoters, or it may refuse to recognize such contract as a valid obligation. In the latter case the contract is not binding upon the corporation, and, conversely, the corporation can not thereafter take advantage of it.¹ In the former case, where the corporation elects to take advantage of the contract, a question arises as to the effect of such conduct on its part. According to the great weight of American authority, an attempted contract made on behalf of a corporation

¹⁰ *Providences Albertype Co. v. Kent & Stanley Co.*, 19 R. I. 561, 35 Atl. 152.

¹¹ *Fuller v. Stout*, — Okla. —, L. R. A. 1918B, 108, 166 Pac. 896.

¹² *Hladovec v. Paul*, 222 Ill. 254, 78 N. E. 619.

¹³ *Hudson Milling Co. v. Higgins*, 85 N. J. L. 268, 88 Atl. 1079.

¹⁴ *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

¹⁵ See §§ 883 et seq.

¹⁶ *Bank v. Orgill*, 82 Miss. 81, 34 So. 325.

¹ See § 1829.

to be formed subsequently, by a promoter thereof, may be treated as at least equivalent to a continuing offer, and if not revoked by the adversary party, and if accepted by the corporation when it is formed, it becomes a valid contract.² If a promoter has been guilty of fraud by which he has induced persons to subscribe to the stock of the prospective corporation, the corporation can not adopt such subscription without adopting the fraud of the promoters, so that the subscribers may repudiate on the ground of fraud.³ If the promoters of a corporation have made a contract of furnishing water at a certain rate, and the corporation accepts the benefit of such contract for a considerable time after it has formed, such contract is binding upon the corporation.⁴ The corporation's taking an assignment of a contract for the purchase of certain realty, and issuing stock to those who have contributed money for the purchase of such realty, is an acceptance of the contract.⁵ If a promoter makes a contract by which a lease of coal lands is to be assigned to the corporation in consideration of paid-up stock, the corporation is bound by such contract if it accepts such lease after it is organ-

² **United States.** Bridgeport, etc., Co. v. Meader, 72 Fed. 115, 18 C. C. A. 451 [affirming, 69 Fed. 225, 15 C. C. A. 694]; Old Colony Trust Co. v. Dubuque, etc., Co., 89 Fed. 794; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050.

Alabama. Stone v. Walker, — Ala. —, L. R. A. 1918C, 839, 77 So. 554.

Arkansas. Bloom v. Home Insurance Agency, 91 Ark. 367, 121 S. W. 293.

Connecticut. Stanton v. R. R. Co., 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300.

Idaho. Mantle v. Jack Waite Mining Co., 24 Ida. 613, 135 Pac. 854, 136 Pac. 1130.

Illinois. Streater Independent Telephone Co. v. Continental Telephone Construction Co., 217 Ill. 577, 75 N. E. 546; Lauder v. Peoria Agricultural and Trotting Society, 71 Ill. App. 475.

Kansas. Davis v. Dexter, etc., Co., 52 Kan. 693, 35 Pac. 776.

Minnesota. Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 627.

Missouri. Pitts v. Mercantile Co., 75 Mo. 221.

New Mexico. Moriarity v. Meyer, 21 N. M. 521, L. R. A. 1916E, 1165, 157 Pac. 652.

New York. Rathbun v. Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; Oakes v. Water Co., 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; Seymour v. Cemetery Association, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365.

Oregon. Schreyer v. Mills Co., 29 Or. 1, 43 Pac. 719.

Pennsylvania. Beltz v. Garrison, 254 Pa. St. 145, 98 Atl. 956.

West Virginia. Wallace v. Eclipse Pocahontas Coal Co., — W. Va. —, 98 S. E. 293.

³ Stone v. Walker, — Ala. —, L. R. A. 1918C, 839, 77 So. 654.

⁴ Belfast v. Belfast Water Co., 115 Me. 234, 98 Atl. 738.

⁵ Esper v. Miller, 131 Mich. 334, 91 N. W. 613.

PERSONS ACTING IN FIDUCIARY CAPACITY § 1830

FIDUCIARY CAPACITY § 1830

ation which is formed to carry on the business of a
which does carry on such business, is presumed
s.⁷ Thus if the partnership had guaranteed
its business of loaning money as agent, the
very on such business can not make any
ting such title.⁸ If a firm incorporates
are turned over to such corporation,
debts of the former.⁹

by conduct as well as by words.¹⁰ Re-
such a contract with knowledge of its terms
of the offer thus made, if it is possible for the
to choose between receiving and returning such bene-
as using a machine bought before incorporation and
making a part payment thereon;¹² or accepting and using the pro-
ceeds of a loan;¹³ or receiving and using material, labor, and tak-
ing possession of a building rented for the corporation;¹⁴ or taking
possession of mining claims leased to it.¹⁵ Where property bought
in this way is received, a mortgage given thereon in the name of
the corporation is valid in equity.¹⁶ So a corporation which has
received the benefit of a mortgage can not avoid it on the ground
that it was executed before one-half of the capital stock had been
paid in, contrary to the requirements of the statute.¹⁷

If the promoters, who made the contract for the corporation,
become stockholders, directors, and officers, the corporation is
charged with their knowledge.¹⁸ Thus a president of a corpora-
tion,¹⁹ or a president and general manager, may ratify a contract

⁸ Wallace v. Eclipse Pocahontas Coal Co., — W. Va. —, 98 S. E. 293.

⁷ North American, etc., Co. v. Mortgage Co., 83 Fed. 796, 28 C. C. A. 88.

⁶ North American, etc., Co. v. Mortgage Co., 83 Fed. 796, 28 C. C. A. 88.

⁹ Andres v. Morgan, 62 O. S. 236, 78 Am. St. Rep. 710, 56 N. E. 875.

¹⁰ Moriarity v. Meyer, 21 N. M. 521, L. R. A. 1916E, 1165, 157 Pac. 652.

¹¹ United German Silver Co. v. Bronson, — Conn. —, 102 Atl. 647; Moriarity v. Meyer, 21 N. M. 521, L. R. A. 1916E, 1165, 157 Pac. 652; Huron, etc., Co. v. Kittleson, 4 S. D. 520, 57 N. W. 233.

¹² Bridgeport, etc., Co. v. Meader, 72

Fed. 115, 18 C. C. A. 451 [affirming, 69 Fed. 225, 15 C. C. A. 694].

¹³ Schreyer v. Mills Co., 29 Or. 1, 43 Pac. 719.

¹⁴ Kaeppler v. Creamery Co., 12 S. D. 483, 81 N. W. 907.

¹⁵ Wall v. Smelting Co., 20 Utah 474, 59 Pac. 399.

¹⁶ Bridgeport, etc., Co. v. Meader, 72 Fed. 115, 18 C. C. A. 451.

¹⁷ Wood v. Water Works Co., 44 Fed. 146, 12 L. R. A. 168.

¹⁸ Rogers v. Land Co., 134 N. Y. 197, 32 N. E. 27; Kaeppler v. Creamery Co., 12 S. D. 483, 81 N. W. 907. See § 1828.

¹⁹ Kaeppler v. Creamery Co., 12 S. D. 483, 81 N. W. 907.

made by himself for the corporation before it was organized.²⁰ However, if A, as promoter of a corporation, secured certain stock subscriptions, and the corporation takes advantage thereof, such corporation does not thereby become liable upon a promise made by one of the other promoters to pay A for such services.²¹

Authorities differ as to whether a corporation can be charged with expenses necessary to its very existence, such as attorney fees for incorporating, irrespective of its own agreement to pay therefor after incorporation.²² It is said that a corporation is liable on an implied contract for services rendered in organizing it, although such services were rendered under an express contract with the promoter that the attorney who rendered such services should be given permanent employment by the corporation,²³ and if the corporation repudiates such contract, the attorney may recover reasonable compensation for his services in organizing it.²⁴

Even if the services necessary to the formation of the corporation are rendered by a promoter,²⁵ and even if he becomes an officer and director,²⁶ he can recover for special services outside of his line of duty as such director. A note given by a corporation for services rendered in procuring its incorporation is enforceable as on sufficient consideration.²⁷

²⁰ *Oakes v. Water Co.*, 143 N. Y. 430, 22 L. R. A. 544, 38 N. E. 461.

Contra, the directors can not accept such a contract so as to bind the corporation. *Tift v. Bank*, 141 Pa. St. 550, 21 Atl. 660.

²¹ *Cushion Heel Shoe Co. v. Hartt*, 181 Ind. 167, 50 L. R. A. (N.S.) 979, 103 N. E. 1063.

²² *Sullivan v. Detroit, etc., Ry.*, 135 Mich. 661, 106 Am. St. Rep. 403, 64 L. R. A. 673, 98 N. W. 739, 756 (obiter); *In re English & Colonial Produce Co.* [1906], 2 Ch. 435. That it is liable. *Freeman Implement Co. v. Osborn*, 14 Colo. App. 488, 60 Pac. 730; *Farmers' Bank v. Smith*, 105 Ky. 816, 88 Am. St. Rep. 341, 49 S. W. 810; *Taussig v. R. R.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969. That it is not liable. *Weatherford, etc., Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837,

24 S. W. 795 [reversing, 23 S. W. 425].

²³ *Sullivan v. Detroit, etc., Ry.*, 135 Mich. 661, 106 Am. St. Rep. 403, 64 L. R. A. 673, 98 N. W. 739, 756.

²⁴ *Sullivan v. Detroit, etc., Ry.*, 135 Mich. 661, 106 Am. St. Rep. 403, 64 L. R. A. 673, 98 N. W. 739, 756. (In this case, however, it was found that the corporation had accepted the contract and had performed it in full by retaining the attorney for a year. This was held to be full performance on the theory that such a contract could be terminated at the will of either party.)

²⁵ *Farmers' Bank v. Smith*, 105 Ky. 816, 88 Am. St. Rep. 341, 49 S. W. 810.

²⁶ *Taussig v. R. R.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969.

²⁷ *Smith v. Water Works*, 73 Conn. 626, 48 Atl. 754.

§ 1831. Nature of liability of corporation. It is said that "a corporation will be held liable for services rendered by its promoters before incorporating only when, by express action taken after it has become a legal entity, it recognizes or affirms such claim."¹ A transaction of this sort is, properly speaking, a new contract, made by acceptance of an outstanding offer.² Thus delivery of a subscription to a promoter is in effect delivery to the

¹ *Cushion Heel Shoe Co. v. Hartt*, 181 Ind. 167, 50 L. R. A. (N.S.) 979, 103 N. E. 1063.

² *Illinois. Reichwald v. Hotel*, 106 Ill. 439.

Minnesota. McArthur v. Printing Co.; 48 Minn. 319, 31 Am. St. Rep. 653, 51 N. W. 216.

Tennessee. Pittsburgh & Tennessee Copper Mining Co. v. Quintrell, 91 Tenn. 693, 20 S. W. 248.

Texas. Weatherford Mineral Wells & Northwestern Ry. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795.

West Virginia. Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92.

Wisconsin. Pratt v. Match Co., 89 Wis. 406, 62 N. W. 84; *Badger Paper Co. v. Rose*, 95 Wis. 145, 37 L. R. A. 162, 70 N. W. 302.

"There are at present many courts, and extant many decisions, holding that a corporation can not have an agent before it has an existence, just as a deceased person or an unborn child or even an infant can not have or appoint an agent; and for this reason it is said that corporations are not liable for the fraud of their promoters (as in the making of false representations or the circulating of deceptive prospectuses, or otherwise) committed before the corporation comes into existence. This is on the theory that, as neither the corporation itself nor its agents committed the fraud, the corporation is not responsible therefor.

"There are, however, other decisions

and authorities holding that, while the corporation could not act itself nor have an agent before it had existence, yet, if the contract of subscription to the capital stock of the corporation to be formed was induced by fraud of the promoters, the subscriber, in certain cases, might have relief against the corporation: (1) If he has paid his money to the corporation for his shares under conditions which will authorize an action for deceit, he may surrender or tender his stock to the corporation in an action for money had and received.

(2) If he be sued by the corporation on his subscription contract, he may set up the fraud of the promoters in procuring his subscription as a defense.

(3) He may go into equity and rescind the contract, and have the money paid by him on the fraudulent contract refunded * * *. In order, however, for the corporation to be bound by the acts of its promoters, it must, after it comes into existence, do some act which makes the contract binding on it; it is sometimes said that it must ratify the contract, but, strictly speaking, it can not and does not ratify. As pointed out by the text-writers and judges, contracts made by promoters for the corporation to be organized can not in law or in equity be ratified by the corporation when it comes into existence, because ratification implies at least the existence of a person or thing in whose behalf the contract might have been made at the time it was made. Being incapable of bind-

corporation when subsequently formed.³ Accordingly, since this is in effect an offer until accepted by the corporation, the adversary party may withdraw such offer at any time before the corporation accepts it.⁴

Some courts, however, speak of this as a ratification of the contract.⁵ It is said that contracts by a promoter on behalf of a corporation are "not void but voidable."⁶ The liability of a corporation that accepts the benefits of a contract made on its behalf by a promoter and which thus becomes liable thereon, is also explained on the theory of estoppel.⁷

ing the corporation when they were made, for the all-sufficient reason that the corporation then had no existence, such contract can not afterwards be ratified by the body.

"It is held, nevertheless, by many courts, that, while there can be no ratification of the contract 'qua' contract, yet there may be created an equitable liability on equitable grounds; or as it is sometimes stated, while it can not ratify contracts made in its behalf before it had an existence, yet after the corporation comes into existence it can exercise its powers to contract, and may do so by accepting the contracts so made for it, and thereafter adopting them as its own. This last doctrine rests upon the ground that the promoters' contract was in the nature only of a proposal, which the corporation could accept or reject after it came into existence.

"It does seem to us to be in keeping with the rules of justice and of law that, where the parties who made the contract intended that the prospective corporation, when formed, should become a party to the undertaking, and intended that the contract should be for the use and benefit of the corporation, and the corporation does accept the benefit, it thereby adopts the proposed contract as fully as if it had been an original party thereto.

"In the case at bar the corporation bank availed itself of a subscription made for shares before it was formed,

and received the price paid therefor, and issued to the subscriber certificates of stock, thereby treating him as a shareholder. This, as all the authorities hold, was sufficient to bind also the corporation. Its obligations and its benefits ought to be mutual, and to be as binding as if it had made the original contract of subscription of its legally authorized agents." *Stone v. Walker*, — Ala. —, L. R. A. 1918C, 839, 77 So. 554.

³ *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110, 12 Am. St. Rep. 701, 3 L. R. A. 796, 41 N. W. 1028.

⁴ *Consolidated Water-Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485.

⁵ *Alabama. Davis v. Montgomery, etc., Co. (Ala.)*, 8 So. 496.

Connecticut. Stanton v. New York, etc., Co., 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300.

Idaho. Henry Gold Mining Co. v. Henry, 25 Ida. 333, 137 Pac. 523.

Indiana. Bruner v. Brown, 139 Ind. 600, 38 N. E. 318.

New York. Oakes v. Cattaraugus, etc., Co., 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *Seymour v. Cemetery*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365.

Tennessee. Pittsburg, etc., Co. v. Quintrell, 91 Tenn. 693, 20 S. W. 248.

⁶ *Cushion Heel Shoe Co. v. Hartt*, 181 Ind. 167, 50 L. R. A. (N.S.) 979, 103 N. E. 1063.

⁷ *Moriarity v. Meyer*, 21 N. M. 521, L. R. A. 1916E, 1165, 157 Pac. 652.

§ 1832. Theory that corporation can not adopt contract of promoter. In some jurisdictions, however, it is assumed that a contract by a promoter can bind the corporation only on the theory of ratification; and since the corporation is not in existence when the promoter makes such contract, and since he can not therefore be acting as its agent in the technical sense of the term,¹ it is held in such jurisdictions that there is not even a voidable contract entered into by an agent in excess of his authority, and that accordingly there is nothing to ratify. For these reasons it is held in such jurisdictions that a corporation is not bound by a contract made on its behalf by a promoter, even though it undertakes to adopt such contract.²

In England there had been an earlier obiter dictum to the effect that a corporation would be liable for the expenses of its organization, if it elected to accept the benefit thereof,³ but such dictum was subsequently disapproved.⁴ It is now held that a corporation is not liable for the services of its solicitor in preparing articles of association, by reason of the fact that it accepts the benefit of such services after the corporation is formed.⁵ It was at one time held in England that if a promoter made a contract with a turnpike company, to the effect that the railway would not cross the turnpike at grade, and thus induce the turnpike company to withdraw opposition in Parliament to a local act creating such railway company, the railway company could not take advantage of such transaction by accepting its charter and at the same time repudiate the contract under which such charter was secured.⁶ It was held

¹ See § 1828.

² In re Empress Engineering Co., 16 Ch. Div. 125; In re Northumberland Avenue Hotel Co., 33 Ch. Div. 16; North Sidney, etc., Co. v. Higgins [1899], A. C. 263; In re English & Colonial Produce Co. [1906], 2 Ch. 435; Van Hummell v. Guarantee Co., 23 Man. 103; Penn. Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22.

"The corporation after its organization can not become a party to the contract even by adoption or ratification of it." Abbott v. Hapgood, 150 Mass. 248, 252, 15 Am. St. Rep. 193, 5 L. R. A. 586, 22 N. E. 907 [citing, Kelner v. Baxter, L. R. 2 C. P. 174; Gunn v. Ins. Co., 12 C. B. (N.S.) 694;

Melhado v. Ry., L. R. 9 C. P. 503; In re Empress Engineering Co., 16 Ch. D. 125]; Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171, 65 N. E. 54; Pennell v. Lothrop, 191 Mass. 357, 77 N. E. 842; Koppel v. Massachusetts Brick Co., 192 Mass. 223, 78 N. E. 128; Whiting & Sons Co. v. Barton, 204 Mass. 189, 90 N. E. 528.

³ In re Hereford and South Wales Wagon and Engineering Co., 2 Ch. Div. 621.

⁴ In re English and Colonial Produce Co. [1906], 2 Ch. 435.

⁵ In re English & Colonial Produce Co. [1906], 2 Ch. 435.

⁶ Edwards v. Grand Junction Ry., 1 Myl. & C. 650.

at one time by the English courts that, in equity, a contract made by promoters on behalf of the corporation could be adopted and ratified by the corporation.⁷ This theory was subsequently overruled expressly,⁸ and it was said that a corporation could not ratify a contract made on its behalf before it came into existence, since it could not ratify a nullity.⁹ If the promoter assumes a personal liability to the adversary party, and he subsequently enters into a contract with the corporation which is to be performed by means of his contract with the adversary party, such transaction clearly does not render the corporation liable directly to such adversary party.¹⁰

Most of the Massachusetts cases are not properly in point. *Pennsylvania, etc., Co. v. Hapgood*¹¹ was a suit by the corporation against parties who had broken a contract with promoters of the corporation, which suit failed because there was "no allegation of acceptance" on the part of the corporation. *Abbott v. Hapgood*¹² was a suit on the same contract by promoters. The observation as to the power of the corporation to adopt was pure dictum,¹³ it did not appear that the contract was made on the part of the promoter on behalf of the corporation but only that the promoter acquired certain property under his contract with the adversary party, which after incorporation was transferred to the corporation. Even in Massachusetts it is said that a corporation may be liable on a contract by its promoter if the offer to the promoter was an alternative offer to him or to the corporation, or if the corporation subsequently entered into a new contract in accordance with the terms of the original contract.¹⁴ Where the corporation has actually

⁷ *Touche v. Metropolitan. Railway Warehousing Co.*, L. R. 6 Ch. App. 671; *Spiller v. Paris Skating Rink Co.*, 7 Ch. Div. 368.

⁸ *In re Empress Engineering Co.*, 16 Ch. Div. 125.

⁹ *In re Hereford and South Wales Wagon and Engineering Co.*, 2 Ch. Div. 621; *In re Empress Engineering Co.*, 16 Ch. Div. 125.

¹⁰ *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [1902], 1 Ch. 146.

¹¹ *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22.

¹² *Boynnton v. Moulton*, 150 Mass.

248, 15 Am. St. Rep. 193, 5 L. R. A. 586, 22 N. E. 907.

¹³ *In Koppel v. Massachusetts Brick Co.*, 192 Mass. 223, 78 N. E. 128.

¹⁴ *Holyoke Envelope Co. v. United States Envelope Co.*, 182 Mass. 171, 65 N. E. 54.

"Two possible modes occur to us in which the defendant could be made liable either on the document or according to its terms. It may be that, construed with reference to the facts, the document was an alternative offer, both to Dean and Shibley to whom it was delivered, and also to the corporation contemplated by it as possibly to

adopted the contract as its own, and accepted the benefits thereof, and taken up the notes which were given by the promoters personally therefor, it can not recover on such notes from the promoters.¹⁵

§ 1833. Statutory restrictions on adoption by corporation. Under a statute which provides that it shall not be lawful for a corporation to transact business until it has complied with certain statutory requirements, and which makes the violation of such statute a misdemeanor, a contract made by its promoter before it has complied with such statutory requirements, is illegal;¹ and accordingly it can not be ratified by the corporation.² Under such a statutory provision, a contract on the part of the promoters that the corporation when formed should purchase certain mortgages,³ or that the corporation should pay a commission for the sale of its stock,⁴ can not be ratified by the corporation so as to make it a binding obligation.

§ 1834. Personal liability of promoters. A promoter who enters into a contract on behalf of a corporation to be formed in the future, is liable personally upon such contract,¹ unless he pro-

be formed. If the words 'It will sell and convey to such new company' be taken to have addressed the new company when it came into being and if the company then accepted the offer, there is no trouble in holding the latter to the stipulations in the plaintiff's favor. *People's Ferry-Co. v. Balch*, 8 Gray 303, 311. On the other hand, if the defendant was not privy to the offer it may have contracted later according to its terms. There are indications that the defendant was not privy to the offer. The consideration mentioned, although partly if not wholly formal, moves from Dean and Shibley only, and this fact tends to restrict the offer to them as the only parties who could enforce the promise. But if this be so, the defendant, although a stranger to the document, still might have accepted the conveyance of the property mentioned with knowl-

edge of the terms set out in that document and upon an express or implied undertaking to perform them in consideration of the conveyance." *Holyoke Envelope Co. v. United States Envelope Co.*, 182 Mass. 171, 65 N. E. 54.

¹⁵ *North Anson Lumber Co. v. Smith*, 209 Mass. 333, 95 N. E. 838.

¹ *Missouri Fidelity & Casualty Co. v. Scott*, — Okla. —, 178 Pac. 122.

² *Missouri Fidelity & Casualty Co. v. Scott*, — Okla. —, 178 Pac. 122.

³ *Missouri Fidelity & Casualty Co. v. Scott*, — Okla. —, 178 Pac. 122.

⁴ *Taylor v. St. Louis National Life Insurance Co.*, 266 Mo. 283, 181 S. W. 8.

¹ *United States. Morse v. Tillotson & Wolcott Co.*, 253 Fed. 340, 1 A. L. R. 1485.

Georgia. Wells v. J. A. Fay & Egan Co., 143 Ga. 732, 85 S. E. 873.

Minnesota. Roberts Mfg. Co. v. Schlick, 62 Minn. 332, 64 N. W. 826.

vides expressly for immunity from personal liability,² though in some jurisdictions it is held that he is not liable if the entire transaction shows that the adversary party looked to the corporation alone.³

If a promoter makes a contract on behalf of the prospective corporation by which it is to borrow money, he is liable personally upon such contract if he has charge of the corporation after it is formed and if he repudiates such contract.⁴ The liability of the promoters is said in some cases to be in the nature of partnership liability.⁵

The promoters are not relieved of liability on their contracts because the corporation adopts them, unless there was an agreement to that effect.⁶ Thus where one in business orders goods, and the business is then incorporated, and the goods are actually delivered to and received by the corporation, the person originally ordering the goods may be held liable.⁷

If the contract between the promoter and the adversary party shows either by express terms or by fair implication that the adversary party agrees to look solely to the corporation when it is formed for performance, all that the promoter has promised is that the corporation when formed shall adopt such contract; and under such circumstances, in jurisdictions in which the prospective corporation may adopt such contract, the promoter is not liable on such contract personally in case the corporation adopts such contract, even though it does not in fact perform it.⁸ If the promoter buys property upon the credit of the prospective corporation, and the prospective corporation assumes such obligation, the promoter is discharged from personal liability.⁹ This result is sometimes ex-

New York. *Munson v. Syracuse, Geneva & Corning Ry.*, 103 N. Y. 58, 8 N. E. 355.

Ohio. *Mosier v. Parry*, 60 O. S. 386, 54 N. E. 364.

² *Heckman's Estate*, 172 Pa. St. 185, 33 Atl. 552.

³ *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400.

⁴ *Morse v. Tillotson & Wolcott Co.*, 253 Fed. 340, 1 A. L. R. 1485.

⁵ *Ryland v. Hollinger*, 117 Fed. 216, 54 C. C. A. 248.

⁶ *Roberts, etc., Mfg. Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826; *Queen City,*

etc., Co. v. Crawford, 127 Mo. 356, 30 S. W. 163.

⁷ *Henderson Woolen Mills v. Edwards*, 84 Mo. App. 448.

⁸ *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N.S.) 1453; *Chicago, etc., Co. v. Talbotton, etc., Co.*, 106 Ga. 84, 31 S. E. 809; *Lummas Cotton Gin Co. v. Cave*, — S. Car. —, 96 S. E. 94.

⁹ *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N.S.) 1153.

plained on the theory that the adversary is estopped to deny the capacity and liability of the corporation upon such contract.¹⁰

If money or some other thing of value has been delivered to the promoters under a contract on behalf of a prospective corporation, and they apply it to some other purpose, they are liable personally therefor.¹¹ Promoters are liable personally for the fraud of their agents, by which third persons are induced to enter into contracts with the promoters on behalf of the prospective corporation.¹²

The promoters may be reimbursed by the corporation to the extent of their legitimate expenses on behalf of the corporation.¹³ Thus promoters of a college, who agree to pay interest on a subscription to obtain it for the college, may recover the sums thus advanced.¹⁴

¹⁰ *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050.

¹¹ *Miller v. Denman*, 49 Wash. 217, 16 L. R. A. (N.S.) 348, 95 Pac. 87.

¹² *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N.S.) 307, 98 N. E. 391.

¹³ *Hayward v. Leeson*, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656.

¹⁴ *Morton v. College*, 100 Ky. 231, 35 L. R. A. 275, 38 S. W. 1.

CHAPTER LVIII

VOLUNTARY ASSOCIATIONS

- § 1835. Contracts of voluntary associations—Voluntary association for profit.
- § 1836. Voluntary association not for profit—Liability of members upon unauthorized contracts.
- § 1837. Liability of members upon authorized contracts.
- § 1838. Ratification.
- § 1839. Liability of member who acts as agent or officer.
- § 1840. Nature of liability of members.
- § 1841. Rights of members upon contract.

§ 1835. Contracts of voluntary associations—Voluntary association for profit. The term "voluntary association," while frequently not employed with accuracy, ordinarily indicates a number of natural persons who are united together without being incorporated, but who have organized in a form which resembles that of a corporation as closely as it is possible to do by voluntary agreement without complying with the statutes which regulate incorporation. Occasionally such a voluntary association is formed for the purpose of engaging in business and making profits. If such is its purpose, its members are liable to third persons as partners upon all contracts which are within the scope of the association and which are entered into by those who are actually or apparently authorized to represent it.¹ The difference, if any, between such an association and a partnership, as far as the rights of third persons are concerned, grows out of the fact that the nature of such an association and its method of organization is frequently sufficient to amount to notice to the world at large that it has conferred authority to make contracts upon its officers and that the members of such association are not authorized to bind it by virtue of their membership alone.

¹England. *Burla v. Smith*, 7 Bing. 705.

Connecticut. *Bennett v. Lathrop*, 71 Conn. 613, 71 Am. St. Rep. 222, 42 Atl. 634.

Iowa. *Schumacher v. Sumner Telephone Co.*, 161 Ia. 326, 142 N. W. 1034.

Maine. *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918.

Wisconsin. *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022.

More frequently a voluntary association consists of a number of natural persons who are not incorporated but who unite for some purpose other than that of carrying on a profession or business or making profits. No liability against non-assenting members of a voluntary association is created by contracts entered into by its officers which are outside of the scope of the purpose for which the association was formed.²

§ 1836. Voluntary association not for profit—Liability of members upon unauthorized contracts. A voluntary association generally consists of a number of natural persons, united together without being incorporated, for some purpose other than carrying on a profession or business, or making profits.¹ It usually takes the form of internal organization of a corporation not for profit, and exists for the same purposes as such corporations.² If such an association is not formed for the purpose of engaging in business, its members are not liable as partners.³ The mere fact of membership in a voluntary association does not of itself render each member liable for contracts entered into by such association.⁴ Thus an association of pilots, having no power to contract for pilot fees, is not bound by a contract of a member on their behalf.⁵ Subscribers to a law and order league's guaranty fund are not personally liable to an attorney retained by its officers, even if they know and ap-

² *Schumacher v. Sumner Telephone Co.*, 161 Ia. 326, 142 N. W. 1034; *Volger v. Ray*, 131 Mass. 439.

¹ *Arkansas. Little Rock Furniture Mfg. Co. v. Kavanaugh*, 111 Ark. 575, 51 L. R. A. (N.S.) 406, 164 S. W. 289.

California. Grand Grove v. Garibaldi Grove, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486.

Iowa. Lewis v. Tilton, 64 Ia. 220, 52 Am. Rep. 436, 19 N. W. 911; *Schumacher v. Sumner Telephone Co.*, 161 Ia. 326, 142 N. W. 1034.

Michigan. Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; *Brown v. Stoerkel*, 74 Mich. 269, 3 L. R. A. 430, 41 N. W. 921; *Detroit Light Guard Band v. First Michigan Independent Infantry*, 134 Mich. 598, 96 N. W. 934.

New Jersey. Abels v. McKeen, 18 N. J. Eq. 462.

Ohio. Devoss v. Gray, 22 O. S. 159. *Pennsylvania. Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818.

West Virginia. Kalbitzer v. Goodhue, 52 W. Va. 435, 44 S. E. 264.

² "Associations of this character are not bodies politic or corporate; nor are they recognized by the law as persons. They are mere aggregates of individuals, called, for convenience, like partnerships, by a common name." *Grand Grove v. Garibaldi Grove*, 130 Cal. 116, 119, 80 Am. St. Rep. 80, 62 Pac. 486.

³ *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818.

⁴ *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147; *McFadden v. Leeka*, 48 O. S. 513, 28 N. E. 874.

⁵ *The City of Reading*, 103 Fed. 696.

prove of such employment.⁶ A member is not liable for debts incurred before he became a member.⁷ Subscribers to a fund as a bonus to induce a factory to locate in their town are not liable for the contracts of an alleged association with no definite members, formed at a citizens' meeting, to secure such location.⁸

§ 1837. Liability of members upon authorized contracts. In order to hold a member for a contract of such an association it must be shown that he either authorized it or ratified it. He may authorize such contract in two ways: First, he may join the association understanding that a part of its objects was making such contracts.¹ Thus a member of a polo team who joins understanding that certain expenses were to be incurred in which he should share, is liable thereon.² Second, he may specifically authorize the contract in question.³ The members of a college class who elect a business manager and who vote to publish a class book, may be held liable upon a contract for the publication of such class book entered into by such business manager within the scope of his authority.⁴

§ 1838. Ratification. A member may ratify contracts expressly or impliedly as by accepting benefits which he knows or should know were obtained by such contract. Such an association can not go out of existence, with contracts outstanding.¹

§ 1839. Liability of member who acts as agent or officer. A member of a voluntary association who is instrumental in making a

⁶ *McCabe v. Goodfellow*, 133 N. Y. 89, 17 L. R. A. 204, 30 N. E. 728.

⁷ *Hornberger v. Orchard*, 39 Neb. 639, 58 N. W. 425; *F. R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938.

⁸ *Cheney v. Goodwin*, 88 Me. 563, 34 Atl. 420.

¹ *Lawler v. Murphy*, 58 Conn. 294, 8 L. R. A. 113, 20 Atl. 457; *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918; *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147; *Lynn v. Commercial Club*, 31 S. D. 401, 141 N. W. 471.

² *Bennett v. Lathrop*, 71 Conn. 613, 71 Am. St. Rep. 222, 42 Atl. 634.

³ *Winona Lumber Co. v. Church*, 6 S. D. 498, 62 N. W. 107; *Wilcox v. Arnold*, 162 Mass. 577, 39 N. E. 414.

⁴ *Wilcox v. Arnold*, 162 Mass. 577, 39 N. E. 414.

¹ *Alabama. Roper v. Burke*, 83 Ala. 193, 30 So. 439.

Massachusetts. McFadden v. Murphy, 149 Mass. 341, 21 N. E. 868.

New Jersey. Camden, etc., Co. v. Guarantors, etc., 59 N. J. L. 328, 35 Atl. 796.

New York. Lafond v. Deems, 81 N. Y. 507.

Vermont. Strickland v. Pritchard, 37 Vt. 324.

contract is personally liable thereon in most jurisdictions, unless he has stipulated expressly against personal liability.¹ Thus persons who sign as directors,² or as president,³ or as treasurer,⁴ or allow their names to be used as officers,⁵ or themselves make the contract as a committee,⁶ bind themselves personally. The fact that the officers who enter into a contract on behalf of the voluntary association do not expect to become liable personally does not alter their liability.⁷ Officers of such voluntary association as a civic league,⁸ a temperance reform club,⁹ or a commandery of Knights Templars,¹⁰ have been held liable personally upon contracts which they have made on behalf of the association. If, however, those who deal with the voluntary association understand that they are to look for compensation to a fund to be raised by subscription, it has been held that they can not recover from the members of the committee personally.¹¹ Where an executive committee is appointed at a mass meeting to provide for a public celebration, the members of such committee are not personally liable for supplies which such committee orders, if they account for the funds received honestly and expended them fairly.¹²

¹ Iowa. *Lewis v. Tilton*, 64 Ia. 220, 52 Am. Rep. 436, 19 N. W. 911; *Comfort v. Graham*, 87 Ia. 295, 54 N. W. 242.

Maine. *Kierstead v. Bennett*, 93 Me. 328, 45 Atl. 42.

Mississippi. *Evans v. Lilly*, 95 Miss. 58, 21 Am. & Eng. Ann. Cas. 1087, 48 So. 612; *Alkahest Lyceum System v. Featherstone*, 113 Miss. 226, 74 So. 151.

Wisconsin. *Fredendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203.

² *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63.

³ *Alkahest Lyceum System v. Featherstone*, 113 Miss. 226, 74 So. 151.

⁴ *Kierstead v. Bennett*, 93 Me. 328, 45 Atl. 42; *Evans v. Lilly*, 95 Miss. 58, 21 Am. & Eng. Ann. Cas. 1087, 48 So. 612; *Alkahest Lyceum System v. Featherstone*, 113 Miss. 226, 74 So. 151.

⁵ *Murray v. Walker*, 83 Ia. 202, 48 N. W. 1075.

Contra, by statute, members of a

G. A. R. post are not personally liable though they make the contracts in person for the post. *Pain v. Sample*, 158 Pa. St. 428, 27 Atl. 1107.

⁶ *McKinnie v. Postles* (Del.), 54 Atl. 798.

⁷ *Lewis v. Tilton*, 64 Ia. 220, 52 Am. Rep. 436, 19 N. W. 911; *Evans v. Lilly*, 95 Miss. 58, 21 Am. & Eng. Ann. Cas. 1087, 48 So. 612; *Alkahest Lyceum System v. Featherstone*, 113 Miss. 226, 74 So. 151.

⁸ *Alkahest Lyceum System v. Featherstone*, 113 Miss. 226, 74 So. 151.

⁹ *Lewis v. Tilton*, 64 Ia. 220, 52 Am. Rep. 436, 19 N. W. 911.

¹⁰ *Evans v. Lilly*, 95 Miss. 58, 21 Am. & Eng. Ann. Cas. 1087, 48 So. 612.

¹¹ *Little Rock Furniture Mfg. Co. v. Kavanaugh*, 111 Ark. 575, 51 L. R. A. (N.S.) 406, 164 S. W. 289.

¹² *Little Rock Furniture Mfg. Co. v. Kavanaugh*, 111 Ark. 575, 51 L. R. A. (N.S.) 406, 164 S. W. 289.

§ 1840. Nature of liability of members. If a member of the association is liable in one of these ways, he can not avoid liability because the contracting party did not know his name or identity.¹ If the members of a voluntary association are liable upon its contracts their liability is joint and several.² A difficulty in enforcing a contract against a voluntary association is found in the fact that the association can not be sued by name, but the individual members in the jurisdiction of the court must be made parties,³ unless by statute the association may be sued by its name. The statutory right to sue an association by name does not abrogate the common-law right to sue the individual members;⁴ nor does it give a member a right to sue the association.⁵ Members of an association who are jointly liable can not sue the association on a policy.⁶ So the adjuster of a voluntary association of dredgers who divides the work can not sue the association because he does not get his share of their earnings.⁷ A note by a fluctuating society, signed individually by trustees, is considered in equity as a charge on their property;⁸ and an association, though it has no power to borrow, may pledge a claim against an insolvent trust company for its deposits.⁹

§ 1841. Rights of members upon contract. The members of the association may enforce a contract entered into with the association as made for their benefit.¹ So where a superior labor organization took away the charter of an inferior association, the latter can sue on causes of action accruing in its favor.²

¹ Lawler v. Murphy, 58 Conn. 294, 8 L. R. A. 113, 20 Atl. 457.

² Vader v. Ballou, 151 Wis. 577, 139 N. W. 413; Crawley v. American Society of Equity, 153 Wis. 13, 139 N. W. 734.

³ United States. Allnut v. Lancaster, 76 Fed. 131.

Indiana. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 2 L. R. A. (N.S.) 788, 6 Am. & Eng. Ann. Cas. 829, 75 N. E. 877.

Iowa. Hanley v. Elm Grove Mutual Telephone Co., 150 Ia. 198, 129 N. W. 807.

Missouri. State v. Kansas City Live Stock Exchange, 211 Mo. 181, 124 Am. St. Rep. 776, 109 S. W. 675.

Pennsylvania. Maisch v. Order of Americus, 223 Pa. St. 199, 72 Atl. 528.

⁴ Jenkinson v. Wysner, 125 Mich. 89, 83 N. W. 1012.

⁵ Huth v. Humboldt Stamm, 61 Conn. 227, 23 Atl. 1084.

⁶ Perry v. Cobb, 88 Me. 435, 49 L. R. A. 389, 34 Atl. 278.

⁷ Potter v. Dredging Co., 59 N. J. Eq. 422, 46 Atl. 537.

⁸ Society of Shakers v. Watson, 68 Fed. 730, 15 C. C. A. 632.

⁹ Commonwealth v. Trust Co., 161 Mass. 550, 37 N. E. 757.

¹ Senour v. Maschinot (Ky.), 31 S. W. 481; Local Union, etc., v. Barrett, 19 R. I. 663, 36 Atl. 5; Ackermann v. Schuetzen Verein (Tex. Civ. App.), 60 S. W. 366.

² Wicks v. Monihan, 130 N. Y. 232, 14 L. R. A. 243, 29 N. E. 139.

CHAPTER LIX

GOVERNMENTS

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I

THE UNITED STATES

§ 1842. Contracts of the United States—Power to contract.

The United States is a government of limited powers, possessing only such as are expressly or impliedly conferred upon it by the Constitution of the United States. It has full power to contract when such contract is a suitable and appropriate method of carrying such powers into execution.¹ It may incur a liability on an implied contract or in quasi-contract,² as by taking property for its use not under a claim of right but with the understanding that compensation is to be made.³

§ 1843. Powers of officers and agents. The United States is bound only by contracts which are made on its behalf by an officer or agent who is authorized to bind the United States by such contract.¹ In the absence of specific statutory authority, an officer or

¹ *United States v. Tingey*, 30 U. S. (5. Pet.) 115, 8 L. ed. 66; *United States v. Rubin*, 227 Fed. 938; *United States v. Utz*, 80 Fed. 848; *Langford v. United States*, 95 Fed. 933; *Salisbury v. United States*, 28 Ct. Cl. 52; *Salisbury v. United States*, 28 Ct. Cl. 404; *Starin v. United States*, 31 Ct. Cl. 65; *Myerle v. United States*, 31 Ct. Cl. 105; *Gregory v. United States*, 33 Ct. Cl. 434; *Haliday v. United States*, 33 Ct. Cl. 453.

"Every government, besides having an existence for the purpose of the exercise of its political powers, is an entity, is a person in law, has what may be called a corporate existence for the necessary purpose (among other things) of acquiring, holding and asserting title to property and entering into contracts. Its rights and powers in this respect are analogous to, if not the same as, those of an ordinary corporation." *United States v. Rubin*, 227 Fed. 938.

On the general subject of the nature of the liability of a state, see *Action Against the Property of Sovereigns*, by Chas. H. Weston, 32 *Harv. Law Review*, 266; *The Responsibility of the State in England*, by Harold J. Laske, 32 *Har-*

vard Law Review, 447, and *Origin and Development of Legal Recourse against the Government in the United States*, by Charles C. Binney, 67 *University of Pennsylvania Law Review*, 372.

On the subject of government contracts in general, see *Government Contracts*, 4 *American Law Review*, 1; *Government Contracts*, by Charles F. Carusi, 43 *American Law Review*, 1; *Government Contracts, Before the Court of Claims*, by Charles F. Carusi, 43 *American Law Review*, 161; *Claims against Governments*, 10 *American Law Review*, 81, and *Government Loans*, 3 *American Law Review*, 218.

See also §§ 1877 et seq. and § 1883.

² *United States v. Russell*, 80 U. S. (13 Wall.) 623, 20 L. ed. 474; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. ed. 846; *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539.

³ *United States v. Russell*, 80 U. S. (13 Wall.) 623, 20 L. ed. 474; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. ed. 846; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539.

¹ *The Floyd Acceptances*, 74 U. S. (7 Wall.) 666, 19 L. ed. 169; *Monroe*

agent of the United States can not bind it by a warranty,² or by issuing a negotiable instrument.³

The Secretary of the Interior has power to enter into a contract with an irrigation district for constructing irrigation ditches and for supplying water.⁴ A contract made by the Secretary of War through the Division of Insular affairs, is made on behalf of the United States, although the contract price is to be paid out of the funds of the Philippine Islands.⁵ While the War Department has no general power to engage in the business of butchering for a profit, it has power to enter into contracts for butchering, if this is a reasonable method of supplying the army with food.⁶ A general in command of a department has wide powers and is authorized to use his discretion in their application.⁷ In a military exigency he may fix the price to be paid for supplies, materials and animals.⁸ A district attorney of the United States has authority to enter into a contract for restitution to the United States, in case a criminal is pardoned for the offense of committing certain kinds of fraud against the United States; but the district attorney has no power to bind the United States by a contract to reimburse the criminal for the improvements made by him upon the property which he restores to the United States, or for the taxes paid thereon.⁹

v. United States, 184 U. S. 524, 46 L. ed. 670 [affirming, *Monroe v. United States*, 35 Ct. Cl. 199]; *Bradford v. United States*, 228 U. S. 446, 57 L. ed. 912; *Maryland Steel Co. v. United States*, 235 U. S. 451, 59 L. ed. 312 (obiter); *Bennett v. United States*, 6 Ct. Cl. 103.

² *Bennett v. United States*, 6 Ct. Cl. 103.

³ *The Floyd Acceptances*, 74 U. S. (7 Wall.) 666, 19 L. ed. 169.

⁴ *Nampa & Meridian Irrigation District v. Petrie*, 28 Ida. 227, 153 Pac. 425.

⁵ *United States v. Andrews*, 207 U. S. 229, 52 L. ed. 185.

⁶ *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449.

⁷ *Stevens v. United States*, 2 Ct. Cl. 95; *Baker v. United States*, 3 Ct. Cl. 343.

"Ordnance officers, quartermasters, and commissaries of subsistence are special agents authorized to perform

specific duties only; a general in command of a department is a general agent, with larger powers and authorized to use discretion in their application. By usage and common understanding, he is empowered to perform all the duties of special agents, and has direct authority over it; at his bidding they go and come, do and undo. He makes or unmakes, at least for the time being; nor is it supposed that his powers are precisely limited by the words of his commission. His powers are better known by the character in which he is held out to the world, which is generally understood to be without much limit as to authority, and its exercise to any needful extent is always sustained." *Stevens v. United States*, 2 Ct. Cl. 95.

⁸ *Wilcox v. United States*, 5 Ct. Cl. 386.

⁹ *Bradford v. United States*, 228 U. S. 446, 57 L. ed. 912.

The officer who has charge of the performance of the contract may extend the time for performance.¹⁰

§ 1844. Applicability of general principles of contract law. Except where modified by specific statutory provisions contracts entered into by the United States are governed by the same general principles of law as are contracts between private individuals. Contracts entered into by the United States are subject to the same general principles of law with reference to such questions as offer and acceptance as are contracts of natural persons.¹ Offer and acceptance are as necessary in these contracts as in any others.² No rights arise out of an unaccepted offer,³ or out of an acceptance of what, at most, is a mere declaration of intention.⁴ A statute which authorizes an officer to enter into a contract is not of itself a contract or an offer; and if such officer is able to make a contract for the United States upon better terms than those indicated in such grant of authority, the rights of the United States are measured by such contract and not by such statute.⁵ The same general principles of fraud,⁶ ratification,⁷ and mistake in expression, as ground for reformation,⁸ that apply to contracts in general, apply to contracts entered into by the United States.

In the absence of special restrictions the ordinary rules of contract law, such as the rules of commercial paper,⁹ apply to contracts with the United States; and common-law rules of evidence apply to actions thereon.¹⁰

¹⁰ *Salomon v. United States*, 86 U. S. (19 Wall.) 17, 22 L. ed. 46; *Maryland Steel Co. v. United States*, 235 U. S. 451, 59 L. ed. 312.

¹ *Lord v. United States*, 217 U. S. 340, 54 L. ed. 790; *United States, ex rel., Goldberg v. Daniels*, 231 U. S. 218, 58 L. ed. 191; *Sizemore v. Brady*, 235 U. S. 441, 59 L. ed. 308; *United States v. Rowell*, 243 U. S. 464, 61 L. ed. 848; *United States v. Carlin Construction Co.*, 224 Fed. 859, 138 C. C. A. 449.

² *Lord v. United States*, 217 U. S. 340, 54 L. ed. 790; *United States, ex rel., Goldberg v. Daniels*, 231 U. S. 218, 58 L. ed. 191.

⁴ *Lord v. United States*, 217 U. S. 340, 54 L. ed. 790.

⁵ *Gilbert v. United States*, 75 U. S. (8 Wall.) 358, 19 L. ed. 303.

⁶ *Crocker v. United States*, 49 Ct. Cl. 85; *Michigan Steel Box Co. v. United States*, 49 Ct. Cl. 421.

⁷ *Chicago, Milwaukee & St. Paul Ry. v. United States*, 244 U. S. 351, 61 L. ed. 1184.

⁸ *Ackerlind v. United States*, 240 U. S. 531, 60 L. ed. 783 [reversing judgment, *Ackerlind v. United States*, 49 Ct. Cl. 635].

⁹ *Wells v. United States*, 45 Fed. 337.

¹⁰ *Allen v. United States*, 28 Ct. Cl. 141.

It has been said, however, that the provisions of Section 3744 of the Revised Statutes of the United States and the practice of the departments to which such statute applies, combine to make a dredging contract a thing apart from ordinary contracts,¹¹ so that the ordinary rules as to waiver by signing a contract and beginning performance have no application to such contracts.¹²

§ 1845. Necessity of appropriation. Under various statutes officers are not authorized to bind the United States by contracts in excess of the amount which Congress has appropriated for the performance of such contract.¹ Under such a statute a contract which is in excess of the appropriation is invalid as to such excess and does not create any obligation against the United States over

¹¹ American Dredging Co. v. United States, 49 Ct. Cl. 350.

¹² American Dredging Co. v. United States, 49 Ct. Cl. 350.

¹ No executive department or other government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by congress for that fiscal year, or involve the government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any department or any officer of the government accept voluntary service for the government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which

may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the senate or house of representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such executive department or other government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month. R. S. of U. S., § 3679; Act of July 12, 1870, c. 251, § 7, 16 Stats. at L. 251; Act of March 3, 1905, c. 1484, § 4, 33

and above the amount of such appropriation.² A contract of lease in excess of an appropriation is invalid as to such excess;³ and the fact that Congress has made an appropriation for an additional portion of the term does not amount to a ratification of the entire contract in excess of such subsequent appropriation.⁴ A contract for furnishing subsistence to Indians under a treaty, is invalid as far as it is in excess of the amount appropriated, and the contractor can not recover such excess,⁵ although the performance of such contract was very beneficial to the United States.⁶ Such contract may be ratified by the United States in whole or in part by making an appropriation sufficient for the consideration in whole or in part.⁷ Since a contract is not valid in excess of the amount appropriated therefor, the failure of Congress to make the necessary appropriation in time can not be regarded as a breach.⁸ The contractor may, however, rely upon statements of the officers of the United States, whose duty it is to know the amount of the appropriation available for the purposes of the contract, as to the balance which is thus available.⁹

In some of the earlier cases it has been held that the exhaustion of the appropriation justified the officer in stopping work, but it did not prevent the United States from becoming liable by reason

Stats. at L. 1257; Act of February 27, 1906, c. 510, § 3, 34 Stats. at L. 48; Comp. Stats. 1916, § 6778.

No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the government to pay a larger sum of money than the amount in the treasury appropriated for the specific purpose. R. S. of U. S., § 3733; Act of July 25, 1868, c. 233, § 3, 15 Stats. at L. 177; Comp. Stats., § 6886.

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the war and navy departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year. R. S. of U. S., § 3732; Act

of March 2, 1861, c. 84, § 10, 12 Stats. at L. 177; Comp. Stats., § 6884.

² Bradley v. United States, 98 U. S. 104, 25 L. ed. 105; United States v. McDougall's Administrator, 121 U. S. 89, 30 L. ed. 861; San Francisco Bridge Co. v. United States, 209 Fed. 135.

³ Bradley v. United States, 98 U. S. 104, 25 L. ed. 105.

⁴ Bradley v. United States, 98 U. S. 104, 25 L. ed. 105.

⁵ United States v. McDougall's Administrator, 121 U. S. 89, 30 L. ed. 861.

⁶ United States v. McDougall's Administrator, 121 U. S. 89, 30 L. ed. 861.

⁷ McCollum v. United States, 17 Ct. Cl. 92.

⁸ San Francisco Bridge Co. v. United States, 40 Ct. Cl. 139.

⁹ San Francisco Bridge Co. v. United States, 209 Fed. 135.

of the act of such officer.¹⁰ It has also been held that one who contracts for performing a part only of the work or purchases authorized by a general appropriation, is not bound to know the condition of the appropriation account, and that his contract is not rendered invalid by the fact that it exceeds the unexpended balance of the appropriation.¹¹

§ 1846. Necessity of advertisement for bids. The chief peculiarities of the formation of contracts into which the United States enters, are due to specific provisions of certain federal statutes which provide in certain cases that contracts entered into by the United States must be in writing; that such contracts must be let after advertisement for proposals; which provide in some cases that no debt in excess of an appropriation which is made for such contract can be incurred; which forbid assignment of contracts with the United States; which exact bonds in building contracts for the benefit of contractors and materialmen, as well as for the benefit of the United States, and which regulate the allowance to be made for extras. Certain federal statutes provide that there must be an advertisement for bids before contracts are made for supplies or services for any of the departments of the federal government, unless the public exigencies require an immediate delivery of the articles or immediate performance of the services.¹

¹⁰ *Ferris v. United States*, 27 Ct. Cl. 542.

¹¹ *Dougherty v. United States*, 18 Ct. Cl. 496.

¹ All purchases and contracts for supplies or services, in any of the departments of the government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals. R. S. of

U. S., § 3709; Act of March 2, 1861, c. 84, § 10, 12 Stats. at L. 220; Comp. Stats. 1916, § 6832.

All provisions, clothing, hemp, and other materials of every name and nature, for the use of the navy, and the transportation thereof, when time will permit, shall be furnished by contract, by the lowest bidder, as follows: In the case of provisions, clothing, hemp, and other materials, the secretary of the navy shall advertise, twice a week for two weeks or longer, not to exceed four weeks, or once a week for two weeks or longer, not to exceed four weeks, in the discretion of the secretary of the navy, in one or more of the principal papers published in the place where such articles are to be furnished, for sealed proposals for furnishing the same, or

and above the amount of such appropriation necessary in case there in excess of an appropriation is invalid impracticable to advertise fact that Congress has made an ar

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grades and varieties, and to aid said
secretary in soliciting bids based upon
formulas and specifications drawn up
by such experts in the service of the
government as the committee may see
fit to call upon, who shall render what-
ever assistance they may require. The
committee shall aid said secretary in
securing the proper fulfillment of the
contracts for such supplies, for which
purpose the said secretary shall pre-
scribe, and all departments comply
with, rules providing for such examina-
tion and tests of the articles received
as may be necessary for such purpose;
in making additions to the said sched-
ule; in opening and considering the
bids, and shall perform such other sim-
ilar duties as he may assign to them:
Provided, that the articles intended to
be purchased in this manner are those
in common use by or suitable to the
ordinary needs of two or more such
departments or establishments; but the
said secretary shall have discretion to
amend the annual common supply
schedule from time to time as to any
articles that, in his judgment, can as
well be thus purchased. In all cases
only one bond for the proper perform-
ance of each contract shall be required,
notwithstanding that supplies for more
than one department or government
establishment are included in such con-
tract. Every purchase or drawing of
such supplies from the contractor shall
be immediately reported to said com-
mittee. No disbursing officer shall be
a member of such committee. No de-
partment or establishment shall pur-
chase or draw supplies from the
common schedule through more than

R. S. of U. S., § 3718.

* * * Hereafter all supplies of fuel,
ice, stationery, and other miscellaneous
supplies for the executive departments
and other government establishments
in Washington, when the public ex-
igencies do not require the immediate
delivery of the article, shall be adver-
tised and contracted for by the secre-
tary of the treasury, instead of by the
several departments and establish-
ments, upon such days as he may desig-
nate. There shall be a general supply
committee in lieu of the board provided
for in section thirty-seven hundred and
nine of the Revised Statutes as
amended, composed of officers, one
from each such department, designated
by the head thereof, the duties of
which committee shall be to make, un-
der the direction of the said secretary,

Whether such public exigency exists or not is a matter to be determined largely by the discretion of the officer whether to advertise for bids or not.³ A contract entered into by the authority of the Secretary of War for buying hogs and for packing them so as to furnish pork for the army, is valid, although there was no advertisement for bids.⁴ A general who is a military commander of a department may enter into a contract for buying necessary weapons without advertising for bids.⁵

Such provision is said to be intended for the benefit of the government, and to render the contract voidable at its option,⁶ rather than absolutely void.⁷

While the United States is liable for the reasonable value of the benefits which it has received under such contract,⁸ it is not liable for the value of goods which are accepted by its agents under such contract but which spoil while in the hands of its agents,⁹ or which are not eventually used by the United States.¹⁰

A contract which contains specifications which are substantially different from those in the advertisement, is inoperative as against the United States, if it wishes to repudiate such contract.¹¹

§ 1847. Form necessary in contracts of United States. Certain federal statutes¹ require contracts with the United States to be "reduced to writing and signed by the contracting parties with

one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: And provided further, that telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him. 36 Stats. at L., c. 297, § 4, p. 531.

² *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449; *Cobb v. United States*, 9 Ct. Cl. 291.

³ *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449.

⁴ *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449.

⁵ *Stevens v. United States*, 2 Ct. Cl. 95.

⁶ *Driscoll v. United States*, 13 Ct. Cl. 15 [not affected on this point by reversal in *United States v. Driscoll*, 96 U. S. 421, 24 L. ed. 847].

⁷ *Driscoll v. United States*, 13 Ct. Cl. 15 [not affected on this point by reversal in *United States v. Driscoll*, 96 U. S. 421, 24 L. ed. 847].

⁸ *Adams v. United States*, 7 Ct. Cl. 437.

⁹ *Adams v. United States*, 7 Ct. Cl. 437.

¹⁰ *Adams v. United States*, 7 Ct. Cl. 437.

¹¹ *United States v. Ellicott*, 223 U. S. 524, 56 L. ed. 535.

¹ It shall be the duty of the secretary of war, of the secretary of the navy, and of the secretary of the interior, to cause and require every contract made

their names at the end thereof.”² Under such a statute a valid contract can not be made by correspondence between an officer of the United States and the adversary party, if some of the letters which evidence such contract are signed by one party and some are signed by the other party.³ The effect of these statutes upon contracts which fell within its provisions, and which were not executed in accordance with its terms, has been a matter of considerable difficulty. While it was at one time urged that the object of such statutes was merely to secure a complete file where all federal contracts could be examined and inspected, and that it was not intended to affect the execution of the contract,⁴ it was held that the statute was intended to apply to the formation of the contract, and that executory contracts which fell within the scope of such statute and which did not comply with its terms, could not be enforced as against the United States.⁵ This statute does not prevent reformation of a written contract which by mis-

by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the returns office of the department of the interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. R. S. of U. S., § 3744; Act of June 2, 1862, c. 93, § 1, 12 Stats. at L. 411; Comp. Stats., § 6895.

Ordinance contracts: Hereafter, whenever contracts which are not to be performed within sixty days are made on behalf of the government by

the chief of ordnance, or by officers under him authorized to make them, and are in excess of five hundred dollars in amount, such contracts shall be reduced to writing and signed by the contracting parties with their names at the end thereof. In all other cases contracts shall be prepared under such regulations as may be prescribed by the chief of ordnance. 36 Stats. at L., c. 115, p. 261; Act of March, 23, 1910.

² *Salomon v. United States*, 86 U. S. (19 Wall.) 17, 22 L. ed. 46; *United States v. Andrews*, 207 U. S. 229, 52 L. ed. 185; *United States v. New York & Porto Rico S. S. Co.*, 239 U. S. 88, 60 L. ed. 161 [reversing judgment, *United States v. New York & Porto Rico S. S. Co.*, 209 Fed. 1007, 126 C. C. A. 668].

³ *South Boston Iron Co. v. United States*, 118 U. S. 37, 30 L. ed. 69.

⁴ See dissenting opinion in *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518.

⁵ *South Boston Iron Co. v. United States*, 118 U. S. 37, 30 L. ed. 69; *Monroe v. United States*, 184 U. S. 524, 46 L. ed. 670; *St. Louis Hay, etc., Co. v.*

take does not express the written contract between the parties.⁶ It seems to be assumed that an oral contract for the return of prisoners of war to their native country is valid.⁷

If an advertisement has been made in compliance with the provisions of R. S. U. S., § 3709, and the bid made by the lowest bidder has been accepted, a contract exists between the United States and such lowest bidder, although the formal written contract which is prepared and signed by the lowest bidder, is not signed by the United States.⁸ If it is contended that such contract is made up of correspondence between the contractor and the United States, such correspondence must show all the terms of a complete contract.⁹ Correspondence which shows an agreement to construct certain articles in accordance with specifications to be furnished thereafter, does not show a contract within the meaning of this statute.¹⁰

The statutory provisions which require certain contracts to be in writing, do not prevent oral waivers or extensions of time on the part of the United States by duly authorized officers or agents.¹¹ Section 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, does not prevent the operation of a warranty which is implied by law.¹² Accordingly, a written contract for the construction of a dry-dock which requires the contractor to divert a certain sewer in accordance with certain specifications, is subject to an implied warranty that such sewer, when diverted in accordance with the specifications, will be adequate.¹³ Such statutes do not apply to military contracts entered into in emergencies.¹⁴

United States, 191 U. S. 159, 48 L. ed. 130; *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *Camp v. United States*, 113 U. S. 648, 28 L. ed. 1081; *United States v. Andrews*, 207 U. S. 229, 52 L. ed. 185.

⁶ *Ackerlind v. United States*, 240 U. S. 531, 60 L. ed. 783; *United States v. Milliken Imprinting Co.*, 202 U. S. 168, 50 L. ed. 980.

⁷ *Ceballos v. United States*, 42 Ct. Cl. 318 [reversed on other grounds, *Ceballos v. United States*, 214 U. S. 47, 53 L. ed. 904].

⁸ *United States v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. ed. — [citing, *Garfield v. United States*, 93 U. S. 242, 23 L. ed. 779].

⁹ *South Boston Iron Co. v. United States*, 118 U. S. 37, 30 L. ed. 69.

¹⁰ *South Boston Iron Co. v. United States*, 118 U. S. 37, 30 L. ed. 69.

¹¹ *Salomon v. United States*, 86 U. S. (19 Wall.) 17, 22 L. ed. 46; *Maryland Steel Co. v. United States*, 235 U. S. 451, 59 L. ed. 312.

¹² *United States v. Spearin*, 248 U. S. 132, 63 L. ed. —. United States Supreme Court Advance Opinions, 1918-19, p. 36.

¹³ *United States v. Spearin*, 248 U. S. 132, 63 L. ed. —. United States Supreme Court Advance Opinions, 1918-19, p. 36.

¹⁴ *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449; *Stevens*

If a contractor has performed his contract in whole or in part, he may recover at least reasonable compensation for the value of his performance, although such contract was not entered into in compliance with the requirements of the statutes.¹⁵ In the absence of evidence, the price fixed in the unpaid voucher may be assumed to be a reasonable price.¹⁶

These statutes have been referred to as statutes for the prevention of frauds and perjuries.¹⁷ They have no application to a contract which has been performed fully upon both sides,¹⁸ and in this respect they resemble the Statute of Frauds. If goods are sold and delivered to the United States and are paid for by the United States under an oral contract, the seller can not thereafter maintain an action to recover reasonable compensation for such goods less the price which he has paid therefor.¹⁹ In some respects they are treated as of a different type from the ordinary Statute of Frauds. They are held not to apply to an oral contract for the sale of goods to the United States which has been performed by the delivery of the goods, even though the United States has not paid therefor,²⁰ and though the statute does not contain any specific exception in favor of contracts which have been performed to such extent. The seller may maintain an action in the court of claims to recover the contract price.²¹ It has finally been held that this statute is enacted for the protection of the United States and to prevent fraud on the part of its officers who are entrusted with making contracts, and it is not intended as a Statute of Frauds to prevent fraud and perjury, to protect both of the parties thereto, and to render the contract unenforceable unless it is executed in compliance with the statute.²² Accordingly, the United States may enforce such a contract against the adversary party, although the

v. United States, 2 Ct. Cl. 95; Cobb v. United States, 9 Ct. Cl. 291; Ceballos v. United States, 42 Ct. Cl. 318 [reversed on other grounds, Ceballos v. United States, 214 U. S. 47, 53 L. ed. 904].

¹⁵ Salomon v. United States, 86 U. S. (19 Wall.) 17, 22 L. ed. 46.

¹⁶ Salomon v. United States, 86 U. S. (19 Wall.) 17, 22 L. ed. 46.

¹⁷ Clark v. United States, 95 U. S. 539, 24 L. ed. 518.

¹⁸ St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 48 L. ed.

130; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185.

¹⁹ St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 48 L. ed. 130.

²⁰ United States v. Andrews, 207 U. S. 229, 52 L. ed. 185.

²¹ United States v. Andrews, 207 U. S. 229, 52 L. ed. 185.

²² United States v. New York & Porto Rico S. S. Co., 239 U. S. 88, 60 L. ed. 161 [reversing, United States v. New York & Porto Rico S. S. Co., 209 Fed. 1007, 126 C. C. A. 668].

contract has not been executed by the officers of the United States in compliance with the statutory requirements.²³

The fact that informal contracts were entered into for supplying ammunition, weapons, and the like, to the United States for prosecuting the war with Germany, and that many of these contracts were not reduced to writing for lack of time, resulted in legislation for adjusting losses on a fair and equitable basis when such orders were countermanded by the United States because of the armistice.²⁴

²³ *United States v. New York & Porto Rico S. S. Co.*, 239 U. S. 88, 60 L. ed. 161 [reversing, *United States v. New York & Porto Rico S. S. Co.*, 209 Fed. 1007, 126 C. C. A. 668].

²⁴ Section 1. That the secretary of war, be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the president, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: Provided, that in no case shall any award either by the secretary of war, or the court of claims include prospec-

tive or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: Provided further, that this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen: And provided further, that the secretary of war shall report to congress at the beginning of its next session following, June thirtieth, nineteen hundred and nineteen, a detailed statement showing the nature, terms, and conditions of every such agreement and the payment or adjustment thereof: And provided further, that no settlement of any claim arising under any such agreement shall bar the United States government through any of its duly authorized agencies, or any committee of congress hereafter duly appointed, from the right of review of such settlement, nor the right of recovery of any money paid by the government to any party under any settlement entered into, or payment made under the provisions of this act, if the government has been defrauded, and the right of recovery in all such cases shall exist against the executors, administrators, heirs, successors, and assigns, of any party or parties: And provided further,

Unless the approval of some specified officer is made a condition precedent, a contract which is made on behalf of the United States by a duly authorized officer or agent, is binding without further approval.²⁵ If the approval of a specified officer is made a condition precedent to the validity of a contract, the contract is unenforceable unless such approval is obtained.²⁶ If the statute requires the approval of a certain officer, such approval may be shown by a letter written by such officer, expressing satisfaction at the progress made in the performance of such contract.²⁷

§ 1848. Construction. The ordinary principles of construction that apply to contracts generally,¹ apply to contracts of the United States,² except as far as these principles are modified by statute or by the known usages of various departments. A reference in a written contract to another writing for a particular pur-

that nothing in this act shall be construed to relieve any officer or agent of the United States from criminal prosecution under the provisions of any statute of the United States for any fraud or criminal conduct: And provided further, that this act shall in no way relieve or excuse any officer or his agent from such criminal prosecution because of any irregularity, or illegality, in the manner of the execution of such agreement: And provided further, that in all proceedings hereunder witnesses may be compelled to attend, appear, and testify, and produce books, papers and letters, or other documents; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding.

Section 2. That the court of claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in

said section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the secretary of war as hereinbefore provided, or in the event that the secretary of war shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said section. Act of March 2, 1919.

²⁵ *Tenny v. United States*, 10 Ct. Cl. 269.

²⁶ *Monroe v. United States*, 184 U. S. 524, 46 L. ed. 670 [affirming, *Monroe v. United States*, 35 Ct. Cl. 199].

²⁷ *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449.

¹ See ch. LXIII.

² *Union Pacific Ry. v. United States*, 117 U. S. 353, 29 L. ed. 920; *Simpson v. United States*, 199 U. S. 397, 50 L. ed. 245; *United States v. Andrews*, 207 U. S. 229, 52 L. ed. 185; *Ceballos v. United States*, 214 U. S. 47, 53 L. ed. 904; *Hollerbach v. United States*, 233 U. S. 165, 58 L. ed. 898; *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 60 L. ed. 636; *Maryland Dredging & Contracting Co. v. United States*, 241 U. S. 184, 60 L. ed. 945 [affirming,

pose makes it a part of the contract only for that purpose.³ If a contract is ambiguous, the practical construction placed upon it by the engineer in charge is of great weight,⁴ especially if such engineer drew the contract.⁵

The necessity of advertising for bids and for drawing the contract in accordance with the terms of such advertisement,⁶ may prevent such contract from merging prior negotiations.⁷ If advertisement is made necessary by statute,⁸ the advertisement can not be regarded as merged, for all purposes, in the subsequent contract;⁹ and, under such statute, the contract may be invalid if it does not conform to the advertisement.¹⁰

The general rules applicable to penalties and liquidated damages,¹¹ apply to contracts of the United States.¹² If a number of bids are submitted for the same article and a higher price is asked for a shorter time of delivery, time is of the essence of the contract;¹³ and a provision for deducting thirty-five dollars for each day's delay is a provision for liquidated damages, and not a penalty.¹⁴ Under a contract for excavating a channel, a provision for the payment of twenty dollars a day as liquidated damages in case of delay, is a valid provision and not a penalty.¹⁵ The cor-

Maryland Dredging & Contracting Co. v. United States, 49 Ct. Cl. 710]. Construction of provision for secrecy in manufacture of torpedoes. United States v. E. W. Bliss Co., 229 Fed. 376, 143 C. C. A. 496 [granting rehearing, United States v. E. W. Bliss Co., 224 Fed. 325, 139 C. C. A. 633; and affirmed in E. W. Bliss Co. v. United States, 248 U. S. 37, 63 L. ed. —; United States Advance Opinions, 1918-1919, p. 61].

³ Guerini Stone Co. v. Carlin Construction Co., 240 U. S. 264, 60 L. ed. 636.

⁴ White v. United States, 241 U. S. 149, 60 L. ed. 929 [reversing judgment, White v. United States, 48 Ct. Cl. 169].

⁵ White v. United States, 241 U. S. 149, 60 L. ed. 929 [reversing judgment, White v. United States, 48 Ct. Cl. 169].

⁶ See § 1846.

⁷ See ch. LXIX.

⁸ See § 1846.

⁹ United States v. Ellicott, 223 U. S. 524, 56 L. ed. 535.

¹⁰ United States v. Ellicott, 223 U. S. 524, 56 L. ed. 535.

¹¹ See ch. LXVIII.

¹² United States v. Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731 [reversing, Bethlehem Steel Co. v. United States, 41 Ct. Cl. 19]; Maryland Dredging & Contracting Co. v. United States, 241 U. S. 184, 60 L. ed. 945 [affirming, Maryland Dredging & Contracting Co. v. United States, 49 Ct. Cl. 710].

¹³ United States v. Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731 [reversing, Bethlehem Steel Co. v. United States, 41 Ct. Cl. 19].

¹⁴ United States v. Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731 [reversing, Bethlehem Steel Co. v. United States, 41 Ct. Cl. 19]. (Contract for gun carriages for the Spanish-American War.)

¹⁵ Maryland Dredging & Contracting Co. v. United States, 241 U. S. 184, 60

respondence of the parties may be considered for the purpose of determining whether a provision is for liquidated damages or for a penalty, although the contract is subsequently reduced to writing and executed by the parties.¹⁶

The ordinary rules which determine whether time is of the essence of the contract,¹⁷ apply to contracts of the United States.¹⁸ If time is of the essence of a contract for munitions or similar supplies, because of the existence of war, the fact that peace is declared before the time for performance arrives, does not prevent time from being of the essence of the contract.¹⁹

§ 1849. Assignment. At modern law contracts which are not personal in their character, may be assigned in the absence of specific statutory provisions against assignment, and in the absence of specific covenants in such contracts against assignment.¹ The statutes of the United States provide specifically that one who has entered into a contract with the United States can not assign his interest in such contract. This subject is considered in connection with the general subject of the scope and effect of statutes which restrict or forbid the power of assigning contracts.² In this connection it may be said that this statute is solely for the protection of the government, and if the government sees fit to recognize the assignment, the assignor can not be heard to claim that it has no legal effect.³

§ 1850. Contractor's bonds. By specific statutory provision a bond of a contractor who has entered into a contract with the United States Government, is needed to protect not only the United States, but also subcontractors, materialmen, and the like. This topic is discussed subsequently in connection with the effect of bonds which are controlled by special statute.⁴

L. ed. 945 [affirming, *Maryland Dredging & Contracting Co. v. United States*, 49 Ct. Cl. 710].

¹⁶ *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. ed. 731 [reversing, *Bethlehem Steel Co. v. United States*, 41 Ct. Cl. 19].

¹⁷ See ch. LXVII.

¹⁸ *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. ed. 731 [reversing, *Bethlehem Steel Co. v. United States*, 41 Ct. Cl. 19].

¹⁹ *United States v. Bethlehem Steel*

Co., 205 U. S. 105, 51 L. ed. 731 [reversing, *Bethlehem Steel Co. v. United States*, 41 Ct. Cl. 19].

¹ See §§ 2243 et seq.

² See § 2260.

³ *Dulaney v. Scudder*, 94 Fed. 6, 36 C. A. 52; *Lopez v. United States*, 24 Ct. Cl. 84, 2 L. R. A. 571; *Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940; *Lay v. Lay*, 248 U. S. 24, 63 L. ed. —; *Thayer v. Prassey*, 175 Mass. 225, 56 N. E. 5.

⁴ See § 2407.

§ 1851. Priority as creditor. The United States has no priority in payment of debts due to it from its creditors by reason of its sovereignty.¹ Its right to priority is purely a matter of statute, and in the absence of a statute which confers priority under the circumstances of the particular case, no right of priority exists.² The United States has by statute provided for priority of its debts in certain specified cases.³ This statute secures priority to the United States in all cases covered thereby.⁴ It does not apply to insolvency of the debtor in general, but only to the cases enumerated in the statute in which the property of the debtor has been taken for the purpose of paying his debts generally.⁵ This statute does not give a lien to the United States upon the property of its debtors.⁶ It is not intended to destroy the validity of prior partial assignments,⁷ or liens.⁸ The United States has no priority over a prior attachment of the property of a debtor who did not abscond,⁹ since such attachment was not a divesting of the debtor's property for the purpose of general distribution among his creditors.¹⁰ Accordingly, the surety of a non-resident contractor does not

¹ *People's National Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917.

² *United States v. Heaton*, 128 Fed. 414, 63 C. C. A. 156; *In re Devlin*, 180 Fed. 170; *The Florida*, 212 Fed. 334; *People's National Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917.

³ *Hegness v. Chilberg*, 224 Fed. 28. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. R. S. of U. S.,

§ 3466; Act of March 3, 1797, c. 20, § 5, 1 Stats. at L. 515; Act of March 2, 1799, c. 22, § 65, 1 Stats. at L. 676; Comp. Stats. 1916, § 6372.

⁴ *United States v. Fisher*, 6 U. S. (2 Cranch.) 358, 2 L. ed. 304.

⁵ *Conard v. Atlantic Life Ins. Co.*, 26 U. S. (1 Pet.) 386, 7 L. ed. 189; *Beaston v. Farmers' Bank*, 37 U. S. (12 Pet.) 102, 9 L. ed. 1017; *Bartlet v. Prince*, 9 Mass. 431.

⁶ *Beaston v. Farmers' Bank*, 37 U. S. (12 Pet.) 102, 37 L. ed. 1017; *People's National Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917.

⁷ *Conard v. Atlantic Insurance Co.*, 26 U. S. (1 Pet.) 386, 7 L. ed. 189.

⁸ *United States v. Hack*, 33 U. S. (3 Pet.) 271, 8 L. ed. 941; *Brent v. Washington Bank*, 35 U. S. (10 Pet.) 596, 9 L. ed. 547.

⁹ *People's National Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917.

¹⁰ *People's National Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917.

obtain priority over such prior attachment by subrogation.¹¹ This statute does not apply to a partial assignment of specific property of the debtor for the purpose of satisfying a specific claim or demand,¹² but it applies to what is substantially a total assignment of his property for the benefit of his creditors,¹³ even if such assignment is made by a series of separate transfers.¹⁴ The right of the United States to priority under such a statute can not be defeated by a state statute which provides a different order of priority,¹⁵ as by a statute which provides for priority in order of record.¹⁶ Since the national banking act contains in itself complete provision for the distribution of the assets of the bank in case of insolvency or bankruptcy, the general statutory provisions which give priority to the United States, do not apply to proceedings to distribute the assets of an insolvent national bank.¹⁷

§ 1852. Extension of time and new contracts. A contractor is not entitled to an extension of time because of the delay of the government in approving his contract if such delay is due to his failure to furnish satisfactory sureties upon his bond,¹ as where the surety companies fail to file a copy of the vote of its directors, giving authority to the attorney in fact to sign the surety bond.² If an engineer is given discretion as to extending the time for performance, the United States is not liable for damages because of his refusal to give an extension of time,³ at least if he is acting in good faith.⁴ A provision for an extension of time in case of unavoidable causes, such as fires, storms, labor strikes, the action of the United States, etc., does not include delay due to the fact that the process is a new and difficult one, and that the contractor is for that reason unable to perform within the time limited.⁵ Under a provision for an extension of time, if recommended by the

¹¹ *People's National Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917.

¹² *United States v. Howland*, 17 U. S. (4 Wheat.) 108, 4 L. ed. 526; *Bouchaud v. Dias*, 1 N. Y. 201.

¹³ *Downing v. Kimtzing*, 2 Serg. & R. (Pa.) 326.

¹⁴ *United States v. United States Bank*, 8 Rob. (La.) 262.

¹⁵ *Field v. United States*, 34 U. S. (9 Pet.) 182, 9 L. ed. 94.

¹⁶ *United States v. Wm. R. Trigg Co.*, 115 Va. 272, 78 S. E. 542.

¹⁷ *Cook County National Bank v. United States*, 107 U. S. 445, 27 L. ed. 537.

¹ *Hathaway v. United States*, 249 U. S. 460, 63 L. ed. —.

² *Hathaway v. United States*, 249 U. S. 460, 63 L. ed. —.

³ *Toomey v. United States*, 49 Ct. Cl. 172.

⁴ *Toomey v. United States*, 49 Ct. Cl. 172.

⁵ *Carnegie Steel Co. v. United States*, 240 U. S. 156, 60 L. ed. 576.

engineer in charge, with the sanction of the chief engineer, the contractor is not entitled to an extension of time on the recommendation of the engineer in charge, if the chief engineer refuses to sanction it.⁶ A provision in a contract fixing the time for performance which by its terms is to be considered sufficient unless extraordinary and unforeseeable conditions supervene, refers to conditions that arise subsequently and not to conditions which existed when the contract was made but which were not then known.⁷ The fact that a submerged forest is discovered after the work is begun, does not amount to an extraordinary and unforeseeable supervening condition.⁸ If a contract provides that in case of an extension of time, expenses for inspection and superintendence should be deducted, and an extension is granted at the request of the contractor, with the warning that the contractor is to be liable for such expenses, such expenses must be deducted from the contract price.⁹

The rules dealing with modification by mutual consent, applicable to ordinary contracts,¹⁰ apply to contracts of the United States.¹¹ Entering into a new contract operates as a waiver of damages for breach of the original contract.¹² An adjustment of mutual claims arising out of a contract is binding on both the government and the contractor in the absence of fraud and the like.¹³

§ 1853. Impossibility. The ordinary rules of impossibility of performance¹ apply to contracts of the United States.² Difficulty

⁶ Maryland Dredging & Contracting Co. v. United States, 241 U. S. 184, 60 L. ed. 945 [affirming, Maryland Dredging & Contracting Co. v. United States, 49 Ct. Cl. 710].

⁷ Maryland Dredging & Contracting Co. v. United States, 241 U. S. 184, 60 L. ed. 945 [affirming Maryland Dredging & Contracting Co. v. United States, 49 Ct. Cl. 710].

⁸ Maryland Dredging & Contracting Co. v. United States, 241 U. S. 184, 60 L. ed. 945 [affirming, Maryland Dredging & Contracting Co. v. United States, 49 Ct. Cl. 710].

⁹ United States v. Normile, 239 U. S.

344, 60 L. ed. 319 [reversing judgment, Normile v. United States, 49 Ct. Cl. 73].

¹⁰ See ch. LXXV.

¹¹ Noel Construction Co. v. United States, 50 Ct. Cl. 98.

¹² Badger Manufacturing Co. v. United States, 49 Ct. Cl. 538.

¹³ United States v. Corliss Steam Engine Co., 91 U. S. 321, 23 L. ed. 397.

¹ See ch. LXXVIII.

² Carnegie Steel Co. v. United States, 240 U. S. 156, 60 L. ed. 576 [affirming, Carnegie Steel Co. v. United States, 49 Ct. Cl. 403]; Toomey v. United States, 49 Ct. Cl. 172.

or expense in performance is not impossibility.³ The fact that the cost of performance is unexpectedly increased by the outbreak of war, does not entitle the contractor to recover such additional cost, as an extra, if there was no breach of contract on the part of the United States contributing to such additional expense.⁴

The special conditions arising out of the war between the United States and Germany resulted in legislation providing for increased compensation in case of increased cost of labor and materials, or other unforeseen conditions.⁵

§ 1854. Performance and breach. The rules of performance and of other types of discharge, which apply to contracts in general, apply to contracts of the United States. The rules concerning express conditions,¹ and breach,² which apply to ordinary contracts, apply to contracts entered into by the United States Government.

³ *Carnegie Steel Co. v. United States*, 240 U. S. 156, 60 L. ed. 576 [affirming, *Carnegie Steel Co. v. United States*, 49 Ct. Cl. 403].

⁴ *United States v. Normile*, 239 U. S. 344, 60 L. ed. 319 [reversing judgment, *Normile v. United States*, 49 Ct. Cl. 73].

⁵ That the secretary of war is hereby authorized to ascertain whether any of the contracts for work on river and harbor improvements entered into but not completed prior to April 16, 1917, the date of the entrance of the United States into war with Germany, have become inequitable and unjust on account of increased cost of materials, labor, and other unforeseen conditions arising out of the war; and to ascertain and report what amounts, if any, in addition to those fixed by the terms of said contracts, should in justice and equity be paid to contractors, for work performed between April 6, 1917, and July 18, 1918, and the date of the approval of an act entitled, "An act making appropriations for the construction, repair, and preservation of certain

public works on rivers and harbors, and for other purposes," on account of the increased cost of labor and materials and other unforeseen conditions arising out of the war during that period: Provided, that in every case the amount so ascertained shall not exceed the actual loss sustained by the contractor in performing the work between the said dates: Provided further, that when such amount shall have been ascertained, the secretary of war shall transmit to congress for consideration a statement or statements of all findings or determinations rendered by authority of this section, the amounts thereof, the names of contractors, and date of contracts. Act of March 2, 1919, § 10.

¹ *Shippey v. United States*, 49 Ct. Cl. 151; *Toomey v. United States*, 49 Ct. Cl. 172.

² *Ripley v. United States*, 223 U. S. 695, 56 L. ed. 614; *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 60 L. ed. 636; *Crocker v. United States*, 49 Ct. Cl. 85.

A letter from a government engineer laying down a general program of work, and fixing the probable quantities in excess of those fixed approximately by the original contract, is not a modification of such contract.³

A contractor is justified in relying upon positive representations in specifications as to the character of material to be excavated,⁴ or as to the existing condition of work which he is undertaking to finish.⁵ A contract to furnish eight hundred and eighty cords of wood, more or less, which is determined to be necessary by a post commander, does not give the contractor a right of action against the government if the post commander notifies the contractor a few days after such contract that he will need but forty cords.⁶ Under a contract by which the United States agrees to pay royalties for the use of an alleged patent right, but that the payment of such royalties should cease in case that at any time it was decided judicially that the company was not legally entitled to such patent, the United States can not set up the invalidity of such patent in an action by the contractor to recover such royalties.⁷ Under a clause in a contract giving to the United States the right to take possession of buildings, implements and materials belonging to the contractor, in case the United States elects to exercise its option to end the contract, the United States has no right to take possession of a plant and equipment belonging to another person.⁸ A change in the method of inspecting goods delivered under the contract, does not amount to a breach thereof.⁹ A repudiation of a contract by the United States before the time of performance is ended, gives to the contractor a right to bring an immediate action against the United States.¹⁰ If the United States repudiates a contract by which the contractor is to manufacture and deliver certain articles to the United States at a certain price, the measure of damages is

³ *Smoot v. United States*, 237 U. S. 38, 59 L. ed. 829 [affirming judgment, *Smoot v. United States*, 48 Ct. Cl. 427].

⁴ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁵ *Hollerbach v. United States*, 233 U. S. 165, 58 L. ed. 898.

⁶ *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622.

⁷ *United States v. Harvey Steel Co.*, 196 U. S. 310, 49 L. ed. 492.

⁸ *Ball Engineering Co. v. White* (U. S.), 63 L. ed. —. *United States Supreme Court Advance Opinions*, 1918-19, p. 509.

⁹ *United States v. Wormer*, 80 U. S. (13 Wall.) 25, 20 L. ed. 530; *United States v. Smoot*, 82 U. S. (15 Wall.) 36, 21 L. ed. 107.

¹⁰ *United States v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. ed. —.

the difference between the contract price and the cost of production.¹¹ If a contract with the United States Government contains a provision to the effect that the contractor will not exhibit any device the design for which is furnished to it by the United States, or give information with regard thereto to any person or to any other government or its representative, the United States may enjoin the contractor from exhibiting such design.¹²

§ 1855. Extras. If the specifications misrepresent the character of the material to be excavated, the contractor is entitled to extra compensation for the actual amount expended by him in making excavation in excess of the amount which would have been necessary if the boring sheets had been correct.¹ A provision in a contract to the effect that the "limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose," leaves the determination of the proper angle of repose to the judgment of the engineer.² If such judgment is exercised honestly, the United States is not liable,³ although as it turned out a different angle would have reduced the cost of the work under the unprecedented flood conditions under which the work was in fact performed.⁴ If a contractor has failed to furnish material in accordance with the terms of the contract, and he is obliged to construct an additional plant in order to provide material in time for the due performance of the contract, he can not recover the cost of such additional plant as an extra.⁵ If a contract provides that coffer-dams are to be constructed at the expense of the contractors,

¹¹ *United States v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. ed. — [citing, *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953; *United States v. Speed*, 75 U. S. (8 Wall.) 77, 19 L. ed. 449; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168; and *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. ed. 967].

¹² *E. W. Bliss Co. v. United States*, 248 U. S. 37, 63 L. ed. —. *United States Supreme Court Advance Opinions*, 1918-19, p. 61. (Involving a balanced turbine torpedo.)

¹ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment,

Christie v. United States, 48 Ct. Cl. 293].

² *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

³ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁴ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁵ *Smoot v. United States*, 237 U. S. 38, 59 L. ed. 829 [affirming judgment, *Smoot v. United States*, 48 Ct. Cl. 427].

they can not claim the cost of such construction under a clause which provides for allowance for extra work.⁶ If a contract provides for the location of a permanent dam by the engineer of the United States, but does not authorize him to locate temporary dams, the United States is not liable to a contractor for damages caused by his constructing a dam at a place which is suggested by the local engineer of the United States at the request of the contractor.⁷ If the resident engineer has promised to make an extra allowance for the cost of coffer-dams, but revokes such promise before the coffer-dams are constructed, no recovery can be had for extras in reliance upon such promise.⁸ If concrete forms are recovered by the contractor voluntarily, so that he can use them again, the cost of recovering them can not be regarded as an extra.⁹ If an engineer decides upon the material to be used by the contractor in the performance of his contract, and he subsequently changes his mind and orders him to use material of greater strength, the United States is liable for damages due to such change.¹⁰

Under a statute which requires all contracts for extras to be in writing and to be approved by a certain officer, no recovery for extras can be had unless a contract therefor has been made in accordance with such statute.¹¹

§ 1856. Provision for decision of architect, engineer, etc. As in other classes of contracts, a provision which requires the certificate of an architect, engineer, or other agent of the United States, showing due performance of the contract, as a condition precedent to recovery,¹ or which provides for submitting other questions of performance,² such as the question of an extension of

⁶ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁷ *United States v. Normile*, 239 U. S. 344, 60 L. ed. 319 [reversing judgment, *Normile v. United States*, 49 Ct. Cl. 73].

⁸ *Christie v. United States*, 237 U. S. 234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

⁹ *Christie v. United States*, 237 U. S.

234, 59 L. ed. 933 [reversing judgment, *Christie v. United States*, 48 Ct. Cl. 293].

¹⁰ *Toomey v. United States*, 49 Ct. Cl. 172.

¹¹ *Churchyard v. United States*, 100 Fed. 920.

¹ *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053; *Shippey v. United States*, 49 Ct. Cl. 151; *Toomey v. United States*, 49 Ct. Cl. 172.

² *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284.

time,³ to his determination, is valid. The decision of such officer is final in the absence of fraud or gross mistake.⁴ In case of bad faith or gross mistake the decision of the architect, engineer, and the like, is not final.⁵ In the absence of a provision in the contract requiring the contractor to appeal to the engineer in charge, or to the chief engineer, such appeal is not necessary.⁶ The architect or engineer can not exercise his discretion in advance;⁷ and he can not approve a general type of material before any specific material has been furnished, so as to preclude other authorized government officials from rejecting such type of material on due notice.⁸

A clause in a contract which provides that the engineer shall have power to annul the contract, does not make his decision, that the contractor is not performing the contract properly, final and conclusive between the parties.⁹ If under such contract the engineer annuls the contract in spite of the fact that the contractor is performing the contract properly on his part, the United States can not recover from the contractor the difference between the original contract price and the cost of completing the performance of the contract.¹⁰

§ 1857. Enforcement of contract against United States. The chief peculiarity of the enforcement of United States contracts is the practical difficulty in enforcing them against the government. From the very nature of a government, having no political superior, enforcing payment of its debts is war, actual or threatened. Permission to sue may be given by the state, either by general or by special statutes. The United States has established the Court of Claims and thus has given permission to be sued therein on contracts;¹ and it has, by other statutes, conferred upon district courts jurisdiction in actions against the United States concurrent with the Court of Claims.² The United States has not, however,

³ *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284.

⁴ *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053; *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284.

⁵ *Ripley v. United States*, 223 U. S. 695, 56 L. ed. 614.

⁶ *Ripley v. United States*, 223 U. S. 695, 56 L. ed. 614.

⁷ *United States v. Barlow*, 184 U. S. 123, 46 L. ed. 463.

⁸ *United States v. Barlow*, 184 U. S. 123, 46 L. ed. 463.

⁹ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481 [affirming, *United States v. O'Brien*, 163 Fed. 1022].

¹⁰ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481 [affirming, *United States v. O'Brien*, 163 Fed. 1022].

¹ See Court of Claims cases in this chapter.

² *United States v. Jones*, 131 U. S. 1, 33 L. ed. 90.

conferred jurisdiction upon state courts to hear and determine actions against the United States.³ The legislative department may also provide directly for enforcing contracts. An appropriation made by Congress for paying a claim is final.⁴ Even where jurisdiction to hear and determine claims against the United States has been conferred on courts, specific performance can not be decreed against the United States.⁵

§ 1858. Conditions imposed on actions against United States. The United States, in giving permission to be sued, may impose such conditions as it sees fit. In consenting to be sued, it may restrict the compensation of attorneys,¹ or provide against any compensation,² or it may require claims to be paid direct to claimants and not to attorneys.³ It may provide for priority of payment of its own debts,⁴ and may set off damages for delay against the compensation which is fixed by the contract.⁵

§ 1859. Jurisdiction in contract. The United States is liable for interfering with the work of a contractor,¹ or for arbitrary and unreasonable conduct of its engineers,² but not for damages for a delay not due to the United States.³ The provisions in the statutes which authorize suits against the United States for money judgments and decrees indicate that the only relief which can be obtained is a money judgment or decree; and the United States can not be compelled in a suit for specific performance to issue and

³ Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960.

⁴ United States v. Louisville, 169 U. S. 249, 42 L. ed. 735. Where New York borrowed from her canal fund to raise troops, a United States statute to repay the "costs, charges and expenses properly incurred" includes such loan and interest paid thereon. United States v. New York, 160 U. S. 598, 40 L. ed. 551.

⁵ United States v. Jones, 131 U. S. 1, 33 L. ed. 90.

¹ Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622.

² A statute that no part of money repaid to a state in refunding direct

taxes shall go to an attorney binds the state and the agent or attorney of the state. Wailes v. Smith, 157 U. S. 271, 39 L. ed. 698.

³ Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780.

⁴ State v. Foster, 5 Wyom. 199, 29 L. R. A. 226, 38 Pac. 926.

⁵ Satterlee v. United States, 30 Ct. Cl. 31.

¹ Kelly v. United States, 31 Ct. Cl. 361.

² Collins v. United States, 35 Ct. Cl. 122.

³ United States v. Bliss, 172 U. S. 321, 43 L. ed. 463; Churchyard v. United States, 100 Fed. 920.

deliver a patent for public land.⁴ The United States may be liable on an implied contract for office rent,⁵ or for use and occupation.⁶

§ 1860. Jurisdiction in quasi-contract other than waiver of tort. The Court of Claims can also entertain actions against the United States in quasi-contracts, such as actions to recover payments illegally exacted by duress or compulsion of law.¹ The statute creating the Court of Claims does not, however, change the nature of the liability of the United States. Payments made voluntarily can not be recovered in this court.² No recovery can be had, on the theory of implied contract, for fees voluntarily overpaid in by a consul-general;³ nor for attorneys' fees where the suit was brought in the name of the United States, but the attorneys looked to their clients for their fees.⁴ If the United States takes private property,⁵ such as land,⁶ not under a claim of ownership, the owner of such property may maintain an action against the United States in the Court of Claims upon such an implied contract.

§ 1861. Jurisdiction in quasi-contract—Waiver of tort. The statute which confers jurisdiction upon the United States courts, such as the Court of Claims, to hear and determine cases upon any contract, express or implied, with the government of the United States, does not confer upon such court jurisdiction of cases arising out of tort in which the injured party has elected to waive the tort and to sue in quasi-contract.¹ If the United States takes possession of realty without the consent of the owner, the owner's

⁴ United States v. Jones, 131 U. S. 1, 33 L. ed. 90.

⁵ Swigett v. United States, 78 Fed. 456.

⁶ Clifford v. United States, 34 Ct. Cl. 223.

¹ United States v. Lawson, 101 U. S. 164, 25 L. ed. 860; United States v. Ellsworth, 101 U. S. 170, 25 L. ed. 862; Swift Company v. United States, 111 U. S. 22, 28 L. ed. 341.

² United States v. Wilson, 168 U. S. 273, 42 L. ed. 464; United States v. Edmonston, 181 U. S. 500, 45 L. ed. 971.

³ United States v. Wilson, 168 U. S. 273, 42 L. ed. 464.

⁴ Coleman v. United States, 152 U. S. 96, 38 L. ed. 368.

⁵ United States v. Russell, 80 U. S. (13 Wall.) 623, 20 L. ed. 474.

⁶ United States v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. ed. 846.

See also, Great Falls Mfg. Co. v. Attorney-General, 124 U. S. 581, 31 L. ed. 527; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539.

¹ Hill v. United States, 149 U. S. 593, 37 L. ed. 862; Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108; United States v. Berdan Fire-Arms Mfg. Co., 156 U. S. 552, 39 L. ed. 530; Russell v. United States, 182 U. S. 516, 45 L. ed.

claim against the United States is in tort and not in quasi-contract.² If the United States takes possession of land under a claim of ownership, the owner can not waive such tort and sue in contract in the courts of the United States.³ If the United States has taken possession of A's plant and equipment, claiming the right to do so under a contract between the United States and B, under which the United States might take possession of B's plant and equipment on electing to terminate its contract with B, A's claim against the United States is in tort and not in quasi-contract.⁴ Under the theory of implied contract the United States could not be held for infringement of a patent in the absence of specific statutory provisions.⁵ By the Act of June 25, 1910,⁶ an action may be

1210; *Harley v. United States*, 198 U. S. 220, 49 L. ed. 1029; *Tempel v. United States*, 248 U. S. 121, 63 L. ed. — [following, *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862; distinguishing, *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, and *United States v. Cress*, 243 U. S. 316, 61 L. ed. 746].

² *Tempel v. United States*, 248 U. S. 121, 63 L. ed. — [citing, *Bigby v. United States*, 188 U. S. 400, 47 L. ed. 519; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539; *J. Ribas y Hijo v. United States*, 194 U. S. 315, 48 L. ed. 994].

³ *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862.

This principle applies where the United States has dredged land, claiming that it is the bed of a navigable stream. *Tempel v. United States*, 248 U. S. 121, 63 L. ed. — [following, *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862; distinguishing, *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, and *United States v. Cress*, 243 U. S. 316, 61 L. ed. 746].

It applies where the United States has fired cannon across the land of an individual. *Portsmouth Harbor, Land & Hotel Co. v. United States* (U. S.), 63 L. ed. —. Advance Opinions, June 15, 1919, p. 526.

See also, *Peabody v. United States*, 231 U. S. 530, 58 L. ed. 351.

This principle applies where the United States takes possession of a contractor's plant, claiming a right to do so under the contract. *Ball Engineering Co. v. White* (U. S.), 63 L. ed. —. Advance Opinions, June 15, 1919, p. 509.

⁴ *Ball Engineering Co. v. White* (U. S.), 63 L. ed. —. United States Supreme Court Advance Opinions, 1918-19, p. 509.

⁵ *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108; *Russell v. United States*, 35 Ct. Cl. 154. No implied contract to pay for a patent arises where patentor introduces it into public service, and pattern, working drawings and machines were paid for by the government. *Gill v. United States*, 160 U. S. 426, 40 L. ed. 480. Though where the patent is used with the understanding that payment is to be made therefor, an implied contract exists. *United States v. Mfg. Co.*, 156 U. S. 552, 39 L. ed. 530; *Talbert v. United States*, 25 Ct. Cl. 141. A local postmaster can not be enjoined from using a patented machine furnished by the government as this is really an action against the United States. *International, etc., Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134. (Decided by a divided court.)

⁶ 36 Stats. at L. 851, c. 423.

brought against the United States for infringement of a patent.⁷ The United States can not be held liable for damage on an elevator in a postoffice building on the theory of implied contract.⁸ If the claim is not on contract the sole remedy is to appeal to Congress.⁹

§ 1862. Claim founded on act of Congress. Under the statute which confers jurisdiction upon the Court of Claims, an action may be brought upon a claim which is founded upon any law of Congress, even if such claim is quasi-contractual in character and does not arise out of any genuine contract, provided that such claim is founded upon a law of Congress.¹

§ 1863. Limitation of actions and presumption of payment. The rule of English law that the period of limitations was not a bar to an action by the king unless he was specifically named therein, applies to actions brought by the United States; and the ordinary periods of limitations do not operate as a bar to the United States, at least if the United States is not specifically named in such statutes.¹ Delay on the part of the United States, in bringing an action to recover the value of public property, sold for much less than its value, by a public officer for his private benefit, is not a bar to such action.² The rule that payment may be presumed from lapse of time applies in actions by the United States.³

II

STATES OF THE UNION

§ 1864. Contracts of a state of the Union—General principles. Each of the states of the Union is a government possessing general

⁷ Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771; United States v. Societe Anonyme de Anciens Etablissements Cail, 224 U. S. 309, 56 L. ed. 778.

⁸ Bigby v. United States, 103 Fed. 597.

⁹ German Bank v. United States, 148 U. S. 573, 37 L. ed. 564.

¹ United States v. Kaufman, 96 U. S. 587, 24 L. ed. 792; Campbell v. United States, 107 U. S. 407, 27 L. ed. 592; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074.

¹ Lindsey v. Miller, 31 U. S. (6 Pet.) 668, 8 L. ed. 538; Gibson v. Chouteau,

80 U. S. (13 Wall.) 92, 20 L. ed. 534; United States v. Thompson, 98 U. S. 486, 25 L. ed. 194; Steele v. United States, 113 U. S. 128, 28 L. ed. 952; United States v. Insley, 130 U. S. 263, 32 L. ed. 968; Chesapeake & Delaware Canal Co. v. United States, 223 Fed. 926, L. R. A. 1916B, 734; United States v. Minor, 235 Fed. 101, 148 C. C. A. 595.

² Steele v. United States, 113 U. S. 128, 28 L. ed. 952.

³ Chesapeake & Delaware Canal Co. v. United States, 223 Fed. 926, L. R. A. 1916B, 734.

and unlimited powers, except such as are expressly or impliedly denied to it by the Constitution of the United States. Within the sphere of its powers it may make such contracts as it wishes.¹ While a state is a sovereign and not a corporate entity, it acts as a corporate entity when it enters into contracts.²

The people may by the constitution forbid all contracts except those made in pursuance of some statute.³ A constitutional provision to the effect that state credit shall not be loaned in aid of any individual renders invalid a plan by which the state is to guarantee payment of interest on farm loans.⁴

§ 1865. Nature of state contracts. The difficulty in recognizing a contract into which a state has entered as a true contract rests in the fact that an action can not be brought thereon against the state without the consent of the state.¹

A contract which can not be enforced at any time or by any means is, of course, an anomaly. At the same time these are genuine contracts, though unenforceable without the consent of the state. This may be seen from a number of considerations. The principle that a state can not be sued is not especially applicable to state contracts. It also prevents recovery in quasi-contract. So a county which overpaid its taxes can not sue the state for them,² unless by statutory authority.³ The same principle prevents recovery in tort.

The state may grant permission to bring suit against it. This permission does not create the liability sought to be enforced.⁴ Statutory permission to sue includes breaches of contract occur-

¹ United States. *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 5 L. ed. 547; *Poole v. Fleeger*, 36 U. S. (11 Pet.) 185, 9 L. ed. 680.

Nebraska. *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796.

Ohio. *State v. Donahey*, 93 O. S. 414, 113 N. E. 263.

South Dakota. *Van Dusen v. State*, 11 S. D. 318, 77 N. W. 201.

Texas. *Conley v. Daughter of Republic*, 106 Tex. 80, 156 S. W. 197, 157 S. W. 937.

Washington. *State v. Clausen*, 94 Wash. 166, 162 Pac. 1.

² *Indianapolis v. Indianapolis Water Co.*, 185 Ind. 277, 113 N. E. 369.

³ *Locke v. State*, 140 N. Y. 480, 35 N. E. 1076; *Stanton v. State*, 5 S. D. 515, 59 N. W. 738.

⁴ *Hill v. Rae*, 52 Mont. 378, L. R. A. 1917A, 495, 158 Pac. 826.

¹ See §§ 1877 et seq.

² *Attorney General v. Bay County*, 106 Mich. 662, 64 N. W. 570.

³ *White v. Smith*, 117 Ala. 232, 23 So. 525.

⁴ *Denning v. State*, 123 Cal. 316, 55 Pac. 1000.

ring before the passage of such statute,⁵ and implies that the case will be governed by the usual rules of law.⁶ Thus statutes of limitation will apply, and the court will not recommend the payment of what would otherwise be a just claim.⁷ Power given to a court to allow "legal rights" against the state does not include mere moral obligations, neither legal nor equitable.⁸

While an individual can not maintain an action against a state on a contract made with it, he can assert rights which he has acquired by virtue of such contracts, such as a contract for taxing a railroad in a certain manner.⁹ So in an action to which the state is not a party, rights existing by virtue of a contract made by a state may be asserted and enforced, as under a contract between two states.¹⁰

The consent of the state to an action against it on a contract may be retroactive, so as to authorize an action upon a contract which it entered into before such consent was given.¹¹ If the contract were not already valid, without such consent, the consent of the state could not have this effect.

A contract between a state and a natural person or private corporation, which is subsequently transferred by such natural person or private corporation to another state, may be enforced in the federal courts.¹² If the contract between the state and a natural person were invalid in the first instance, its assignment by the natural person to another state could not give it additional validity.

§ 1866. Powers of officers or agents of state. From the nature of the state it can act only through its officers and agents and it is bound by their contracts on its behalf which are entered into within the scope of their authority and in compliance with the constitutional and statutory provisions which regulate the contracts of the state.¹ In the absence of constitutional restrictions the legislature usually has power to make contracts on behalf of the state.²

⁵ *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457.

⁶ *Harris v. State*, 9 S. D. 453, 69 N. W. 825.

⁷ *Cowles v. State*, 115 N. Car. 173, 20 S. E. 384.

⁸ *Western, etc., Ry. v. State (Ga.)*, 14 L. R. A. 438.

⁹ *Stearns v. Minnesota*, 179 U. S. 223. 45 L. ed. 162.

¹⁰ *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 5 L. ed. 547; *Poole v. Fleeger*, 36 U. S. (11 Pet.) 185, 9 L. ed. 680.

¹¹ See § 1879.

¹² See § 1878.

¹ *Moore v. Garneau*, 39 Neb. 511, 58 N. W. 179.

² *New Jersey v. Wilson*, 11 U. S. (7 Cranch) 164, 3 L. ed. 303; *State v. Junkin*, 81 Neb. 118, 115 N. W. 546.

Other officers and officials have power to make contracts on behalf of the state only as far as they are authorized so to do by constitutional or statutory provisions.³ Even the governor has no implied power to bind the state by contract,⁴ as by a contract for the employment of an attorney.⁵ The general authority which is conferred upon officers or agents is frequently limited by constitutional⁶ or statutory⁷ provisions, and contracts entered into in violation of constitutional or statutory provisions are invalid.⁸ If a constitutional or statutory provision requires that a contract shall be written and executed before it takes effect, the acceptance of the lowest bid by the proper official or agent of the state does not amount to a binding contract.⁹ If a constitutional or statutory provision requires the approval of a contract by a certain official before it shall take effect, a contract is inoperative until approved by the designated official,¹⁰ even if it is entered into in compliance

³ *Cahill v. State Auditors*, 127 Mich. 487, 55 L. R. A. 493, 86 N. W. 950; *Young v. State*, 19 Wash. 634, 54 Pac. 36; *Randall v. State*, 16 Wis. 340.

⁴ *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281; *Young v. State*, 19 Wash. 634, 54 Pac. 36.

⁵ *Cahill v. State Auditors*, 127 Mich. 487, 55 L. R. A. 493, 86 N. W. 950; *Randall v. State*, 16 Wis. 340.

⁶ *Mulnix v. Mutual Benefit Life Ins. Co.*, 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123; *Oxnard Beet Sugar Co. v. State*, 73 Neb. 57, 102 N. W. 80, 105 N. W. 716; *Norbeck & Nicholson Co. v. State*, 32 S. D. 189, 142 N. W. 847; *State v. Donald*, 160 Wis. 21, 151 N. W. 331.

⁷ *California. Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670.

Idaho. State v. National Surety Co., 29 Ida. 670, 161 Pac. 1026.

Nebraska. Stanser v. Cather, 85 Neb. 305, 123 N. W. 316 [rehearing denied, 85 Neb. 313, 124 N. W. 102].

Ohio. State v. Buttles, 3 O. S. 309; *State v. Commissioners of Public Printing*, 52 O. S. 81, 39 N. E. 193; *State v. Donahey*, 94 O. S. 382, 114 N. E. 1037.

Wisconsin. Randall v. State, 16 Wis. 340.

⁸ *California. Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670.

Colorado. Mulnix v. Mutual Benefit Life Ins. Co., 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123.

Indiana. McCaslin v. State, 99 Ind. 428.

Iowa. State v. Young, 134 Ia. 505, 110 N. W. 292.

Nebraska. Oxnard Beet Sugar Co. v. State, 73 Neb. 57, 102 N. W. 80, 105 N. W. 716.

South Carolina. Carolina National Bank v. State, 60 S. Car. 465, 85 Am. St. Rep. 865, 38 S. E. 620.

South Dakota. Norbeck & Nicholson Co. v. State, 32 S. D. 189, 142 N. W. 847.

Texas. Day Sand & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865.

Wisconsin. Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426; *State v. Donald*, 160 Wis. 21, 151 N. W. 331.

⁹ *Capitol Printing Co. v. Hoey*, 124 N. Car. 767, 33 S. E. 160.

¹⁰ *State v. Hogan*, 22 Mont. 384, 56 Pac. 818.

with law by advertising for bids and by letting the contract to the lowest bidder."

§ 1867. Ratification. Contracts which are within the powers of the state but which are entered into by officers in excess of their authority, may be ratified by the legislature.¹ Language has been used which seems to indicate that a contract entered into by an officer or agent in excess of his authority can be ratified only by the legislature.² This rule is probably correct only in cases in which the contract was originally forbidden by statute or in which only the legislature had authority to authorize the contract in the first instance.³ An officer who has entered into a contract in excess of his authority, can not ratify such contract by his subsequent act.⁴ The action of the state in bringing an action upon a contract amounts to a ratification if such action is authorized by the legislature or by some officer who has authority to ratify and enforce such contract.⁵

§ 1868. Powers of state—Borrowing money. Since the state is a government of general and unlimited powers except as far as restricted by the Constitution of the United States, it has power to borrow money.¹ In the absence of constitutional restrictions the legislature may act on behalf of the state in providing for borrowing money and in regulating the powers and duties of the officers who are to represent the state in such transaction.² The power of

¹¹ *State v. Hogan*, 22 Mont. 384, 56 Pac. 818.

¹ *Idaho*. *Geo. H. Fuller Dock Co. v. State*, 6 Ida. 315, 55 Pac. 857.

Minnesota. *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395, 49 N. W. 259.

New York. *O'Hara v. State*, 112 N. Y. 146, 8 Am. St. Rep. 726, 2 L. R. A. 603, 19 N. E. 659.

Ohio. *State v. Buttles*, 3 O. S. 309.

South Dakota. *Brown v. State*, 14 S. D. 219, 84 N. W. 801.

Wisconsin. *Shipman v. State*, 42 Wis. 377.

² *Hord v. State*, 167 Ind. 622, 79 N. E. 916; *State v. Buttles*, 3 O. S. 309.

³ *State v. Buttles*, 3 O. S. 309.

⁴ *State v. Chilton*, 49 W. Va. 453, 39 S. E. 612.

⁵ *State v. Buttles*, 3 O. S. 309.

¹ *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448; *State v. Blease*, 95 S. Car. 403, 79 S. E. 247.

² *United States*. *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448.

Mississippi. *Smith v. State*, 99 Miss. 859, 35 L. R. A. (N.S.) 789, 56 So. 179.

Missouri. *Church v. Hadley*, 240 Mo. 680, 39 L. R. A. (N.S.) 248, 145 S. W. 8.

Oklahoma. *Bryan v. Menefee*, 21 Okla. 1, 95 Pac. 471.

South Carolina. *State v. Blease*, 95 S. Car. 403, 79 S. E. 247.

the state to borrow money includes power to issue bonds.³ In the absence of specific statutory provisions, bonds may be issued for prior valid debts.⁴ Specific constitutional provisions may, however, limit the power of the state legislature and of state officers to issue bonds.⁵ The amount of indebtedness which the legislature may incur may be limited by specific constitutional provisions,⁶ which may provide that such limits can be exceeded only if the question of incurring such indebtedness is submitted to the electors of the state and receives a specified proportion of votes.⁷ The state officers who are entrusted with the sale of bonds must comply substantially with the requirements fixed by statute.⁸ If the statute provides for the sale of bonds for not less than par, a sale for less than par is unauthorized.⁹ In this sense "par" means the face of the bond with accrued interest to the date of the sale or else the sale of the bonds to bear interest only from the date of the sale.¹⁰ If the officers who are charged with the duty of selling bonds for not less than par agree with the purchasers who pay the face value of the bonds that the bonds shall bear interest from their date, which is prior to the date of sale, the state is not bound to pay interest for such period prior to the date of sale.¹¹ A provision that bonds shall not be sold for less than par does not prevent the officers who are charged with the duty of selling them from using reasonable and proper methods to effect their sale;¹² and this includes the power to enter into contracts with brokers to pay commissions for the sale of such bonds.¹³

§ 1869. Applicability of general principles of contract law. A contract which has been duly entered into by the state through an

³ *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304; *State v. Blease*, 95 S. Car. 403, 79 S. E. 247.

⁴ *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304; *State v. Blease*, 95 S. Car. 403, 79 S. E. 247.

⁵ *Stanley v. Townsend*, 170 Ky. 833, 186 S. W. 941; *State v. McMillan*, 12 N. D. 280, 96 N. W. 310; *State Capitol Commission v. Board of Finance*, 74 Wash. 15, 132 Pac. 861.

⁶ *Stanley v. Townsend*, 170 Ky. 833, 186 S. W. 941.

⁷ *Stanley v. Townsend*, 170 Ky. 833, 186 S. W. 941.

⁸ *Smith v. State*, 99 Miss. 859, 35 L. R. A. (N.S.) 789, 56 So. 179; *Bryan v. Menefee*, 21 Okla. 1, 95 Pac. 471.

⁹ *Smith v. State*, 99 Miss. 859, 35 L. R. A. (N.S.) 789, 56 So. 179.

¹⁰ *Smith v. State*, 99 Miss. 859, 35 L. R. A. (N.S.) 789, 56 So. 179.

¹¹ *Smith v. State*, 99 Miss. 859, 35 L. R. A. (N.S.) 789, 56 So. 179.

¹² *Church v. Hadley*, 240 Mo. 680, 39 L. R. A. (N.S.) 248, 145 S. W. 8.

¹³ *Church v. Hadley*, 240 Mo. 680, 39 L. R. A. (N.S.) 248, 145 S. W. 8.

authorized agent in the manner provided by law, possesses the usual incidents of contracts to which subjects are parties.¹ The usual rules of construction apply to contracts which are entered into by the state.² A grant of power by the state to issue bonds for an improvement and to levy an assessment therefor does not amount to a contract between the state and the bondholders that the state will reimburse the bondholders in case the officers, whose duty it is to collect the necessary funds, do not do so.³ A contract between the governor and a private partnership for public printing is assignable and the assignee may mandamus college officials for "copy," and sureties on that bond are not released by such assignment.⁴ It is held, however, that a state is not liable for interest unless it has agreed to pay it.⁵

§ 1870. Limitation on amount of indebtedness. The people of the state, being the ultimate sovereign power therein, may in the state constitution restrict the contractual power of the various departments of the state. The power of a state to enter into contracts is frequently restricted by constitutional provisions which forbid the state to incur a debt except for certain specified purposes or to incur a debt in excess of a certain amount.¹ A limitation on the amount of indebtedness does not apply to a warrant payable only out of a specific fund.² Under some statutes a debt can not be incurred unless such indebtedness is authorized at a popular election.³ While these constitutional

¹ *Indianapolis v. Indianapolis Water Co.*, 185 Ind. 277, 113 N. E. 369; *State v. Claugen*, 94 Wash. 166, 162 Pac. 1.

² *Union Trust Co. v. State*, 154 Cal. 716, 24 L. R. A. (N.S.) 1111, 99 Pac. 183; *Burr v. Massachusetts School for Feeble-Minded*, 197 Mass. 357, 83 N. E. 883; *State v. Junkin*, 81 Neb. 118, 115 N. W. 546.

³ *Union Trust Co. v. State*, 154 Cal. 716, 24 L. R. A. (N.S.) 1111, 99 Pac. 183.

⁴ *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242.

⁵ *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, 11 L. R. A. 370, 26 N. E. 778.

¹ *United States v. Williams v. Louisiana*, 103 U. S. 637, 26 L. ed. 595.

Colorado. In re Contracting of State Debt, 21 Colo. 399, 41 Pac. 1110.

Kentucky. *Rhea v. Newman*, 153 Ky. 604, 44 L. R. A. (N.S.) 989, 156 S. W. 154.

New Jersey. *Wilson v. State Water Supply Commission*, 84 N. J. Eq. 150, 93 Atl. 732.

Oklahoma. In re Menefee, 22 Okla. 365, 97 Pac. 1014.

Utah. *State v. Candland*, 36 Utah 406, 24 L. R. A. (N.S.) 1260, 104 Pac. 285.

Wisconsin. *State v. Donald*, 160 Wis. 21, 151 N. W. 331.

² *Allen v. Grimes*, 9 Wash. 424, 37 Pac. 662.

³ In re Menefee, 22 Okla. 365, 97 Pac. 1014.

provisions present a general similarity there are differences in phraseology and there are corresponding differences in construction. The ordinary running expenses of the government have been held not to be within such provisions.⁴ A debt which is to be paid out of a state appropriation to be made by a succeeding legislature and out of tax levies which are not authorized by the legislature when such debt is incurred, is regarded as being within the constitutional provision.⁵ Such constitutional provision is regarded as applicable if incurred by a state university, although it is a corporation, if the only means of paying such debts are by appropriations from the state treasury.⁶ Such constitutional provisions do not apply to bonds or warrants which are issued upon valid prior indebtedness,⁷ or to interest thereon.⁸ Under some constitutional provisions the indebtedness is to be limited to a certain percentage of the tax valuation of the state.⁹ Such a provision is construed as applying to the tax valuation at the time that the indebtedness is authorized and not to the tax valuation at the time at which the bonds or other evidences of indebtedness are to be issued.¹⁰

§ 1871. Necessity of advertisement for bids and competitive bidding. Among the restrictions which are imposed upon state agents and officers in making contracts on behalf of the state, the most frequent are those which are intended to prevent corruption and to secure for the public the benefit of competition by requiring advertisements for bids and letting contracts at competitive bidding. If a constitutional or statutory provision requires advertisement for competitive bids, a contract is invalid which is entered into without substantial compliance with such provision.¹ The advertisement or notice for bids must set forth the nature of the proposed contract in such detail as to secure to the public fair and

⁴Rhea v. Newman, 153 Ky. 604, 44 L. R. A. (N.S.) 989, 156 S. W. 154.

⁵State v. Candland, 36 Utah 406, 24 L. R. A. (N.S.) 1260, 104 Pac. 235.

⁶State v. Candland, 36 Utah 406, 24 L. R. A. (N.S.) 1260, 104 Pac. 235.

⁷Rhea v. Newman, 153 Ky. 604, 44 L. R. A. (N.S.) 989, 156 S. W. 154; In re Menefee, 22 Okla. 365, 97 Pac. 1014.

⁸Rhea v. Newman, 153 Ky. 604, 44 L. R. A. (N.S.) 989, 156 S. W. 154.

⁹Lewis v. Brady, 17 Ida. 251, 28 L. R. A. (N.S.) 149, 104 Pac. 900.

¹⁰Lewis v. Brady, 17 Ida. 251, 28 L. R. A. (N.S.) 149, 104 Pac. 900.

¹Mulnix v. Mutual Benefit Life Ins. Co., 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123; State v. Toole, 26 Mont. 22, 91 Am. St. Rep. 386, 55 L. R. A. 644, 66 Pac. 496; Traphagen v. Lindsay, 95 Neb. 823, 146 N. W. 1026; State v. Donahey, 94 O. S. 382, 114 N. E. 1037.

reasonable competition.² If a constitutional or statutory provision requires letting to the lowest bidder, a contract which is entered into without any attempt to advertise for bids, is invalid.³ Under such a constitutional provision, a statute which authorizes a contract with a specific publishing house, without advertising for competitive bids by which the state lends the plates for certain volumes of the supreme court reports and the publishing house agrees to annotate them and to sell them at a certain fixed price, is invalid.⁴ If the constitutional or statutory provision requires competitive bidding, a contract entered into in violation of such provision is invalid, although it may deal with a subject-matter concerning which specifications can not be drawn and competitive bids can not be made.⁵ A constitutional provision that bids must be let to the lowest responsible bidder has, however, been held not to refer to incidental matters, such as printing proceedings of the general assembly from day to day, for which advertising is impracticable.⁶

§ 1872. Letting contract as entirety. If the statute requires the contract to be let as a whole, the attempt on the part of the officer or agent to let portions of it to different persons, is unauthorized,¹ and it does not operate as a rejection of a bid.² If a statutory or constitutional provision requires different classes of work to be let by separate contracts, the public officers or agents have no authority to join two or more different classes of work in one contract.³

§ 1873. Letting state contract to lowest bidder. The constitutional or statutory provisions which regulate the letting of contracts after competitive bids have been received usually require the official to let the contract to the lowest responsible bidder.¹ Under

² *Atkinson v. State Engineering Department*, 165 Cal. 609, 133 Pac. 616; *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374.

³ *Hodges v. Lawyers Co-operative Publishing Co.*, 111 Ark. 571, 164 S. W. 294.

⁴ *Hodges v. Lawyers Co-operative Publishing Co.*, 111 Ark. 571, 164 S. W. 294.

⁵ *Hodges v. Lawyers Co-operative Publishing Co.*, 111 Ark. 571, 164 S. W. 294.

⁶ *Stone v. Publishing Co. (Ky.)*, 55 S. W. 725.

¹ *State v. Cornell*, 52 Neb. 25, 71 N. W. 961.

² *State v. Cornell*, 52 Neb. 25, 71 N. W. 961.

³ *State v. Public Printing Commissioners*, 52 O. S. 81, 39 N. E. 193.

¹ *Mulnix v. Mutual Benefit Life Ins. Co.*, 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123; *State v. Rickards*, 16 Mont. 145, 50 Am. St. Rep. 476, 28 L. R. A. 298, 40 Pac. 210.

such a constitutional or statutory provision, the officer who let the contract has a wide range of discretion in determining who is a responsible bidder; and he can not be required to let the contract to the lowest bidder if in the honest exercise of his judgment he believes that one who is not the lowest bidder is the lowest responsible bidder.² If the statute requires the contract to be let to the lowest bidder, less discretion is given to the officer who is authorized to let the contract.³ A statute which does not in terms provide that a contract shall be let to the lowest bidder, but which provides that if the successful bidder does not enter into a contract within a certain time the contract shall be given to the next lowest bidder or the officers in their discretion may readvertise for bids, shows that the legislature intends that the contract shall be let in the first instance to the lowest bidder.⁴ Authority to reject any and all bids does not give a right under a statute requiring a contract to be let to the lowest bidder, to reject the lowest bid arbitrarily and without cause.⁵

§ 1874. Liability of state upon authorized contracts. A state is bound by contract entered into upon its behalf by duly authorized officers or agents.¹ Under statutory authority officers may be authorized to bind the state by contracts for renting rooms or buildings for use as officials.² The state may employ an agent to prosecute a claim against the United States.³

§ 1875. Liability of state upon unauthorized contracts. Since the powers of an officer or agent of the state are ordinarily conferred by the constitution or by statute, persons who deal with the state through such officers or agents are charged with notice of their powers,¹ and the state can not be estopped to deny the authority of such officer or agent.²

² *Mulnix v. Mutual Benefit Life Ins. Co.*, 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123; *State v. Rickards*, 16 Mont. 145, 50 Am. St. Rep. 476, 28 L. R. A. 298, 40 Pac. 210.

³ *State v. Cornell*, 52 Neb. 25, 71 N. W. 961.

⁴ *State v. Cornell*, 52 Neb. 25, 70 N. W. 961.

⁵ *State v. Cornell*, 52 Neb. 25, 71 N. W. 961.

¹ *State v. Donahey*, 93 O. S. 414, 113 N. E. 263.

² *State v. Donahey*, 93 O. S. 414, 113 N. E. 263.

³ *Davis v. Massachusetts*, 164 Mass. 241, 30 L. R. A. 743, 41 N. E. 292.

¹ *California*. *Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670. *Indiana*. *McCaslin v. State*, 99 Ind. 428.

Iowa. *State v. Young*, 134 Ia. 505, 110 N. W. 292.

Texas. *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865.

Wisconsin. *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426.

² *Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670; *Carolina National Bank v. State*, 60 S. Car. 465.

§ 1876. Liability of state in quasi-contract for benefits. If a contract is entered into on behalf of the state in violation of a constitutional or statutory provision which requires advertisement for bids, no liability even in quantum meruit arises.¹ Where shrubbery and trees were planted on the grounds of a state college under an unauthorized contract with the board of regents, the state was held liable for a reasonable value therefor where without ratifying it the state passively enjoyed the benefit of such contract.²

§ 1877. Enforcement of contract against state—General principles. The peculiarity of the contracts of a state, like those of the United States, is that they can not be enforced against the state unless the state consents thereto.¹

A suit in equity can not be maintained against the state in analogy to a petition *monstrans de droit* in England.² The rule that an action can not be brought against the state is not limited to actions in the courts of the state against which the action is brought. It applies to actions brought against the state in the

85 Am. St. Rep. 865, 38 S. E. 620; *Norbeck & Nicholson Co. v. State*, 32 S. D. 189, 142 N. W. 847.

¹ *Mulnix v. Ins. Co.*, 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123.

² *Jewell Nursery Co. v. State*, 5 S. D. 623, 59 N. W. 1025.

¹ *United States. Palmer v. State*, 248 U. S. 32, 63 L. ed. 19.

California. Denning v. State, 123 Cal. 316, 55 Pac. 1000.

Indiana. State v. Mutual Life Ins. Co., 175 Ind. 59, 42 L. R. A. (N.S.) 256, 93 N. E. 213.

Louisiana. Hope v. Board of Liquidation, 41 La. Ann. 535, 6 So. 819.

Mississippi. Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281.

New York. Sayre v. State, 123 N. Y. 291, 25 N. E. 163; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400.

Oklahoma. Lovett v. Lankford, 47 Okla. 12, 145 Pac. 787.

Washington. Northwestern, etc., Bank v. State, 18 Wash. 73, 42 L. R. A. 33, 50 Pac. 586.

On this subject see, *The State as Defendant under the Federal Constitution: The Virginia-West Virginia Debt Controversy*, by William C. Coleman,

31 Harvard Law Review 210; *An Interpretation of the Eleventh Amendment*, by LeRoy G. Pilling, 15 Michigan Law Rev. 468; *Coercing a State to Pay a Judgment: Virginia v. West Virginia*, by Thos. Reed Powell, 17 Michigan Law Review 1; *The Eleventh Amendment and the Nonsuability of the State*, by A. H. Wintersteen, 30 American Law Register (N.S.) 1; *Can States be Compelled to Pay Their Debts?* by Bradley T. Johnson, 12 American Law Review 625; *The Supreme Court and State Repudiation—The Virginia and Louisiana Cases*, by John Norton Pomeroy, 17 American Law Review 684; *Suing the State*, by George M. Davis, 18 American Law Review 814, and *Suability of States by Individuals in the Courts of the United States*, by Jacob Trieber, 41 American Law Review 845.

See also §§ 1842 and 1883.

² *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281 [distinguishing, *Farish v. State*, 3 Miss. (2 How.) 826; and *State v. Mayes*, 28 Miss. 706, as decided under specific constitutional and statutory provisions authorizing suits against the state in chancery].

federal courts under the present provisions of the constitution of the United States,³ and to actions brought against the state in the courts of sister states.⁴

Unless the state consents, an action can not be brought against a state in quasi-contract,⁵ or to enjoin the state from paying money under a contract on the ground that such contract was induced by fraud.⁶ This principle is not limited to contracts, however, and an action in tort can not be brought against a state unless the state has consented thereto.⁷ Replevin can not be brought against the state to recover property delivered under an invalid contract.⁸

It has been said that a will contest is not an action within the meaning of the rule that an action can not be brought against the state without the consent of the state, and that an heir may contest a will under which the state is a beneficiary without the consent of the state.⁹

§ 1878. Enforcement of contract against state in federal courts. Under the Constitution of the United States,¹ the judicial power of the United States extends to controversies between two or more states and between a state and citizens of another state. The supreme court of the United States has original jurisdiction of cases in which a state shall be a party. While the convention that drafted the Constitution seems to have believed that this grant of power did not give to an individual the right to sue a state, the supreme court decided that it did, and the action of assumpsit was allowed.² In consequence of that decision the eleventh amendment to the Constitution of the United States was adopted, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another

³ See § 1878.

⁴ *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712, 11 S. W. 935.

⁵ *Metropolitan Trust Co. v. Commissioners*, 220 N. Y. 344, 115 N. E. 1000.

⁶ *State v. Superior Court*, 86 Wash. 685, 151 Pac. 108.

⁷ *Idaho. Davis v. State*, 30 Ida. 137, 163 Pac. 373.

Indiana. Indianapolis v. Indianapolis Water Co., 185 Ind. 277, 113 N. E. 369.

Kentucky. Zoeller v. Board of Agriculture, 163 Ky. 446, 173 S. W. 1143.

Massachusetts. Burroughs v. Com-

monwealth, 224 Mass. 28, Ann. Cas. 1917A, 38, 112 N. E. 491.

Oklahoma. Lankford v. Oklahoma Engraving & Printing Co., 35 Okla. 404, 130 Pac. 278.

Utah. Wilkinson v. State, 42 Utah 483, 134 Pac. 626.

⁸ *Allen Engineering Co. v. Kays*, 106 Ark. 174, 152 S. W. 992.

⁹ *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883. (Consent was in fact given by the state.)

¹ Art. III, § 2.

² *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 1 L. ed. 440.

state or by citizens or subjects of a foreign state." This constitutional provision restricts the jurisdiction of the courts of the United States in an action brought against a state by an individual or a corporation.³ If, however, a state of the Union voluntarily intervenes as a claimant of a fund in court, it submits voluntarily to the jurisdiction of the courts of the United States, and it can not thereafter raise the objection that the action is in effect an action by the adversary claimant against the state.⁴

This provision does not restrict the jurisdiction of the federal courts in actions brought against the state by the United States or by another state of the Union. The supreme court of the United States may therefore enforce contracts entered into between two states of the Union.⁵ So if a natural person buys bonds issued by one state and donates them absolutely to another state, the latter state may sue the former on them, even if the purpose of the assignment was to enable the state to maintain such action, as long as it was for the benefit of the state.⁶ However, if the assignment of bonds to the state is not absolute, but merely for the purpose of enabling it to sue for the benefit of the real owners of the bonds, the state can not maintain the action.⁷ So the United States may sue a state in the action of debt on bonds issued by the latter,⁸ or it may sue a state for an accounting and money.⁹

§ 1879. Consent of state to be sued. The state may grant permission to bring an action against the state. This consent may be granted by the legislature.¹ Unless permission to sue the state is given by the state constitution only the legislature can authorize an action against the state.² The act of an unauthorized state official in appearing in an action against the state and in filing an

³ *Murray v. Wilson, Distilling Co.*, 213 U. S. 151, 53 L. ed. 742; *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 59 L. ed. 316; *Farish v. State Banking Board*, 235 U. S. 498, 59 L. ed. 330.

⁴ *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780.

⁵ *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537; *Virginia v. West Virginia*, 220 U. S. 1, 55 L. ed. 353; *Virginia v. West Virginia*, 222 U. S. 17, 56 L. ed. 71; *Virginia v. West Virginia*, 231 U. S. 89, 58 L. ed. 135; *Virginia v. West Virginia*, 238 U. S. 202, 59 L.

ed. 1272; *Virginia v. West Virginia*, 241 U. S. 531, 60 L. ed. 1147.

⁶ *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448.

⁷ *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656.

⁸ *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336.

⁹ *United States v. Michigan*, 190 U. S. 379, 47 L. ed. 1103.

¹ *Title Guaranty & Surety Co. v. Guernsey*, 205 Fed. 91.

² *Title Guarantee & Surety Co. v. Guernsey*, 205 Fed. 91.

answer does not amount to consent to the state.³ Since the legislature has inherent power to authorize actions against the state,⁴ a constitutional provision to the effect that suits may be brought against the state in such courts and in such manner as may be provided by law, is not self-executing, and an action can not be brought against the state unless the legislature has provided by statute for bringing such actions.⁵ Whether a constitutional provision to the effect that a suit may be brought against the state in such courts and in such manner as may be provided by law is self-executing or not, is not a federal question, and the United States supreme court will not review the decision of the supreme court of the state upon this question.⁶

Permission to sue on a contract is not ratification thereof and does not prevent the state from denying liability on the ground that such contract was in excess of the authority of the officer or agent who entered into it on behalf of the state.⁷

Consent to sue a state can be revoked,⁸ even after such action has been brought,⁹ unless rights have vested thereunder.

§ 1880. Necessity of complying with conditions precedent to action against state. If the legislature provides that actions can be brought against the state only by complying with certain specified conditions,¹ such as presenting such claims to certain officers for their approval or disapproval in advance,² no action can be

³ Lankford v. Schroeder, 47 Okla. 279, L. R. A. 1915F, 623, 147 Pac. 1049.

⁴ See note 1, this section.

⁵ United States. Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94.

Ohio. Raudabaugh v. State, 96 O. S. 513, 118 N. E. 102.

Tennessee. General Oil Co. v. Crain, 117 Tenn. 82, 121 Am. St. Rep. 967, 95 S. W. 824.

Washington. Northwestern & Pacific Hypotheek Bank v. State, 18 Wash. 73, 42 L. R. A. 33, 50 Pac. 586.

Wisconsin. Chicago, Milwaukee & St. Paul Ry. v. State, 53 Wis. 509.

⁶ Palmer v. State, 248 U. S. 32, 63 L. ed. 19.

⁷ Carolina National Bank v. State, 60 S. Car. 465, 85 Am. St. Rep. 865, 38 S. E. 629. (A superintendent of the penitentiary had taken notes for convict hire, and endorsed them to the bank.

It was held that as he had no authority to take them, the state was not liable on his indorsement, or for money had and received.) Nichols v. State, 11 Tex. Civ. App. 327, 32 S. W. 452. (Defective advertisement for bids.)

⁸ Beers v. Arkansas, 61 U. S. (20 How.) 527, 15 L. ed. 991; McDowell v. Fuller, 183 Mich. 639, 150 N. W. 353; Maury v. Commonwealth, 92 Va. 310, 23 S. E. 757.

⁹ Beers v. Arkansas, 61 U. S. (20 How.) 527, 15 L. ed. 991; McDowell v. Fuller, 183 Mich. 639, 150 N. W. 353.

¹ Gates v. State, 128 N. Y. 221, 28 N. E. 373; Northwestern Mutual Life Ins. Co. v. State, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

² State v. Lancaster County Bank, 8 Neb. 218; Lyman County v. State, 11 S. D. 391, 78 N. W. 17.

brought against the state except in substantial compliance with such conditions. If a state gives its consent to be sued it may impose a condition that the action can be brought only in a state court.³ If the state gives a certain remedy against itself by statute, only that remedy can be had.⁴ If the consent of the legislature is limited to certain specific classes of cases, an action can not be brought against the state in cases of any other classes.⁵ An injury suffered by a fall of seats used to view horse racing on the grounds of a fair under state control, can not be treated as a breach of implied contract with the state.⁶

§ 1881. What constitutes an action against the state. The principle that a state can not be sued without its own consent applies, of course, to actions which are brought against the state as a party defendant.¹ It is not, however, limited to actions to which the state is avowedly a party, but it applies also to actions which are brought against branches of the state or officers or agents of the state, if the effect of such action will be to enforce a liability against the state or to compel or restrain the action of the state. A branch of the state government, such as a state university,² can not be sued except by statutory authority.³ An action against a state banking board is in effect an action against the state if such board is acting within the scope of the powers conferred upon it by a valid statute.⁴

The rule that a state can not be sued without its own consent can not be evaded by bringing a suit in the nature of mandamus against a state officer, the effect of which will be to enforce a contract against the state.⁵ A disputed claim against the state for rent arising out of contract can not be collected by a proceeding in

³ *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140.

⁴ *Cornwall v. Commonwealth*, 82 Va. 644, 3 Am. St. Rep. 121.

⁵ *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281; *Seely v. State*, 12 Ohio 496; *Petition of Wausau Investment Co.*, 163 Wis. 283, 158 N. W. 81.

⁶ *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. (In this case the statute specifically forbade an appropriation of money for horse races.) [Citing, *Gibbons v. United States*, 75 U. S. (8 Wall.) 269, 19 L. ed. 453.]

¹ See §§ 1877 et seq.

² *Oklahoma, etc., College v. Willis*, 6 Okla. 593, 40 L. R. A. 677, 52 Pac. 921.

³ *University of Illinois v. Bruner*, 175 Ill. 307, 51 N. E. 687 [affirming, 66 Ill. App. 665; distinguishing, *Thomas v. University*, 71 Ill. 310].

⁴ *Lankford v. Platte Iron Works Co.*, 235 U. S. 461 59 L. ed. 316; *Farish v. State Banking Board*, 235 U. S. 498, 59 L. ed. 330; *Lankford v. Schroeder*, 47 Okla. 279, L. R. A. 1915F, 623, 147 Pac. 1049.

⁵ *United States. Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805; *In re Ayers*, 123 U. S. 433, 31 L. ed. 216; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535.

mandamus.⁶ An architect who has submitted plans for a state capitol can not have specific performance, as the state is the real party defendant.⁷

While mandamus will not lie without statutory authority against state officials in cases in which the state is really a party as an indirect means of enforcing a state contract, it will lie to compel a board to let a contract which it has awarded, if the proceedings have been regular, and the letting is a mere ministerial act.⁸

The fact that the state has authorized an action against it is not such an adequate remedy in the due course of law as to prevent an application for a writ of mandamus to compel the payment of a claim if no officer has discretion to withhold the payment of such claim and if the appropriation therefor would lapse before the action against the state to recover upon such claim could be heard.⁹

A suit to enjoin state officers from interfering with rights which are protected by the constitution or statutes of the United States, is not an action against the state, even if such officers are acting under an unconstitutional state statute.¹⁰

§ 1882. Priority of state as creditor. According to the weight of authority the principles of English law which give the king priority over other creditors by virtue of his prerogative, confers priority upon the state over other creditors, although there is no constitutional or statutory provision which confers such priority.¹

Illinois. *People v. Dulaney*, 96 Ill. 503.

Iowa. *Mills Publishing Co. v. Larabee*, 78 Ia. 97, 42 N. W. 593.

Oklahoma. *Love v. Filtsch*, 33 Okla. 131, 44 L. R. A. (N.S.) 212, 124 Pac. 30.

Virginia. *Board v. Gannt*, 76 Va. 455.

West Virginia. *Miller v. Board, etc.*, 46 W. Va. 192, 76 Am. St. Rep. 811, 32 S. E. 1007.

⁶*Love v. Filtsch*, 33 Okla. 131, 44 L. R. A. (N.S.) 212, 124 Pac. 30.

⁷*Cope v. Hastings*, 183 Pa. St. 300, 38 Atl. 717.

⁸*State v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386, 55 L. R. A. 644, 66 Pac. 496. (But relief was here refused as bids had not been advertised for prop-

erty.) *McCoy v. Handlin*, 35 S. D. 487, L. R. A. 1915E, 858, 153 N. W. 361.

⁹*McCoy v. Handlin*, 35 S. D. 487, L. R. A. 1915E, 858, 153 N. W. 361.

¹⁰*Harrison v. St. Louis & San Francisco Railroad Co.*, 232 U. S. 318, 58 L. ed. 621, L. R. A. 1915F, 1187; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916D, 545; *Greene v. Louisville & Interurban R. R.*, 244 U. S. 499, 61 L. ed. 1280; *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522, 61 L. ed. 1291; *Illinois Central R. R. Co. v. Greene*, 244 U. S. 553, 61 L. ed. 1309.

¹*State v. First State Bank*, 22 N. M. 661, L. R. A. 1918A, 394, 167 Pac. 3; *In re Carnegie Trust Co.*, 206 N. Y. 390, 46 L. R. A. (N.S.) 260, 99 N. E. 1096;

In some jurisdictions, however, it has been held that prerogative in the English sense does not exist in our law and that a state is not entitled to priority unless there is some constitutional or statutory provision conferring priority.²

Priority is frequently conferred by constitutional or statutory provisions.³ Even where there is no priority at common law, priority may, nevertheless, be conferred by statute,⁴ and provision may be made for such priority in certain classes of funds but not in other classes.⁵

In jurisdictions in which a common-law priority exists such priority may be waived by statute.⁶ It has been held that a statute which provides for a pro rata distribution among creditors operates as a waiver of the priority of the state, although the state is not expressly named in such statute.⁷

The priority of the state is not a lien,⁸ and such priority is lost as against property of the debtor by a proceeding which creates a lien in favor of other creditors or which passes title in trust for creditors.⁹

III

FOREIGN GOVERNMENTS

§ 1883. Foreign governments. A foreign government or sovereign may enter into a contract if such contract is binding upon it

Booth v. Miller, 237 Pa. St. 297, 85 Atl. 457; United States Fidelity & Guaranty Co. v. Rainey, 120 Tenn. 357, 113 S. W. 397.

² Potter v. Fidelity & Deposit Co., 101 Miss. 823, 58 So. 713.

See also, Board of Levee Commissioners v. Powell, 109 Miss. 415, 69 So. 215 [reversing on rehearing, Board of Levee Commissioners v. Powell, 109 Miss. 154, 68 So. 711].

³ Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co., 33 Okla. 535, 126 Pac. 556.

⁴ Board of Levee Commissioners v. Powell, 109 Miss. 415, 69 So. 215 [reversing on rehearing, Board of Levee Commissioners v. Powell, 109 Miss. 154, 68 So. 711].

⁵ Board of Levee Commissioners v. Powell, 109 Miss. 415, 69 So. 215 [reversing on rehearing, Board of Levee Commissioners v. Powell, 109 Miss. 154, 68 So. 711].

⁶ In re Devlin, 180 Fed. 170.

⁷ In re Devlin, 180 Fed. 170.

⁸ State v. Williams, 101 Md. 529, 109 Am. St. Rep. 579, 1 L. R. A. (N.S.) 254, 4 Am. & Eng. Ann. Cas. 970, 61 Atl. 297; State v. First State Bank, 22 N. M. 661, L. R. A. 1918A, 394, 167 Pac. 3.

⁹ State v. Williams, 101 Md. 529, 109 Am. St. Rep. 579, 1 L. R. A. (N.S.) 254, 4 Am. & Eng. Ann. Cas. 970, 61 Atl. 297; State v. First State Bank, 22 N. M. 661, L. R. A. 1918A, 394, 167 Pac. 3.

in accordance with its own law. The practical difficulty which arises out of such a contract is the difficulty of enforcing it. A foreign state or sovereign may bring an action, and no objection can be made to his use of this method of enforcing obligations which are due to him.¹ If a contract has been made by a minister or other representative of a foreign government or sovereign in his own name, the action may be brought in the name of such minister or of his successor in office.² It is not necessary that it should be brought in the name of the head of the foreign state.³ A different question arises, however, when it is sought to enforce a contract against a foreign government or sovereign. From the nature of sovereignty, a sovereign can not be compelled to submit to the jurisdiction of any court, whether his own or that of another state. This is not a technical rule depending upon a verbal definition of sovereignty, but it arose originally out of the fact that, as to his own courts, the courts were agencies of the sovereign, and could not, accordingly, coerce their master; and even under the changed conditions of most modern governments, the fact remains that considerations of public policy forbid the seizure of public property for its debts, and make it necessary that payment of debts and obligations be left to the honor of the nation and to the willingness of the branch of the government which has the power to levy taxes, to disburse public funds, and to maintain the credit of the nation by carrying out its just obligations. In the case of the courts of another state, it is evident that any other rule would put it in the power of the courts to bring on a war between their country and the foreign government or sovereign by an exercise of jurisdiction over a foreign government or sovereign, against his will. For these reasons it has always been held that the courts of one nation can not entertain an action against a foreign sovereign, or nation, to compel such sovereign or nation to perform contracts or to answer in damages for the breach thereof.⁴ The courts can not compel a foreign sovereign or government to perform its contract by the

¹ *King of Spain v. Hullet*, 1 Cl. & F. 333.

² *Castaneda v. Clydebank Engineering and Shipbuilding Co.* [1902], A. C. 524.

³ *Castaneda v. Clydebank Engineering and Shipbuilding Co.* [1902], A. C. 524.

⁴ *De Haber v. Queen of Portugal*, 17 Q. B. 196; *Twycross v. Drefus*, 5 Ch.

D. 605; *Smith v. Weguelin*, L. R. 8 Eq. 198; *Mighill v. Sultan of Jahore* [1894], 1 Q. B. 149.

See, *Contractual Claims in International Law*, by Edwin M. Borchard, 13 *Columbia Law Review* 457, and *Suits Between States*, by James Brown Scott, 12 *American Journal of International Law* 619.

See also §§ 1842 et seq. and 1877 et seq.

indirect method of sustaining an attachment against the funds of such government or sovereign,⁵ or by entertaining proceedings against the funds of such government or sovereign in the hands of an agent.⁶ In the case of a sovereign, his immunity is not limited to cases in which he enters into contracts in his public capacity.⁷ The foreign sovereign who has entered into a contract of marriage while living under an assumed name, can not be held liable for damages in an action for breach of promise, if he chooses to avow his sovereign character.⁸ If the same individual is a sovereign in his own country and a subject in another country, he can not be compelled to respond in the courts of the country in which he is a subject, for acts done by him in the country in which he is a sovereign.⁹ If an action is brought against one who has been a sovereign, for acts other than those done by him in his sovereign capacity, it is not a good defense to plead that he was a sovereign when such acts were done, unless he also adds that he is a sovereign when such action is brought.¹⁰

A state or a sovereign may be granted an opportunity to be heard in court if it so wishes;¹¹ and for this purpose such state or sovereign may be made a defendant.¹² While an action can not be brought against a state, a sovereign state which has been made a party to litigation at its own request, can not withdraw from such litigation except by leave of the court.¹³ If an action is brought against a sovereign, it is said that he waives his immunity by filing an answer to the merits.¹⁴ His act in filing a demurrer to the jurisdiction of the court, does not operate as a waiver of his immunity.¹⁵ If a foreign government brings a suit to recover a trust fund it submits itself to the jurisdiction of the court and can not object to an order of interpleader by which an adversary

⁵ *De Haber v. Queen of Portugal*, 17 Q. B. 196.

⁶ *Twycross v. Drefus*, 5 Ch. D. 605; *Smith v. Weguelin*, L. R. 8 Eq. 198.

⁷ *Mighill v. Sultan of Jahore* [1894], 1 Q. B. 149.

⁸ *Mighill v. Sultan of Jahore* [1894], 1 Q. B. 149.

⁹ *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1 [affirming, *Charles, Duke of Brunswick v. King of Hanover*, 6 Beav. 1].

¹⁰ *Munden v. Duke of Brunswick*, 10 Q. B. 656.

¹¹ *Manning v. Nicaragua*, 14 How. Pr. (N. Y.) 517.

¹² *Manning v. Nicaragua*, 14 How. Pr. (N. Y.) 517.

¹³ *Porto Rico v. Ramos*, 232 U. S. 627, 58 L. ed. 763.

¹⁴ *Richardson v. Fajardo Sugar Co.*, 241 U. S. 44, 60 L. ed. 879.

¹⁵ *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1 [affirming, *Charles, Duke of Brunswick v. King of Hanover*, 6 Beav. 1].

claimant to such trust fund is brought in.¹⁶ While a foreign sovereign submits himself to the jurisdiction of the court of another country in which he brings an action for the purpose of the subject-matter of the action, he does not submit himself to the jurisdiction of such court as to counter-claims which the defendant may set up as against such sovereign.¹⁷ On the other hand, it seems to be held that a claim against a foreign government may be set off in an action by such foreign government,¹⁸ even though such foreign government has attachable property in that state, since attachment will not lie against such foreign government.¹⁹

¹⁶ Kingdom of Roumania v. Guaranty Trust Co., 244 Fed. 195.

¹⁷ South African Republic v. La Compagnie Franco-Belge du Chemin de fer du Nord [1898], 1 Ch. 190.

¹⁸ Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282; Rowan v. Sharps' Rifle Mfg. Co., 31 Conn. 1.

¹⁹ Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282, 31 Conn. 1.

CHAPTER LX

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I

NATURE AND CLASSES

§ 1884. Nature and classes of public corporations. A public corporation is a corporation formed by the state for purposes of local government and administration.¹ Public corporations are divided into municipal corporations and the organizations of less extensive powers, such as counties, townships, school districts, and the like, known as quasi-corporations. A municipal corporation is a political subdivision of the state which the legislature has made into a corporation for the purpose of exercising governmental functions.² A board of underwriters of fire insurance which organizes under a statute which permits it to establish a fire patrol to discover and prevent fires and to preserve life and property at fires and thereafter, the expense of which is to be paid by an assessment upon the members of the board, is not a municipal corporation.³ Recent constitutional provisions have withdrawn municipal corporations from legislative control to a very considerable extent.⁴ A constitutional provision which prevents the legis-

¹ *The Mayor of Nashville v. Ray*, 86 U. S. (19 Wall.) 468, 22 L. ed. 164; *In re City of Boston*, 221 Mass. 468, 109 N. E. 389; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774; *Booten v. Pinson*, 77 W. Va. 412, L. R. A. 1917A, 1244, 89 S. E. 985; *Sutter v. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 155 N. W. 127.

² *In re City of Boston*, 221 Mass. 468, 109 N. E. 389; *Booten v. Pinson*, 77 W. Va. 412, L. R. A. 1917A, 1244, 89 S. E. 985; *Sutter v. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 155 N. W. 127.

A municipal corporation is "a body corporate consisting of the inhabitants of a designated area, created by the legislature, with or without the con-

sent of such inhabitants, for governmental purposes, possessing local legislative and administrative power, also power to exercise within such area so much of the administrative power of the state as may be delegated to it, and possessing limited capacity to own and hold property and to act in purveyance of public conveniences." *Sutter v. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 155 N. W. 127.

³ *Sutter v. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 155 N. W. 127.

⁴ *People v. Perkins*, 56 Colo. 17, 137 Pac. 55; *Fitzgerald v. Cleveland*, 88 O. S. 338, 103 N. E. 512; *Kalich v. Knapp*, 73 Or. 568, 142 Pac. 594, 145 Pac. 22.

lature from enacting or repealing charters, does not apply to an existing municipal corporation in the absence of language which shows such intention expressly.⁵ Under such constitutional provisions a charter is ordinarily supplemented by general laws.⁶

Public quasi-corporations have powers of government and administration which are usually more limited than those which are conferred upon municipal corporations, and, according to the test urged by some authorities, they lack the power of making local laws.⁷ The difference in powers between municipal corporations and quasi-corporations often leads to important distinctions in the validity of their contracts. The difference in name alone is unimportant. A county may be included under the term "municipal or other corporation."⁸

A county is a political subdivision of the state which is created for the purpose of local self-government and for the administration of law.⁹

The term "county" is regularly used in the United States of the largest subdivision of the state for governmental and administrative purposes. The division of powers between different governmental organizations and agencies differs greatly in different parts of the United States. In some of the states the great bulk of local self-government is conferred upon the county; while in other parts of the United States it is conferred upon the town or township.

⁵ *Grants Pass v. Rogue River Public Service Corporation*, 87 Or. 637, 171 Pac. 400.

⁶ *Grants Pass v. Rogue River Public Service Corporation*, 87 Or. 637, 171 Pac. 400.

⁷ *Schweiss v. Court*, 23 Nev. 226, 34 L. R. A. 602, 45 Pac. 289.

⁸ *Central, etc., Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454. So may a school district. *Curry v. District Township*, 62 Ia. 102, 17 N. W. 191.

⁹ *Arizona*. *Hunt v. Mohave County*, 18 Ariz. 480, 162 Pac. 600.

Colorado. *Dixon v. People*, 53 Colo. 527, 127 Pac. 930.

Florida. *Keggin v. Hillsborough County*, 71 Fla. 356, 71 So. 372.

Georgia. *Hammond v. Clark*, 136 Ga. 313, 38 L. R. A. (N.S.) 77, 71 S. E. 479.

Illinois. *People v. Grover*, 258 Ill.

124, Ann. Cas. 1914B, 212, 101 N. E. 216.

Montana. *Hersey v. Neilson*, 47 Mont. 132, Ann. Cas. 1914C, 963 [sub nomine, *Hershey v. Nelson*, 131 Pac. 30].

Ohio. *State v. O'Brien*, 95 O. S. 166, 115 N. E. 25.

Oklahoma. *Whitehead v. Galloway* (Okla.), 153 Pac. 1101.

Oregon. *Mackenzie v. Douglas County*, 81 Or. 442, 159 Pac. 625 [affirmed on rehearing, *Mackenzie v. Douglas County*, 81 Or. 442, 159 Pac. 1033].

South Carolina. *Edgefield County v. Georgia-Carolina Power Co.*, 104 S. Car. 311, 88 S. E. 801.

Tennessee. *Ferguson v. Tyler*, 134 Tenn. 25, 183 S. W. 162.

Washington. *State v. Clausen*, 95 Wash. 214, 163 Pac. 744.

In the absence of constitutional provision the legislature has complete power over the county.¹⁰ Under some constitutional provisions, however, the county is created by the people of the state acting through the constitution and it can not be destroyed by the legislature.¹¹

While a county is occasionally referred to as a public corporation,¹² or a municipal corporation,¹³ it does not, properly speaking, come within the class of municipal corporations,¹⁴ and it is usually classed with the public quasi-corporations.¹⁵ Whether a public organization, like a county, is to be classed with corporations or quasi-corporations, is unimportant as far as it is a mere question of names. As a matter of the application of constitutional and statutory provisions which confer powers upon public corporations or which restrict the power of public corporations, it is frequently a matter of great importance to know whether a given organization comes within the class of corporations.

The term "township" or "town" is regularly used in different parts of the United States for the purpose of indicating a governmental agency which is smaller than the county. The township, like a county, is an organization created by the state for the purpose of local self-government and for the administration of law.¹⁶ A township is said not to be a public corporation,¹⁷ and accordingly a special act which confers powers upon a township is not rendered invalid by a constitutional prohibition against special acts which confer corporate power.¹⁸

¹⁰ *State v. Clausen*, 95 Wash. 214, 163 Pac. 744.

¹¹ *Ferguson v. Tyler*, 134 Tenn. 25, 183 S. W. 162.

¹² *Hammond v. Clark*, 136 Ga. 313, 38 L. R. A. (N.S.) 77, 71 S. E. 479; *Schubel v. Olcott*, 60 Or. 503, 120 Pac. 375.

¹³ *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822.

¹⁴ *Hersey v. Neilson*, 47 Mont. 132, Ann. Cas. 1914C, 963 [sub nomine, *Hershey v. Nelson*, 131 Pac. 30]; *Hamilton County v. Mighels*, 7 O. S. 109; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460.

¹⁵ *United States. Sherman County v. Simons*, 109 U. S. 735, 27 L. ed.

Iowa. Snethen v. Harrison County, 172 Ia. 81, 152 N. W. 12.

Missouri. Cassidy v. St. Joseph, 247 Mo. 197, 152 S. W. 306.

Nebraska. Davie v. Douglas County, 98 Neb. 479, L. R. A. 1916B, 1261, 153 N. W. 509.

Ohio. Carder v. Fayette County, 16 O. S. 353.

Wisconsin. Northern Trust Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460.

¹⁶ *State v. O'Brien*, 95 O. S. 166, 115 N. E. 25.

¹⁷ *Brattleboro Savings Bank v. Hardy Township*, 98 Fed. 524.

¹⁸ *Brattleboro Savings Bank v. Hardy Township*, 98 Fed. 524.

The legislature may provide for the organization of a port,¹⁹ and it may confer such powers upon it as to make it a municipal corporation within the meaning of constitutional provisions.²⁰

Districts which are organized for election purposes, for purposes of preserving records, and the like, and which are not given administrative or governmental power, are not regarded as either public corporations or public quasi-corporations.²¹

II

POWERS

§ 1885. Notice of powers of public corporations. All persons dealing with a public corporation are bound to take notice of the statutes creating it and conferring power upon it, and the mandatory statutes which prescribe the manner in which it may exercise its power.¹ All who deal with a public corporation are said to

¹⁹ *State v. Port of Astoria*, 79 Or. 1, 154 Pac. 399.

²⁰ *State v. Port of Astoria*, 79 Or. 1, 154 Pac. 399.

²¹ *Whitehead v. Galloway* (Okla.), 153 Pac. 1101.

¹ *United States. The Floyd Acceptances*, 74 U. S. (7 Wall.) 686, 19 L. ed. 169; *Marsh v. Fulton Co.*, 77 U. S. (10 Wall.) 676, 19 L. ed. 1040; *German Savings Bank v. Franklin Co.*, 128 U. S. 526, 32 L. ed. 519; *Nesbitt v. Riverside, etc., District*, 144 U. S. 610, 36 L. ed. 562; *Barnett v. Dennison*, 145 U. S. 135, 36 L. ed. 652; *National Bank, etc., v. Granada*, 54 Fed. 100; *Coffin v. Kearney Co.*, 57 Fed. 137; *Manhattan Co. v. Ironwood*, 74 Fed. 535, 20 C. C. A. 642.

Alabama. Pearson v. Duncan, — Ala. —, 73 So. 406.

Arkansas. Jennings v. Sebastian County, Ft. Smith District, 115 Ark. 130, 171 S. W. 920.

California. Sutro v. Dunn, 74 Cal. 593, 16 Pac. 505.

Colorado. Smith, etc., Co. v. Denver, 20 Colo. 84, 33 Pac. 844.

Illinois. Law v. People, 87 Ill. 383; *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, L. R. A. 1916D, 991, 111 N. W. 573.

Iowa. McPherson v. Foster, 43 Ia. 48, 22 Am. Rep. 215; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Ia. 250, 90 N. W. 746; *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

Kentucky. Murphy v. Louisville, 72 Ky. (9 Bush.) 189; *Floyd County v. Owego Bridge Co.*, 143 Ky. 693, 137 S. W. 237; *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122.

Massachusetts. Osgood v. Boston, 165 Mass. 281, 43 N. E. 108.

Michigan. McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625.

Minnesota. State v. Ry. Co., 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32.

Montana. State v. Hindson, 44 Mont. 429, 120 Pac. 485.

North Carolina. Commissioners of Wilkes Co. v. Call, 123 N. Car. 308, 44 L. R. A. 252, 31 S. E. 481; *McPeeters v. Blankenship*, 123 N. Car. C-1, 21 S. E. 879.

do so at their peril.² All who deal with a public corporation are charged with restrictions upon the amount of indebtedness which it may incur.³ Thus where bonds were issued under a statute which fixed the levy at ten mills per annum for thirteen years, a sum insufficient to pay the bonds in full, the court said that all bondholders "were bound to take notice of the extent of the taxing district, and of the value of the property therein, and with those facts before them they acted at their peril as far as the property owners in this special taxing district are concerned."⁴ Bonds of a school district are void if for purpose for which it can not borrow money.⁵

§ 1886. Power of public corporations to make contracts. In the absence of specific statutory provision it is usually said that a public corporation has implied power to make contracts necessary to enable it to exercise the powers and perform the duties which are conferred or imposed upon it by law.¹ A public corporation

North Dakota. *People's Bank v. School District*, 3 N. D. 496, 28 L. R. A. 642, 57 N. W. 787; *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726.

New Mexico. *Raton Waterworks Co. v. Raton*, 9 N. M. 70, 49 Pac. 898 [reversed on another point, 174 U. S. 360, 43 L. ed. 1005].

Ohio. *Wellston v. Morgan*, 65 O. S. 219, 62 N. E. 127.

Oklahoma. *Diggs v. Lobsitz*, 4 Okla. 232, 43 Pac. 1069; *In re Town of Afton*, 43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184; *Enid v. Warner-Quinlan Asphalt Co.*, — Okla. —, 161 Pac. 1092.

Rhode Island. *Ecroyd v. Coggeshall*, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260.

South Dakota. *Livingston v. School District*, 9 S. D. 345, 69 N. W. 15.

Vermont. *Barre v. Perry*, 82 Vt. 301, 73 Atl. 574.

Wisconsin. *Endion Improvement Co. v. Evening Telegram Co.*, 104 Wis. 432, 80 N. W. 732.

² *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122; *In re Town of Afton*,

43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184.

³ *German National Bank v. Covington*, 164 Ky. 292, 175 S. W. 330; *Eureka Fire Hose Mfg. Co. v. Granite*, — Okla. —, 159 Pac. 308; *Kreusler v. School District*, 256 Pa. St. 281, 100 Atl. 821.

⁴ *Miller v. Hixson*, 64 O. S. 39, 56, 59 N. E. 749.

⁵ *Board of Education, etc., v. Blodgett*, 155 Ill. 441, 46 Am. St. Rep. 348, 31 L. R. A. 70, 40 N. E. 1025.

¹ *United States. French v. Paving Co.*, 181 U. S. 324, 45 L. ed. 879.

Alabama. *Alabama, etc., Co. v. Reed*, 124 Ala. 253, 82 Am. St. Rep. 166, 27 So. 19.

California. *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358; *Oakland v. Water Front Co.*, 118 Cal. 160, 50 Pac. 277.

Georgia. *Heilbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206.

Illinois. *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230; *Eastern Illinois State Normal School v. Charleston*, 271 Ill.

which has entered into a contract within its powers and in compliance with the constitutional provisions which regulate its contracts, is bound thereby as is a natural person.²

According to the weight of authority a public corporation possesses only the powers which are expressly conferred upon it by constitutional and statutory provisions or which are implied from its express powers as being reasonable and proper means of carrying the express powers into operation.³ If power is conferred upon

602, L. R. A. 4916D, 991, 111 N. E. 573.

Indiana. Board, etc., of Perry Co. v. Gardner, 155 Ind. 165, 57 N. E. 908; Voss v. Waterloo Water Co., 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 208.

Iowa. Mills Co. v. R. R. Co., 47 Ia. 66.

Michigan. Mitchell v. Negaunee, 113 Mich. 359, 67 Am. St. Rep. 468, 38 L. R. A. 157, 71 N. W. 646.

Nebraska. State v. Martin, 27 Neb. 441, 43 N. W. 244.

New Jersey. Oakley v. Atlantic City, 63 N. J. L. 127, 44 Atl. 651.

North Carolina. Cox v. Pitt County, 146 N. Car. 584, 16 L. R. A. (N.S.) 253, 60 S. E. 516.

Oklahoma. Hoffman v. Pawnee County, 3 Okla. 325, 41 Pac. 566.

Pennsylvania. Reuting v. Titusville, 175 Pa. St. 512, 34 Atl. 916.

South Carolina. Jones v. Camden, 44 S. Car. 319, 51 Am. St. Rep. 819, 23 S. E. 141.

Virginia. Richmond, etc., Co. v. West Point, 94 Va. 668, 27 S. E. 460.

Washington. Sheafe v. Seattle, 18 Wash. 298, 51 Pac. 385.

West Virginia. Herald v. Board of Education, 65 W. Va. 765, 31 L. R. A. (N.S.) 588, 65 S. E. 102.

Wisconsin. Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826; Tyre v. Krug, 159 Wis. 39, L. R. A. 1915C, 624, 149 N. W. 718; Milwaukee v. Raulf, 164 Wis. 172, 159 N. W. 819.

² **United States.** American Pipe & Construction Co. v. Westchester County, 225 Fed. 947.

Nebraska. State v. Cass County, 60 Neb. 566, 83 N. W. 733.

New Jersey. Mason v. Cranbury Township, 68 N. J. L. 149, 52 Atl. 568.

Wisconsin. Siegel v. Liberty, 118 Wis. 599, 95 N. W. 402.

³ **United States.** Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552 [affirming, 1 Wyom. 137].

Colorado. Chase v. Boulder County, 37 Colo. 268, 11 Am. & Eng. Ann. Cas. 483, 86 Pac. 1011.

Illinois. Edwardsville v. Madison County, 251 Ill. 265, 37 L. R. A. (N.S.) 101, 96 N. E. 238.

Iowa. Harrison County v. Ogden, 133 Ia. 9, 110 N. W. 32.

Michigan. Gainer v. Nelson, 147 Mich. 113, 110 N. W. 511.

Montana. Edwards v. Lewis and Clark County, 53 Mont. 359, 165 Pac. 297.

South Dakota. Pierson v. Minnehaha County, 28 S. D. 534, 38 L. R. A. (N.S.) 261, 134 N. W. 212.

Vermont. Swanton v. Highgate, 81 Vt. 152, 16 L. R. A. (N.S.) 867, 69 Atl. 667.

Washington. State v. King County Superior Court, 68 Wash. 660, Ann. Cas. 1913E, 1076, 124 Pac. 127.

Wisconsin. Putney Brothers Co. v. Milwaukee County, 108 Wis. 554, 84 N. W. 822.

a public corporation by express words, its existence is clear.⁴ There is some authority for the proposition that in the absence of statute a city has authority under the general police power to make contracts which are intended to give effect to the usual and necessary powers of municipal corporations.⁵ It has even been held that if no provision therefor is made by statute, a city has implied power to contract for lighting,⁶ or for water.⁷ It has been held that a municipal corporation which is situated in a warm climate has power under its police power to acquire an ice plant and to operate it with its water works, on the ground that pure ice is a public necessity in such cities.⁸ These cases, however, represent a rather extreme view. Power of a municipal corporation is usually to be deduced, expressly or impliedly, from statutory provisions.⁹

It is generally held that the power to establish water works,¹⁰ or lighting plants,¹¹ does not exist in the absence of specific constitutional or statutory provisions. The exercise of such power is undoubtedly a great convenience but it is not so essential to the exercise of governmental functions that such power can be implied from the existence of the public corporation.¹²

A grant of power to a specified class of public corporations is not a grant of power to other corporations.¹³

§ 1887. Effect of statute on power to contract. The powers of public corporations are now provided for in most states by statute. Where such statutes are drawn with such detail that it is evidently the intention of the legislature to make complete provision for the

⁴Colvin v. Ward, 189 Ala. 198, 66 So. 98; Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544; Gilman v. Milwaukee, 61 Wis. 588, 21 N. W. 640.

⁵State, ex rel., v. Tampa Waterworks Co., 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358; Holton v. Camilla, 134 Ga. 560, 31 L. R. A. (N.S.) 116, 68 S. E. 472.

⁶Lake Charles, etc., Co. v. Lake Charles, 106 La. 65, 30 So. 289; Fawcett v. Mt. Airy, 134 N. Car. 125, 101 Am. St. Rep. 825, 63 L. R. A. 870, 45 S. E. 1029.

⁷State, ex rel., v. Tampa Waterworks Co., 56 Fla. 858, 19 L. R. A.

(N.S.) 183, 47 So. 358; Lake Charles, etc., Co. v. Lake Charles, 106 La. 65, 30 So. 289.

⁸Holton v. Camilla, 134 Ga. 560, 31 L. R. A. (N.S.) 116, 68 S. E. 472.

⁹See n. 3, ante.

¹⁰Wichita Water Co. v. Wichita, 234 Fed. 415.

¹¹Posey v. North Birmingham, 154 Ala. 511, 15 L. R. A. (N.S.) 711, 45 So. 663.

¹²Posey v. North Birmingham, 154 Ala. 511, 15 L. R. A. (N.S.) 711, 45 So. 663.

¹³Coos Bay Times Publishing Co. v. Coos County, 81 Or. 626, 160 Pac. 532.

power of cities to make contracts, the question of the existence of such power turns upon the construction of such statutes.¹

Where the statutes completely provide for what purposes and in what manner a public corporation may contract, no implied power to contract exists.² Contracts entered into by a municipal corporation, even if within its general powers, are invalid unless they are executed in compliance with the mandatory statutes which regulate contracts of public corporations.³ Specific legislative provisions which supplement or supersede specific provisions in charters of public corporations, may, on the other hand, render such contracts valid when otherwise they would be invalid.⁴

Within the limits of the power conferred upon it, a public corporation has a wide range of discretion as to the terms and conditions of the contract into which it will enter.⁵ Express authority

¹ Florida. Jacksonville, etc., Co. v. Jacksonville, 36 Fla. 229, 51 Am. St. Rep. 24, 30 L. R. A. 540, 18 So. 677.

Georgia. Barrett v. Atlanta, 145 Ga. 678, 89 S. E. 781.

Illinois. Danville v. Water Co., 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118.

Louisiana. Geary v. Board of Commissioners, 139 La. 781, 72 So. 245.

Michigan. Wheeler v. Sault Ste. Marie, 164 Mich. 338, 35 L. R. A. (N.S.) 547, 129 N. W. 685.

Ohio. Markley v. Mineral City, 58 O. S. 430, 65 Am. St. Rep. 776, 51 N. E. 28; Gas and Water Co. v. Elyria, 57 O. S. 374, 49 N. E. 335; Wellston v. Morgan, 65 O. S. 219, 62 N. E. 127.

Texas. Citizens' Bank v. Terrell, 78 Tex. 430, 14 S. W. 1003.

Virginia. Winchester v. Redmond, 93 Va. 711, 57 Am. St. Rep. 822, 25 S. E. 1001.

A public corporation may contract for an underground railway; at least, under specific statutory authority. Sun, etc., Association v. The Mayor, etc., of New York, 152 N. Y. 257, 37 L. R. A. 788, 46 N. E. 499 (by special statute).

² California. Osburn v. Stone, 170 Cal. 480, 150 Pac. 367.

Georgia. Barrett v. City of Atlanta, 145 Ga. 678, 89 S. E. 781.

Illinois. Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, L. R. A. 1916D, 991, 111 N. E. 573.

Michigan. Wheeler v. Sault Ste. Marie, 164 Mich. 338, 35 L. R. A. (N.S.) 547, 129 N. W. 685.

Montana. Edwards v. Lewis and Clark County, 53 Mont. 359, 165 Pac. 297.

Ohio. Gas and Water Co. v. Elyria, 57 O. S. 374, 49 N. E. 335; Wellston v. Morgan, 65 O. S. 219, 62 N. E. 127.

Oklahoma. Purcell v. Wadlington, 43 Okla. 728, 144 Pac. 380.

West Virginia. County Court v. Piedmont, 72 W. Va. 296, 78 S. E. 63.

³ Hill County v. Shaw & Borden Co., 225 Fed. 475, 140 C. C. A. 523; Osburn v. Stone (Cal.), 150 Pac. 367; Hunter v. Roseburg, 80 Or. 588, 157 Pac. 1065 [denying rehearing, Hunter v. Roseburg, 80 Or. 588, 156 Pac. 267].

⁴ State, ex rel., v. Tampa Waterworks Co., 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

⁵ Knaack v. School Township, 179 Ia. 410, 161 N. W. 446; Moriarity v. Board of Commissioners, 90 N. J. L. 328, 100 Atl. 1070; Norris v. Lawton, 47 Okla. 213, 148 Pac. 123.

is not necessary to enable a public corporation to provide by contract for such details as the manner in which street paving is to be done,⁶ or to reserve power to terminate contracts at its option.⁷

A limitation which is expressly imposed upon one class of public corporations does not operate as a limitation of powers which are expressly or impliedly conferred upon other classes of public corporations.⁸ A limitation upon the indebtedness of the state is not a limitation upon the indebtedness of a municipal corporation.⁹

§ 1888. Effect of statute on power to make implied contracts.

A public corporation may incur liability on implied contract if it could make an express contract of the same nature, and if the statute does not prescribe the exclusive method of making such contracts.¹ Thus where a city causes part of the electricity furnished to be used in lighting public buildings, and refuses to designate the lights to be removed and notifies the company not to remove any, it is liable for the electricity furnished in excess of the contract amount.² So it may be liable on an implied contract for attorneys' fees.³ If the statute prescribes the method of making a contract, a city can not be held liable on an implied contract not entered into according to statute.⁴ The fact that the statute

⁶ *Norris v. Lawton*, 47 Okla. 213, 148 Pac. 123.

⁷ *Moriarity v. Board of Commissioners*, 90 N. J. L. 328, 100 Atl. 1070.

⁸ *Bliss v. Hamilton*, 171 Cal. 123, 152 Pac. 303; *Haskett v. Sulphur Springs*, 185 Ind. 315, 114 N. E. 33.

⁹ *State v. Madison*, 7 Wis. 688.

¹ *United States. Austin v. Bartholomew*, 107 Fed. 349, 46 C. C. A. 327.

Alabama. Brush, etc., Co. v. Montgomery, 114 Ala. 433, 21 So. 960.

California. Buck v. Eureka, 124 Cal. 61, 56 Pac. 612.

Illinois. New Athens v. Thomas, 82 Ill. 259.

Kentucky. Frankfort Bridge Co. v. Frankfort, 57 Ky. (18 B. Mon.) 41.

Michigan. Central Bitulithic Paving Co. v. Mt. Clemens, 143 Mich. 259, 106 N. W. 888.

Nebraska. Rogers v. Omaha, 76 Neb. 187, 107 N. W. 214.

New Jersey. Frank v. Board of Education, 90 N. J. L. 273, 100 Atl. 211.

Vermont. Hardwicke School District v. Wolcott, 78 Vt. 23, 61 Atl. 471.

² *Brush, etc., Co. v. Montgomery*, 114 Ala. 433, 21 So. 960.

³ *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612.

⁴ *California. Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

Michigan. Detroit v. Robinson, 38 Mich. 108.

Ohio. Wellston v. Morgan, 65 O. S. 219, 62 N. E. 127; *McCormick v. Niles*, 81 O. S. 246, 27 L. R. A. (N.S.) 1117, 90 N. E. 803.

Wisconsin. Appleton Waterworks Co. v. City of Appleton, 132 Wis. 563, 113 N. W. 44.

requires the publication of ordinances in newspapers of opposite politics,⁵ that it fixes a maximum rate for such publication,⁶ and that there is only one newspaper of a certain political party in the municipal corporation,⁷ does not authorize such newspaper to publish such ordinances and to recover from the municipal corporation in the absence of an express contract. If there is no power to make an express contract there can be no implied contract.⁸ Thus where by statute there can be no contract between the city and an official, a pound-master can have no claim on an implied contract for premises furnished as a pound.⁹ Thus in the absence of statute a county is not liable to an acquitted defendant for costs in a criminal case,¹⁰ nor to compensate attorneys for defendant on appeal,¹¹ nor for physician's services at an inquest,¹² nor for compensation for a sheriff's posse.¹³ So as he is not a peace officer, a deputy marshal can have no fees for arrest of vagrants under the statute.¹⁴ The statute may impose a liability on the county for services rendered by a member of a board of health of a village to the poor during an epidemic of smallpox.¹⁵ A limitation on the amount of indebted-

⁵ *McCormick v. Niles*, 81 O. S. 246, 27 L. R. A. (N.S.) 1117, 90 N. E. 803.

⁶ *McCormick v. Niles*, 81 O. S. 246, 27 L. R. A. (N.S.) 1117, 90 N. E. 803.

⁷ *McCormick v. Niles*, 81 O. S. 246, 27 L. R. A. (N.S.) 1117, 90 N. E. 803.

⁸ *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777; *Spitzer v. Blanchard*, 82 Mich. 234, 46 N. W. 400; *Haakins v. Oklahoma City*, 38 Okla. 57, 126 Pac. 204; *Wilson v. Mitchell*, 17 S. D. 515, 106 Am. St. Rep. 784, 65 L. R. A. 158, 97 N. W. 741; *H. S. Turner Investment Co. v. Seattle*, 70 Wash. 201, 41 L. R. A. (N.S.) 781, 126 Pac. 426 (obiter, as the action was on an express and invalid contract for exemption from assessment).

If a city has no power to take possession of a well for its water supply, except by a proceeding in eminent domain, there can be no quasi-contractual obligation to make compensation for the unauthorized act of a public officer in taking possession of such well. *Wil-*

son v. Mitchell, 17 S. D. 515, 106 Am. St. Rep. 784, 65 L. R. A. 158, 97 N. W. 741.

⁹ *Macy v. Duluth*, 68 Minn. 452, 71 N. W. 687.

¹⁰ *Eisen v. Multnomah County*, 31 Or. 134, 49 Pac. 730.

¹¹ *State v. Young*, 104 Ia. 730, 74 N. W. 693. Nor is it liable for defendant's attorney fees unless the statute is complied with. *De Long v. Muskegon County*, 111 Mich. 508, 69 N. W. 1115.

¹² *Galveston County v. Ducie*, 91 Tex. 665, 45 S. W. 798.

¹³ *Sears v. Gallatin County*, 20 Mont. 462, 40 L. R. A. 405, 52 Pac. 204 [citing, *Anderson v. Jefferson County*, 25 O. S. 13]; *Chapin v. Ferry*, 3 Wash. 386, 15 L. R. A. 116, 28 Pac. 754; *Randles v. Waukesha County*, 96 Wis. 629, 71 N. W. 1034.

¹⁴ *Twinim v. Lucas County*, 104 Ia. 231, 73 N. W. 473.

¹⁵ *St. John's v. Clinton County*, 111 Mich. 609, 70 N. W. 131.

ness applies to implied contracts as well as to express ones.¹⁶ It does not apply, however, to quasi-contract as distinguished from genuine implied contracts. Thus it does not apply to the return of money paid for illegal tax certificates which under the ordinance in force was never the property of the city.¹⁷

§ 1889. Construction of statutory and constitutional powers—General provisions. Powers which are conferred upon a public corporation by constitutional provisions or by statutory provisions are construed strictly.¹ It possesses only the powers which are conferred upon it expressly, the powers which are implied from those which are granted expressly and the powers which are essential to

¹⁶ *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044; *Windsor v. Des Moines*, 110 Ia. 175, 81 N. W. 476; *Board v. Gillett*, 9 Okla. 593, 60 Pac. 277.

¹⁷ *Phelps v. Tacoma*, 15 Wash. 367, 46 Pac. 400.

¹ *Indiana. State v. Goldthait*, 172 Ind. 210, 19 Am. & Eng. Ann. Cas. 737, 87 N. E. 133.

Iowa. Atkinson v. Webster City, 177 Ia. 659, 158 N. W. 473.

Kentucky. Owen County v. Walker, 141 Ky. 516, 133 S. W. 236.

Maryland. Rushe v. Hyattsville, 116 Md. 122, 81 Atl. 278.

Montana. Hersey v. Neilson, 47 Mont. 132, Ann. Cas. 1914C, 963 [sub nom. *Hershey v. Nelson*, 131 Pac. 30].

Wisconsin. Hyde v. Kenosha County, 43 Wis. 129.

"Municipalities are established by law for the purposes of government. Their functions are performed through appropriate officers and agents, and they can exercise only such powers as are legally conferred by express provisions of law, or such as are by fair implication and intendment properly incident to or included in the powers expressly conferred for the purpose of carrying out and accomplishing the object of

the municipality. Powers that are indispensable to the declared objects and purposes of a municipality may be inferred or implied from powers expressly given that are fairly subject to such construction. The difficulty of making specific enumeration of all such powers as the legislature may intend to delegate to municipal corporations renders it necessary to confer some power in general terms. The general powers given are intended to confer other powers than those specifically enumerated. General powers given to a municipality should be interpreted and construed with reference to the purposes of the incorporation. Where particular powers are expressly conferred, and there is also a general grant of power, such general grant by intendment includes all powers that are fairly within the terms of the grant, and are essential to the purposes of the municipality, and not in conflict with the particular powers expressly conferred. The law does not expressly grant powers and impliedly grant others in conflict therewith. If reasonable doubt exists as to a particular power of a municipality, it should be resolved against the city; but, where the particular power is clearly conferred, or is fairly included in or in-

the purpose for which the corporation was created.² At the same time a grant of power, whether express or implied, carries with it power to make all contracts which are necessary and proper to carry into execution the power which is thus granted.³ Power to issue bonds includes power to provide for the payment of annual interest thereon.⁴ Power to contract includes power to impose reasonable restrictions.⁵ In the absence of statutory restrictions power to make a contract for a public improvement includes power to insert specific provisions as to the method of performance.⁶ Power to provide for the establishment of a public utility,⁷ such as

ferable from other powers expressly conferred, and is consistent with the purposes of the municipality and the powers expressly conferred, the existence of the power should be resolved in favor of the city, so as to enable it to perform its proper functions of government." *State, ex rel., v. Tampa Waterworks Co.*, 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

²*Posey v. North Birmingham*, 154 Ala. 511, 15 L. R. A. (N.S.) 701, 45 So. 663; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 206; *Wheeler v. Sault Ste. Marie*, 164 Mich. 338, 35 L. R. A. (N.S.) 547, 129 N. W. 685; *Attorney General, ex rel., v. Board of Education*, 175 Mich. 438, 45 L. R. A. (N.S.) 972, 141 N. W. 574.

³*United States. French v. Paving Co.*, 181 U. S. 324, 45 L. ed. 879.

California. McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358.

Iowa. First National Bank v. Emmetsburg, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

Kentucky. Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

Illinois. Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, L. R. A. 1916D, 991, 111 N. E. 573.

Indiana. Board, etc., of Perry County

v. Gardner, 155 Ind. 165, 57 N. E. 908.

Massachusetts. Bowers v. Needham, 216 Mass. 422, 103 N. E. 906.

Minnesota. Reed v. Anoka, 85 Minn. 294, 88 N. W. 981.

Missouri. Hays v. Poplar Bluff, 263 Mo. 516, L. R. A. 1915D, 595, 173 S. W. 676.

Montana. Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544.

New Jersey. Mason v. Cranbury Township, 68 N. J. L. 149, 52 Atl. 568.

Oregon. Salem v. Anson, 40 Or. 339, 91 Am. St. Rep. 485, 56 L. R. A. 169, 67 Pac. 190.

Pennsylvania. Reuting v. Titusville, 175 Pa. St. 512, 34 Atl. 916.

Virginia. Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139.

Wisconsin. Levis v. Black River Improvement Co., 105 Wis. 391, 81 N. W. 669; *Tiede v. Schneidt*, 105 Wis. 470, 81 N. W. 826.

⁴*Vallely v. Grand Forks Park Commissioners*, 16 N. D. 25, 15 L. R. A. (N.S.) 61, 111 N. W. 615.

⁵*Hamilton v. Gambell*, 31 Or. 328, 48 Pac. 433; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

⁶*Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

⁷*State, ex rel., v. Tampa Waterworks Co.*, 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

a system of water works,⁸ confers wide discretion as to the means by which such system is to be established if no attempt is made by the legislature to regulate such exercise of discretion.

Restrictions upon powers which are expressly or impliedly given are to be construed strictly.⁹

A power can not be implied from restrictions on its use.¹⁰ Power to construct an electric light plant is not to be implied from a constitutional restriction upon the amount of indebtedness for such purpose or from the statutory restriction upon issuing bonds for such purpose without first submitting the question to a popular vote.¹¹

A grant of a specific power does not confer an analogous power which is not granted and which is not incidental to any of the powers which are granted.¹² Power to erect cisterns for fire purposes does not confer power to erect a system of general water works;¹³ and power to construct water works does not confer power to engage in a general plumbing business.¹⁴ Power to repair streets does not confer power to operate a quarry outside of the corporate limits for the purpose of securing material for repairing streets.¹⁵

§ 1890. Power to contract—In general. Since the power of a public corporation to bind itself by contract depends upon the nature and extent of the powers conferred upon it by statute, no general absolute rules can be laid down as to the contractual powers which are necessarily possessed by every public corporation.¹ A slight difference in the wording of two statutes may lead

⁸ *State, ex rel., v. Tampa Water-works Co.*, 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

⁹ *Asbury v. Albemarle*, 162 N. Car. 247, 44 L. R. A. (N.S.) 1189, 78 S. E. 146.

¹⁰ *Posey v. North Birmingham*, 154 Ala. 511, 15 L. R. A. (N.S.) 711, 45 So. 663; *Board of Commissioners v. Workman*, — Ind. —, 116 N. E. 83 [reversing on rehearing, *Board of Commissioners v. Workman*, — Ind. —, 103 N. E. 99].

¹¹ *Posey v. North Birmingham*, 154 Ala. 511, 15 L. R. A. (N.S.) 711, 45 So. 663.

¹² *Donable v. Harrisonburg*, 104 Va. 533, 2 L. R. A. (N.S.) 910, 52 S. E. 174.

¹³ *Savidge v. Spring Lake*, 112 Mich. 91, 70 N. W. 425.

¹⁴ *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

¹⁵ *Donable v. Harrisonburg*, 104 Va. 533, 2 L. R. A. (N.S.) 910, 52 S. E. 174.

¹ "Upon the general subject of the liability of a municipal corporation, the authorities are a tangled web of contradictions and it is difficult to assert any proposition with respect to the same for which adjudications on

to material differences in the power of making contracts possessed by the corporations acting respectively under such statutes. All that can be done is to give typical illustrations of the contractual powers usually possessed by public corporations.

The fact that a public corporation does not own the land on which it proposes to place a public improvement, does not render invalid a contract between the public corporation and a contractor for the construction of such improvement, if it has in some way acquired the right to use such land.² A contract entered into by a city for paving, as a public street, a strip of ground in which the city has no right of way, is *ultra vires*.³

§ 1891. Specific illustrations—Power to acquire and dispose of property. Power to buy land includes power to create a debt and to issue non-negotiable but not negotiable bonds.¹ A city may agree to buy a lot for a public library to obtain a donation therefor.² Power to acquire and manage property for school purposes does not authorize a board of education to make a lease of land which is used for a school building, to one who intends to drill for oil and gas.³ A city may acquire a building for public purposes and dispose by lease of any part thereof not immediately necessary for public use.⁴ Power to rent property which is not used by the public corporation, includes power to lease it for a single occasion or for a number of occasions.⁵ Land which belongs to a town may

both sides may not be cited." *Arengti v. San Francisco*, 16 Cal. 255, 283 [quoted in *Cincinnati v. Cameron*, 33 O. S. 336, 374]; *People, ex rel., v. Chicago*, 278 Ill. 318, L. R. A. 1917E, 1089, 116 N. E. 158; *First Nat. Bank v. Emmetsburg*, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451; *Gottlieb v. Macklin*, 109 Md. 429, 31 L. R. A. (N.S.) 580, 71 Atl. 940.

² *Overall v. Madisonville*, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278; *Bell v. Kirkland*, 102 Minn. 213, 13 L. R. A. (N.S.) 793, 113 N. W. 271.

³ *Sang v. Duluth*, 58 Minn. 81, 59 N. W. 878.

⁴ *Witter v. Board, etc.*, 112 Ia. 380, 83 N. W. 1041; *Richmond, etc., Co. v.*

West Point, 94 Va. 668, 27 S. E. 460 [citing, (The Mayor, etc., of) *Nashville v. Ray*, 86 U. S. (19 Wall.) 468, 22 L. ed. 164; *Ketchum v. Buffalo*, 14 N. Y. 356].

² *Attorney General v. Nashua*, 67 N. H. 478, 32 Atl. 852.

³ *Herald v. Board of Education*, 65 W. Va. 765, 31 L. R. A. (N.S.) 588, 65 S. E. 102.

⁴ *Curtis v. Portsmouth*, 67 N. H. 506, 39 Atl. 439 [citing, *Spaulding v. Lowell*, 40 Mass. (23 Pick.) 71; *French v. Quincy*, 85 Mass. (3 All.) 9; *Jones v. Camden*, 44 S. Car. 319, 51 Am. St. Rep. 819, 23 S. E. 141.

⁵ *Gottlieb v. Macklin*, 109 Md. 429, 31 L. R. A. (N.S.) 580, 71 Atl. 949.

be leased to persons who intend to erect summer cottages thereon.⁶ Authority to sell realty and personalty such as the interests of the school may make necessary and to make by-laws with reference to the regulation of school books, does not authorize a board of education to purchase school books and to sell them to the pupils at the wholesale price.⁷ Power to adopt rules for the management of a public school and to promote the public usefulness of a school does not authorize the board of education to permit a principal to use a school building for the purpose of selling school supplies at a profit.⁸ A commissioner in charge of terminal stations may be empowered to vacate streets, to change the location thereof, to buy and sell realty, and to change the location of stations.⁹

A public corporation has no implied authority to make contracts which are not necessary to carry out the governmental purposes for which it was formed. Power to buy land for its use and benefit is not power to buy for investment,¹⁰ nor for making a gift thereof,¹¹ nor can a county bind itself by a warranty in its deed,¹² nor convey realty without an express grant of power.¹³ Under general power to dispose of its property, a public corporation can not lease its water works.¹⁴

§ 1892. Grant of franchises. Power to grant franchises "upon such terms and conditions as council may prescribe," includes power to take a bond to insure the prompt installment and completion of the plant.¹ While a city may grant a franchise, and such contract is valid and binding on the city,² it has no power, in the

⁶ *Davis v. Rockport*, 213 Mass. 279, 43 L. R. A. (N.S.) 1139, 100 N. E. 612.

⁷ *Attorney General, ex rel., v. Board of Education*, 175 Mich. 438, 45 L. R. A. (N.S.) 972, 141 N. W. 574.

⁸ *Tyre v. Krug*, 159 Wis. 39, L. R. A. 1915C, 624, 149 N. W. 718.

⁹ *McCutcheon v. Terminal Station Commission*, 217 N. Y. 127, 111 N. E. 661.

¹⁰ *Hunnicutt v. Atlanta*, 104 Ga. 1, 30 S. E. 500.

¹¹ *Markley v. Mineral City*, 58 O. S. 430, 65 Am. St. Rep. 776, 51 N. E. 28.

¹² *Harrison v. Palo Alto Co.*, 104 Ia.

383, 73 N. W. 872 [citing, *Findla v. San Francisco*, 13 Cal. 534].

¹³ *Jefferson County v. Grafton*, 74 Miss. 435, 60 Am. St. Rep. 516, 36 L. R. A. 798, 21 So. 247.

¹⁴ *Ogden City v. Irrigation Co.*, 16 Utah 440, 41 L. R. A. 305, 52 Pac. 697 [citing, *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 58 Am. St. Rep. 817, 30 L. R. A. 848, 62 N. W. 975].

¹ *Salem v. Anson*, 40 Or. 339, 91 Am. St. Rep. 485, 56 L. R. A. 169, 67 Pac. 190.

² *People v. Telephone Co.*, 192 Ill. 307, 85 Am. St. Rep. 338, 61 N. E. 428; *Baxter Springs v. Power Co.*, 64 Kan. 591, 68 Pac. 63; *Covington v. South*

absence of express statutory grant, to contract for an exclusive franchise.³ General language does not imply power to grant exclusive privileges.⁴ Thus an exclusive grant of the right to furnish water for a term of years is invalid.⁵ So a public corporation can not contract for a monopoly of gas.⁶

It has been held that a grant of exclusive control over a street, the title to which is in the city, carries with it power to grant a perpetual franchise in such street.⁷

§ 1893. Streets. Since a public corporation usually has power to construct and maintain streets and roads, it may enter into contracts for their construction and repair, and lighting of its streets, for sidewalks⁸ and shade trees.⁴ A public corporation which is authorized to acquire property to widen a street can not enter into a contract with a property owner to move back a building belonging to such property owner and to restore it to the condition in

Covington & Cincinnati Street Ry. Co., 246 U. S. 413, 62 L. ed. 802, 2 A. L. R. 1099.

It is also binding on the grantee of the franchise after acceptance. *Mobile Electric Co. v. Mobile*, — Ala. —, L. R. A. 1918F, 667, 79 So. 39.

³*Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381; *Thrift v. Elizabeth City*, 122 N. Car. 31, 44 L. R. A. 427, 30 S. E. 349; *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

⁴*Detroit, etc., Ry. Co. v. Detroit*, 110 Mich. 384, 64 Am. St. Rep. 350, 35 L. R. A. 859, 68 N. W. 304 [affirmed, 171 U. S. 48, 43 L. ed. 67].

⁵*Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

⁶*Parfitt v. Ferguson*, 159 N. Y. 111, 53 N. E. 707.

⁷*Covington v. South Covington & Cincinnati Street Ry. Co.*, 246 U. S. 413, 62 L. ed. 802, 2 A. L. R. 1099.

⁸*United States. French v. Paving Co.*, 181 U. S. 324, 45 L. ed. 879 [affirming, *Barber, etc., Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934].

Iowa. Allen v. Davenport, 107 Ia. 90, 77 N. W. 532.

Kansas. The contract for construction may provide that the contractor shall repair the street as far as necessary by reason of poor work or defective material in consideration of the original assessment. *Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474 [citing, *Cole v. People*, 161 Ill. 16, 43 N. E. 607].

Missouri. *Barber Asphalt Paving Co., v. Ullman*, 137 Mo. 543, 38 S. W. 458.

Nebraska. *Robertson v. Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442.

New Jersey. *Wilson v. Trenton*, 60 N. J. L. 394, 38 Atl. 635.

Pennsylvania. *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

²*Colorado Springs v. Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921; *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 41 Atl. 454.

³*Jones v. City of Camden*, 44 S. Car. 319, 51 Am. St. Rep. 819, 23 S. E. 141.

⁴*Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841.

which it was before such removal.⁵ A public corporation can not enter into a contract for maintaining a private way.⁶ Power to construct streets and bridges does not confer power to enter into a contract with a railway for strengthening a public bridge so that the railway may operate its lines over it.⁷ Power to keep streets in order includes power to release a railroad company from its liability to keep up a bridge. The city may agree to maintain such bridge itself.⁸ Power to construct and maintain roads and bridges is said to imply power to buy an automobile to use in inspecting such roads and bridges.⁹ Power to purchase "machinery or other equipment for construction" of highways is held not to confer power to buy an automobile for the purpose of inspection and supervision.¹⁰ A municipal corporation has no authority to make a contract with a railway company by which the municipal corporation agrees to strengthen a bridge so as to enable a railway to cross it if such bridge is already of sufficient strength for the needs of ordinary traffic; and after the railway has strengthened such bridge it can not recover compensation therefor from the municipal corporation under such contract.¹¹ A public corporation can not bind itself to maintain a private way with public funds.¹²

§ 1894. Water supply. A public corporation may contract for a water supply.¹ Power to maintain a water works includes power to enter into a contract with a private corporation to pump water.² The fact that there is a specific grant of power to a public corporation to sink wells, erect pumps, and the like, does not prevent such public corporation from entering into a contract with a corporation to furnish a water supply under a grant of power to make laws

⁵ *Wheeler v. Sault Ste. Marie*, 164 Mich. 338, 35 L. R. A. (N.S.) 547, 129 N. W. 685.

⁶ *Smith v. Smythe*, 197 N. Y. 457, 35 L. R. A. (N.S.) 524, 90 N. E. 1121.

⁷ *Minneapolis, St. P. R. & D. E. T. Co. v. Minneapolis*, 124 Minn. 351, 50 L. R. A. (N.S.) 143, 145 N. W. 609.

⁸ *Hicks v. Ry.*, 102 Va. 197, 45 S. E. 688.

⁹ *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

¹⁰ *State v. Menning*, 95 O. S. 97, 115 N. E. 571.

¹¹ *Minneapolis, St. P. R. & D. E. T. Co. v. Minneapolis*, 124 Minn. 351, 50 L. R. A. (N.S.) 143, 145 N. W. 609.

¹² *Smith v. Smythe*, 197 N. Y. 457, 35 L. R. A. (N.S.) 524, 90 N. E. 1121.

¹ *Gadsden v. Mitchell*, 145 Ala. 137, 117 Am. St. Rep. 20, 6 L. R. A. (N.S.) 781, 40 So. 557; *Cincinnati, ex rel., v. Cincinnati*, 11 Ohio C. C. 309, 1 Ohio C. D. 372. A county may contract for a water supply for an unincorporated town. *Agua Pura Co. v. Las Vegas*, 10 N. M. 6, 60 Pac. 208.

² *Arnhold v. Klug*, 97 Kan. 576, 155 Pac. 805.

necessary to guard against fire and to provide for the establishment of water works.³ Power to make a contract for a supply of water includes power to adopt a contract which has been entered into with the promoters of a water company.⁴ Power to provide a water supply includes power to buy an existing system of water works.⁵ A statutory provision to the effect that a public corporation which undertakes to acquire or construct a system to furnish water to its inhabitants must acquire a water system which is owned by a private or a quasi-public corporation, does not apply to a water plant which can not be used as a part of the intended public system,⁶ nor does it apply to a plant which is owned by a partnership.⁷ Power to provide a water supply confers power to erect a plant to supply water.⁸ Power to provide for supplying water and lighting includes power to make contracts for that purpose,⁹ including contracts by which a water works system is to be constructed and operated by the adversary party for a compensation to be paid by the public corporation.¹⁰ Power to construct water works includes power to repay to private persons the amount spent by them in constructing pipes to connect with the city water works.¹¹ Under power to "construct and maintain water works," it can not sell without legislative enactment.¹²

³ *State, ex rel., v. Tampa Waterworks Co.*, 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

⁴ *Belfast v. Belfast Water Co.*, 115 Me. 234, 98 Atl. 738.

Power to contract for the construction of a system of waterworks does not include power to make a contract for such a system which does not connect with a water supply, of which the city can legally make use. *Smith v. Stoughton*, 185 Mass. 329, 70 N. E. 195.

⁵ *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490; *Eau Claire Water Co. v. Eau Claire*, 132 Wis. 411, 112 N. W. 458.

⁶ *Asbury v. Albemarle*, 162 N. Car. 247, 44 L. R. A. (N.S.) 1189, 78 S. E. 146.

⁷ *Asbury v. Albemarle*, 162 N. Car. 247, 44 L. R. A. (N.S.) 1189, 78 S. E. 146.

⁸ *Fawcett v. Mt. Airy*, 134 N. Car. 125, 45 S. E. 1029.

⁹ *Marin Water & Power Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767; *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981; *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651.

¹⁰ *United States. Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Anoka Water Works, Electric Light & Power Co. v. Anoka*, 109 Fed. 580.

Florida. State, ex rel., v. Tampa Waterworks Co., 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

Maine. Belfast v. Belfast Water Co., 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738.

Minnesota. Reed v. Anoka, 85 Minn. 294, 88 N. W. 981.

New Jersey. Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. L. 378, 6 Atl. 24.

¹¹ *State v. St. Louis*, 169 Mo. 31, 68 S. W. 900.

¹² *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 58 Am. St. Rep. 817, 30 L. R. A. 848, 62 N. W. 975 [compare

A public corporation has no power to agree to furnish water for a long period of years at a nominal price in order to induce a public institution to locate in such corporation.¹³

§ 1895. Light, power and electricity. A city may erect a lighting plant, and furnish private light as well as public, if it is a suitable method of operating.¹ Power to provide for lighting streets and to control a plant which the public corporation owns for the purpose of supplying light, confers authority to own an electric light plant in order to light the streets.² As a power specifically given carries with it power to make contracts necessary to carry such given power into effect, power to construct a lighting plant includes power to buy an engine therefor,³ and to contract for labor and material.⁴ Power to erect poles and lights includes power to contract therefor.⁵ Power to purchase a lighting plant includes power to purchase different parts of such lighting plant as the city may be able to afford from its current revenues.⁶ A city and county owning a building in common, as city hall and court house, may make a joint contract for lighting it.⁷

Power to establish a system of lighting or electricity includes power to sell any excess service to private consumers;⁸ but if the statute provides that the council is to fix the rates, no other officers have authority so to do.⁹ Power to furnish electricity to

Baily v. Philadelphia, 184 Pa. St. 594, 63 Am. St. Rep. 812, 39 L. R. A. 837, 39 Atl. 494, where it was held to have power to lease waterworks].

¹³ Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, 111 N. E. 573.

¹ Jacksonville, etc., Co. v. Jacksonville, 36 Fla. 229, 51 Am. St. Rep. 24, 30 L. R. A. 540, 18 So. 677; Mitchell v. Negaunee, 113 Mich. 359, 67 Am. St. Rep. 468, 38 L. R. A. 157, 71 N. W. 646 [compare Biddle v. Riverton, 58 N. J. L. 289, 33 Atl. 279].

² Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

³ Arbuckle-Ryan Co. v. Grand Ledge, 122 Mich. 491, 81 N. W. 358.

⁴ Rockebrandt v. Madison, 9 Ind.

App. 227, 53 Am. St. Rep. 348, 36 N. E. 444.

⁵ Oakley v. Atlantic City, 63 N. J. L. 127, 44 Atl. 651. Power to levy a special tax for lighting does not limit a general power to light. Townsend, etc., Co. v. Port Townsend, 19 Wash. 407, 53 Pac. 561.

⁶ Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

⁷ State v. McCurdy, 62 Minn. 509, 64 N. W. 1133.

⁸ Crawfordsville v. Braden, 130 Ind. 149, 30 Am. St. Rep. 214, 14 L. R. A. 268, 28 N. E. 849; Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278; Butler v. Karb, 96 O. S. 472, 117 N. E. 953.

⁹ Butler v. Karb, 96 O. S. 472, 117 N. E. 953.

private consumers includes power to install such electrical appliances as are necessary to furnish the electric power of the type which a specific consumer needs,¹⁰ and to charge the consumer with the expense thereof.¹¹ Power to furnish electricity to private consumers confers the same general power as is conferred upon a corporation which is engaged in the same kind of service.¹²

Power to borrow money for the purpose of installing the electric lights and purchasing necessary power and otherwise, to furnish light to the public corporation, does not confer authority to furnish lights to the inhabitants of the public corporation,¹³ where the cost of furnishing lights to the inhabitants is much greater than the cost of lighting the streets.¹⁴ Power to purchase property necessary for the use of the corporation does not confer power to construct an electric light plant.¹⁵

§ 1896. Sewers. Under authority to construct sewers, a municipal corporation may enter into a contract for the construction of sewers.¹ Under a power to provide a system of sewers, a public corporation may buy a right of way for a sewer;² may contract for disposing of sewage outside of the city limits,³ and has power to contract with a rendering establishment situated outside the city.⁴

¹⁰ State, ex rel., W. J. Armstrong Co. v. Waseca, 122 Minn. 348, 46 L. R. A. (N.S.) 437, 142 N. W. 319.

¹¹ State, ex rel., W. J. Armstrong Co. v. Waseca, 122 Minn. 348, 46 L. R. A. (N.S.) 437, 142 N. W. 319.

¹² State, ex rel., W. J. Armstrong Co. v. Waseca, 122 Minn. 348, 46 L. R. A. (N.S.) 437, 142 N. W. 319.

¹³ Swanton v. Highgate, 81 Vt. 152, 16 L. R. A. (N.S.) 867, 69 Atl. 667.

¹⁴ Swanton v. Highgate, 81 Vt. 152, 16 L. R. A. (N.S.) 867, 69 Atl. 667.

¹⁵ Posey v. North Birmingham, 154 Ala. 511, 15 L. R. A. (N.S.) 711, 45 So. 663.

¹ American Pipe & Construction Co. v. Westchester County, 225 Fed. 947; First Nat. Bank v. Emmetsburg, 157 Ia. 555, L. R. A. 1915A, 982, 138

N. W. 451; Jones v. Holzapfel, 11 Okla. 405, 68 Pac. 511.

² Leeds v. Richmond, 102 Ind. 372, 1 N. E. 711; Coit v. Grand Rapids, 115 Mich. 493, 73 N. W. 811. (Even if the price to be paid is said to be an exemption of the land through which the right of way runs from the sewer assessment; for though a contract to exempt from assessment was void, the real purpose of the contract was to pay a sum equal to the assessment for the right of way, which was lawful.) [Citing, Turner v. Cruzen, 70 Ia. 202, 30 N. W. 483.]

³ McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358.

⁴ Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826.

§ 1897. Public buildings. Power is usually conferred upon public corporations to enter into contracts for the construction of necessary public buildings.¹ This power ordinarily includes the power to select an architect,² or an engineer.³ It includes power to enter into a contract for plans of a public building.⁴ The fact that it is agreed that if the contract is let to the person who furnishes the plan, the cost of the plans is to be included as part of the cost of the building, does not render the contract invalid.⁵ Power to construct and equip a morgue includes power to employ a keeper thereof.⁶ Power to build a court house is power to furnish it.⁷

§ 1898. Contract to refrain from exercise of governmental functions. A public corporation can not enter into a binding contract by which it agrees not to exercise its governmental functions,¹ even if such contract is included within the broad and general language of statutory provisions which confer power upon the public corporation.² It can not contract away its police power,³ or its power to tax.⁴ In the absence of specific statutory authority, a public corporation can not enter into a contract by which it agrees to exempt certain property from taxation.⁵ It can not enter into

¹ Board of Revenue v. Merrill, 193 Ala. 521, 68 So. 971; Dunn v. O'Neill, 144 Ga. 823, 88 S. E. 190; Mason v. Dunn, 146 Ga. 352, 91 S. E. 121; Wells v. Boone County, 171 Ia. 377, 153 N. W. 220; Trimble v. Pittsburgh, 248 Pa. St. 550, 94 Atl. 227.

² Board of Revenue v. Merrill, 193 Ala. 521, 68 So. 971.

³ Trimble v. Pittsburgh, 248 Pa. St. 550, 94 Atl. 227.

⁴ Wells v. Boone County, 171 Ia. 377, 153 N. W. 220.

⁵ Wells v. Boone County, 171 Ia. 377, 153 N. W. 220.

⁶ Manley v. Scott, 108 Minn. 142, 29 L. R. A. (N.S.) 652, 121 N. W. 628.

⁷ Alabama, etc., Co. v. Reed, 124 Ala. 253, 82 Am. St. Rep. 166, 27 So. 19.

¹ Wyandotte County Gas Co. v. Kansas, 231 U. S. 622, 58 L. ed. 404; Milwaukee Electric Ry. & Light Co. v. Commonwealth, 238 U. S. 174, 59 L. ed. 1254; State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 28

L. R. A. (N.S.) 298, 108 N. W. 261; State v. Board of Park Commissioners, 100 Minn. 150, 9 L. R. A. (N.S.) 1045, 110 N. W. 1121; State v. Great Northern Ry. Co., 134 Minn. 249, 158 N. W. 972; Benwood v. Public Service Commission, 75 W. Va. 127, L. R. A. 1915C. 261, 83 S. E. 295.

² McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358; Flynn v. Water Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

³ Pittsburgh, etc., Ry. Co. v. Hood, 94 Fed. 618, 36 C. C. A. 423.

⁴ Altgelt v. San Antonio, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75; Birmingham v. Birmingham Waterworks Co., 139 Ala. 531, 101 Am. St. Rep. 49, 36 So. 614.

⁵ City of Tampa v. Kaunitz, 39 Fla. 683, 63 Am. St. Rep. 202, 23 So. 416; Tarver v. Dalton, 134 Ga. 462, 29 L. R. A. (N.S.) 183, 67 S. E. 929; Shuck v. Lebanon, 24 Ky. Law Rep. 451, 68 S. W. 843; Louisville Tobacco Ware-

a contract by which it agrees not to charge a license tax upon a water company in excess of a certain amount during the term of the contract, under which such water company has agreed to supply water to such public corporation.⁸

A city can not bind itself for all future time, as to maintain a bridge,⁷ or a well in a public street;⁹ nor can a city covenant to keep a whole street open; nor guarantee against all damage from the backing up of a sewer.¹⁰ A contract whereby a railroad agrees to pay to the city all damages due to abutting property owners for vacating a street, is unenforceable.¹¹ A contract by which a public corporation agrees to maintain certain parkways forever, is invalid, since it can not divest itself of its right to vacate streets and parkways when proper.¹² A contract by which a public corporation agrees with a railway that it will thereafter construct and maintain all the crossings which may be necessary by reason of opening new streets, is invalid.¹³

§ 1899. Delegation or assumption of public duties. If the legislature has imposed certain duties upon public officials, the public corporation has no authority to hire other persons to perform such duties.¹ Under a statute which provides that the accounts of public officers must be audited by a state examiner, a county has no power to employ an individual to audit such accounts.² Power to rent market stalls does not include power to hire an auctioneer.³ Power to maintain roads is not power to

house Co. v. Commonwealth, 106 Ky. 165, 49 S. W. 1069; Dayton v. Bellevue, W. & F. G. L. Co., 119 Ky. 714, 7 Am. & Eng. Ann. Cas. 1012, 68 S. W. 142; Winchester v. Winchester Waterworks Co., 149 Ky. 177, 148 S. W. 1.

⁸ Birmingham v. Birmingham Waterworks Co., 139 Ala. 531, 101 Am. St. Rep. 49, 36 So. 614.

⁷ State v. Ry., 30 Minn. 108, 50 L. R. A. 656, 83 N. W. 32.

⁹ Snyder v. Mt. Pulaaski, 176 Ill. 397, 44 L. R. A. 407, 52 N. E. 62.

¹⁰ Penley v. Auburn, 85 Me. 278, 21 L. R. A. 657, 27 Atl. 158.

¹¹ Nashville v. Sutherland, 92 Tenn. 335, 36 Am. St. Rep. 88, 19 L. R. A. 619, 21 S. W. 674.

¹¹ New Haven v. R. R., 62 Conn. 252, 18 L. R. A. 256, 25 Atl. 316.

¹² State v. Board of Park Commissioners, 100 Minn. 150, 9 L. R. A. (N.S.) 1045, 110 N. W. 1121.

¹³ State, ex rel., v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 28 L. R. A. (N.S.) 298, 108 N. W. 261.

¹ News-Dispatch Printing & Auditing Co. v. Board of Commissioners, — Okla. —, 161 Pac. 207.

² News-Dispatch Printing & Auditing Co. v. Board of Commissioners, — Okla. —, 161 Pac. 207.

³ Norfolk v. Pollard, 94 Va. 279, 26 S. E. 832.

employ an inspector,⁴ and power to sell bonds does not include power to compromise a claim for breach of a void executory agreement to sell bonds.⁵ A county can not contract for medical services to cure a pauper who is an habitual drunkard,⁶ and a board of public works can employ a pipeman only by contract at will.⁷

A public corporation can not by contract assume liabilities imposed by law upon other public bodies and not upon itself. Thus a city can not offer a reward for conviction for a state offense,⁸ or issue bonds for a county jail.⁹ County bonds for road purposes can not be issued where a city within the county is not subject to the road tax,¹⁰ nor for a state institution.¹¹

§ 1900. Powers incidental to taxation. A power to levy and collect taxes does not include the power to enter into a contract with an individual for discovering property which has escaped taxation.¹ Such power can not be implied by reason of the fact that it is not made the duty of any public officer to discover property which has escaped taxation;² nor can it be implied from the fact that the statutes provide that a taxing officer who discovers property which has escaped taxation shall receive a certain proportion of the penalty imposed upon such property.³ Where there is specific statutory authority for the employment of a person to discover property omitted from taxation upon payment of a contingent fee, such contract does not confer a power coupled with an interest and it is not irrevocable.⁴ Power to assess property for taxation

⁴ *Turner v. Fulton County*, 109 Ga. 633, 34 S. E. 1024.

⁵ *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973 [affirming, 86 Hun (N. Y.) 548].

⁶ *Putney Bros. Co. v. Milwaukee Co.*, 108 Wis. 554, 84 N. W. 822.

⁷ *Frankfort v. Brawner*, 100 Ky. 166, 172, 37 S. W. 950 [rehearing denied, 38 S. W. 497].

⁸ *Winchester v. Redmond*, 93 Va. 711, 57 Am. St. Rep. 822, 25 S. E. 1001.

⁹ *Myers v. Jeffersonville*, 145 Ind. 431, 44 N. E. 452.

¹⁰ *Devine v. Board, etc., of Sacramento Co.*, 121 Cal. 670, 54 Pac. 262.

¹¹ *Oberlin v. Wasson*, 52 O. S. 610, 44 N. E. 1143.

¹ *Grannis v. Blue Earth Co.*, 81 Minn. 55, 83 N. W. 495. An individual tax-

payer may sue to annul an illegal contract for collecting back taxes. *Burness v. Multnomah County*, 37 Or. 460, 60 Pac. 1005; *Stevens v. Henry County*, 218 Ill. 468, 4 L. R. A. (N.S.) 339, 75 N. E. 1024; *State v. Dickinson County*, 77 Kan. 540, 16 L. R. A. (N.S.) 476, 95 Pac. 392; *Pierson v. Minnehaha County*, 28 S. D. 534, 38 L. R. A. (N.S.) 261; 134 N. W. 212.

² *Stevens v. Henry County*, 218 Ill. 468, 4 L. R. A. (N.S.) 339, 75 N. E. 1024.

³ *Pierson v. Minnehaha County*, 28 S. D. 534, 38 L. R. A. (N.S.) 261, 134 N. W. 212.

⁴ *State, ex rel., v. McCafferty*, 25 Okla. 2, L. R. A. 1915A, 639, 105 Pac. 992.

has been held to confer power to employ persons other than the regular assessors to estimate the value of property, such as timber, the value of which is a matter of expert knowledge.⁵

§ 1901. Contracts to be performed during long period. Unless specifically restrained by statute a public corporation may make a contract which by its terms is to last for a long period of time. Contracts for water and lighting are the common examples of contracts of this sort.¹ The time must, however, be reasonable.² Thus a five-year lighting contract terminable at three months' notice;³ a contract for water supply to last twenty-five years,⁴ or ten years;⁵ or for lighting to last ten years,⁶ or five years;⁷ a contract for furnishing gas for twenty-five years;⁸ a contract for water for twenty years,⁹ or for thirty years,¹⁰ have in view of the nature of the contracts been held not unreasonable. A perpetual contract,¹¹ as for a water supply,¹² has been held to be valid. A public corporation can not enter into a contract by which it is to levy an annual tax in order to pay a water company which agrees to supply

⁵ *Pacific Timber Cruising Co. v. Clarke County*, 233 Fed. 540; *Haynes v. Police Jury*, 139 La. 101, 71 So. 244; *Wingate v. Clatsop County*, 71 Or. 94, 142 Pac. 561.

Contra, *Dexter-Horton Trust & Savings Bank v. Clearwater County*, 235 Fed. 743.

¹ *United States. Denver v. New York Trust Co.*, 229 U. S. 123, 57 L. ed. 1101.

California. *Marin Water & Power Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767.

Colorado. *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993.

Maine. *Maine Water Co. v. Waterville*, 93 Me. 586, 40 L. R. A. 294, 45 Atl. 830; *Belfast v. Belfast Water Co.*, 115 Me. 234, 98 Atl. 738.

Pennsylvania. *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 41 Atl. 434.

² *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358.

³ *Hartford v. Light Co.*, 65 Conn. 324, 32 Atl. 925.

⁴ *Walla Walla v. Water Co.*, 172 U. S. 1, 43 L. ed. 341.

⁵ Though the contract is such as to tie up the general revenue for the water fund. *Monroe Water Co. v. Heath*, 115 Mich. 277, 73 N. W. 234.

⁶ *Reid v. Trowbridge*, 78 Miss. 542, 29 So. 167.

⁷ *Dlack v. Chester*, 175 Pa. St. 101, 34 Atl. 354.

⁸ *Vincennes v. Light Co.*, 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573.

⁹ *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Light, etc., Co. v. Jackson*, 73 Miss. 598, 19 So. 771.

¹⁰ *Little Falls, etc., Co. v. Little Falls*, 102 Fed. 663; *Gadsden v. Mitchell*, 145 Ala. 137, 117 Am. St. Rep. 20, 6 L. R. A. (N.S.) 781, 40 So. 557.

¹¹ *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738; *Burns v. New York*, 213 N. Y. 516, 108 N. E. 77.

¹² *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738.

the public corporation with water;¹³ and such contract can not be upheld on the theory that it is to last only for the time that such company shall remain in existence as a corporation.¹⁴

Failure to specify a period for which a contract,¹⁵ such as a contract to supply water,¹⁶ is to run, is construed as making such contract subject to termination upon reasonable notice. In the absence of statutory authority a public corporation can not enter into a contract with a public utility,¹⁷ such as a street railway company,¹⁸ for fixing rates so that such rates can not be reduced thereafter. A contract by which a city agrees to furnish water for a long period of time and for a nominal compensation, is invalid.¹⁹

The power of the officers of a public corporation to enter into a contract which is to be performed after the expiration of the term of office of the officers by whom the contract was made, depends in part upon the nature of the contract. Public officers can not make a contract which relates to the exercise of administrative, governmental or legislative functions which will bind their successors unless the power so to do is granted expressly.²⁰ On the other hand, contracts which are in exercise of the public powers of a public corporation are governed by the same rules as those which govern the contracts of natural persons; and such contracts bind the successors in office of the officers by whom they were made.²¹

¹³ *Westminster Water Co. v. Mayor of Westminster*, 98 Md. 551, 103 Am. St. Rep. 424, 64 L. R. A. 630, 56 Atl. 990.

¹⁴ *Westminster Water Co. v. Mayor of Westminster*, 98 Md. 551, 103 Am. St. Rep. 424, 64 L. R. A. 630, 56 Atl. 990.

¹⁵ *Childs v. Columbia*, 87 S. Car. 566, 34 L. R. A. (N.S.) 542, 70 S. E. 296.

¹⁶ *Childs v. Columbia*, 87 S. Car. 566, 34 L. R. A. (N.S.) 542, 70 S. E. 296.

¹⁷ *San Francisco-Oakland Terminal Rys. v. Alameda*, 226 Fed. 889.

¹⁸ *San Francisco-Oakland Terminal Rys. v. Alameda*, 226 Fed. 889.

¹⁹ *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573.

²⁰ *United States. Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N.S.) 736.

Arizona. Tempe v. Corbell, 17 Ariz. 1, L. R. A. 1915E, 581, 147 Pac. 745.

Maryland. Westminster Water Co. v. Westminster, 98 Md. 551, 103 Am. St. Rep. 424, 64 L. R. A. 630, 56 Atl. 990.

Pennsylvania. McCormick v. Hanover Township, 246 Pa. St. 169, 92 Atl. 195.

South Carolina. State v. Major, 94 S. Car. 472, 78 S. E. 896.

²¹ *United States. Detroit v. Detroit Citizens' Street Railway*, 184 U. S. 368, 46 L. ed. 592; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 34 L. R. A. 518; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N.S.) 736.

California. McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R.

A public officer or a board can not ordinarily appoint subordinates for terms beyond the terms of the board which appointed them.²² However, a county board may appoint a morgue-keeper for a period of a year, although such appointment is made just before the term of office of such board expires.²³ A school board may appoint a superintendent of schools for a term lasting beyond the term of the members of the board,²⁴ at least if such appointment is not unreasonable, or made in bad faith in order to secure his tenure of office as against an unfriendly board.²⁵ A contract for sprinkling public streets which is to last for a year and the performance of which is to begin shortly before the expiration of the term of the council which made the contract, does not bind its successors.²⁶

Contracts which are entered into for the purpose of supplying the public with water, for furnishing lighting, and the like, are regarded as an exercise of the business power of the public corporation, and accordingly such contracts bind successive officers,²⁷ but they must go into full effect during the term of the officers who enter into them.²⁸ Under statutory authority to enter into a contract for public printing for a term of two years, a board may

A. 794, 44 Pac. 358; *Liggett v. Kiowa County*, 6 Colo. App. 269, 40 Pac. 475.

Indiana. *Indianapolis v. Indianapolis Gas-Light Coke Co.*, 66 Ind. 396; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

Iowa. *Grant v. Davenport*, 36 Ia. 396.

Massachusetts. *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

Minnesota. *Manley v. Scott*, 108 Minn. 142, 29 L. R. A. (N.S.) 652, 121 N. W. 628.

New York. *Weston v. Syracuse*, 17 N. Y. 110.

²² *McCormick v. Hanover Township*, 246 Pa. St. 169, 92 Atl. 195; *State v. Major*, 94 S. Car. 472, 78 S. E. 896.

²³ *Manley v. Scott*, 108 Minn. 142, 29 L. R. A. (N.S.) 652, 121 N. W. 628.

²⁴ *Davis v. Public Schools*, 175 Mich. 105, 140 N. W. 1001.

²⁵ *Davis v. Public Schools*, 175 Mich. 105, 140 N. W. 1001.

²⁶ *Tempe v. Corbell*, 17 Ariz. 1, L. R. A. 1915E, 581, 147 Pac. 745.

²⁷ *United States. Detroit v. Ry.*, 184 U. S. 368, 46 L. ed. 592; *Illinois, etc., Bank v. Arkansas City*, 76 Fed. 271, 34 L. R. A. 518; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N.S.) 736.

California. *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358.

Colorado. *Liggett v. Kiowa County*, 6 Colo. App. 269, 40 Pac. 475.

Indiana. *Indianapolis v. Coke Co.*, 66 Ind. 396; *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

Iowa. *Grant v. Davenport*, 36 Ia. 396.

Massachusetts. *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

New York. *Weston v. Syracuse*, 17 N. Y. 110.

²⁸ *Kerlin Bros. Co. v. Toledo*, 20 Ohio C. C. 603, 11 Ohio C. D. 56.

make such contract just before the expiration of its term of office,²⁹ although such contract will last during almost the entire term of the successors of such board.³⁰

Unless in good faith, for a reasonable time, and for the public interest, a contract extending beyond the term of the officials making it, is void.³¹ A contract for the erection and maintenance of a bridge "for all future time,"³² has been held unreasonable.

If the time for which a contract may be made is fixed by statute, no contract in excess of such time can be made.³³ A city whose corporate existence is to end by statutory merger in a larger municipality, can not make a contract to last beyond its own existence.³⁴ So a ten-year contract made by the officials of a town included within the limits of "Greater New York," made fourteen days before the charter of "Greater New York" was to go into effect, was held void as a mere scheme to encumber the new municipality.³⁵ The authorities are divided on the question of the effect of a contract by which the public corporation attempts to bind itself for a longer time than allowed by law. Some courts hold it good up to the limit for which the corporation might have bound itself.³⁶ Thus a contract for twenty years, to be renewed for twenty more if the city did not buy, is good for the first twenty where the city can bind itself for only twenty years.³⁷ Such a contract has been said to be good as far as performed.³⁸ Other authorities hold such a contract totally void.³⁹ Power to contract for a water supply for thirty years is not power to make a fixed and unalterable rate.⁴⁰ Under a provision of the constitution forbidding legislative appro-

²⁹ Picket Publishing Co. v. Carbon County, 36 Mont. 188, 13 L. R. A. (N.S.) 1115, 92 Pac. 524.

³⁰ Picket Publishing Co. v. Carbon County, 36 Mont. 188, 13 L. R. A. (N.S.) 1115, 92 Pac. 524.

³¹ Board, etc., of Franklin County v. Ranck, 9 Ohio C. C. 301, 6 Ohio C. D. 133.

³² State v. Ry. Co., 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32.

³³ Gaslight, etc., Co. v. New Albany, 156 Ind. 406, 59 N. E. 176; (City of) Wellston v. Morgan, 59 O. S. 147, 52 N. E. 127.

³⁴ Hendrickson v. New York, 160 N. Y. 144, 54 N. E. 680.

³⁵ Hendrickson v. New York, 160 N. Y. 144, 54 N. E. 680.

³⁶ Defiance Water Co. v. Defiance, 90 Fed. 753.

³⁷ Neosho, etc., Co. v. Neosho, 136 Mo. 498, 38 S. W. 89.

³⁸ Dawson v. Waterworks Co., 106 Ga. 696, 32 S. E. 907.

³⁹ Gaslight, etc., Co. v. New Albany, 156 Ind. 406, 59 N. E. 176; Kirkwood v. Highlands Co., 94 Mo. App. 637, 68 S. W. 761; Defiance v. Council of Defiance, 23 Ohio C. C. 26; (City of) Wellston v. Morgan, 59 O. S. 147, 52 N. E. 127.

⁴⁰ Danville v. Water Co., 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118.

priations for more than two years, a state officer can not bind the state for contracts extending beyond that period.⁴¹

§ 1902. Power to borrow money. Whether a municipal corporation has implied power to borrow money when it is reasonably necessary for one of the purposes for which it is created, or for the exercise of powers which have been conferred upon it, is a question upon which there is a conflict of authority. In many jurisdictions it has been held that a public corporation has no power to borrow except such power as is given to it by the legislature, either expressly or by necessary implication of powers which are expressly given.¹ It is said that such power does not exist unless it is either conferred expressly or unless powers are conferred upon the public corporation which can not be exercised except by borrowing money.² Where this theory obtains power to buy land and to erect public buildings has been held not to confer a power to borrow money for such purposes.³ In many of these cases, however, the court has probably been influenced to some extent by the fact that the legislature had made express provision for borrowing for certain purposes or under certain circumstances, and from such legislation it might fairly be deduced that the legislature did not intend to confer the power of borrowing money for other purposes or under other circumstances. In other jurisdictions it is held that a public corporation has an implied power to borrow money when it is reasonably necessary for the purpose of its creation.⁴ Power to light the streets is held to confer power to

⁴¹ *State v. Medbery*, 7 O. S. 522.

¹ *Allen v. La Fayette*, 89 Ala. 641, 9 L. R. A. 497, 8 So. 30; *Coquard v. Oquawka*, 192 Ill. 355, 61 N. E. 660; *Wells v. Salina*, 119 N. Y. 280, 7 L. R. A. 759, 23 N. E. 870.

² *The Mayor v. Ray*, 86 U. S. (19 Wall.) 468, 22 L. ed. 164; *Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Luther v. Wheeler*, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 6 Am. & Eng. Ann. Cas. 754, 52 S. E. 874.

³ *Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278.

⁴ *Arkansas. Forrest City v. Bank*, 116 Ark. 377, 172 S. W. 1148.

Indiana. Richmond v. McGirr, 78 Ind. 192.

Iowa. Austin v. Colony, 51 Ia. 102, 49 N. W. 1051.

Maine. Lovejoy v. Foxcroft, 91 Me. 367, 40 Atl. 141.

Nebraska. State v. Babcock, 22 Neb. 614, 35 N. W. 941.

Ohio. Bank v. Chillicothe, 7 Ohio (pt. II) 31.

Pennsylvania. Long v. Lemoyne Borough, 222 Pa. St. 311, 21 L. R. A. (N.S.) 474, 71 Atl. 211.

Wisconsin. Clark v. Janesville, 10 Wis. 136; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721.

borrow money for such purpose.⁵ Power to borrow is often conferred by statute.⁶ Public corporations other than municipal, such as counties or township, are far more limited in their powers of borrowing than municipal corporations.⁷

§ 1903. Power to issue negotiable instruments. Whether a public corporation has an implied power in the absence of statutory authority or statutory prohibition, to issue negotiable instruments as evidence of a lawful debt, is a question upon which there is a conflict of authority. Under modern business methods the power of incurring a debt or of borrowing money is generally exercised in the most natural and appropriate manner by issuing a negotiable instrument as an evidence of the indebtedness. Accordingly, in some jurisdictions it is held that a power to incur a debt or to borrow money may be exercised by a public corporation which possesses it in the same way as it could be exercised by a natural person or by a private corporation, and that a public corporation may issue a negotiable instrument as evidence of any lawful debt.¹ The power to perform a public service,² such as the power to furnish water, is held to confer power to borrow money and to give a note as evidence of such debt,³ even if under a constitutional pro-

⁵ *Forrest City v. Bank*, 116 Ark. 377, 172 S. W. 1148.

⁶ *Heinl v. Terre Haute*, 161 Ind. 44, 66 N. E. 450; *Corliass v. Highland Park*, 132 Mich. 152, 93 N. W. 254 [affirmed on rehearing, 93 N. W. 610].

⁷ *Brown v. Board*, 108 Ky. 783, 57 S. W. 612.

¹ *United States. Carter County v. Sinton*, 120 U. S. 517, 30 L. ed. 701; *Holmes v. Shreveport*, 31 Fed. 113.

Arkansas. Forrest City v. Bank, 116 Ark. 377, 172 S. W. 1148.

Massachusetts. Commonwealth v. Williamstown, 156 Mass. 70, 30 N. E. 472.

New York. Hubbard v. Sadler, 104 N. Y. 223, 10 N. E. 426.

North Carolina. Smathers v. Madison County, 125 N. Car. 480, 34 S. E. 554.

Washington. Murry v. Fay, 2 Wash. 352, 28 Pac. 533. As to power to fix

maturity of debt, see *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 230.

It has been held in Wisconsin that a public corporation has an implied power to borrow money and to issue bonds wherever the exercise of such powers is the means which is usually and customarily incident to the proper execution of its municipal functions. *Mills v. Gleason*, 11 Wis. 470; *State v. Milwaukee*, 25 Wis. 122; *State v. Regents*, 54 Wis. 159, 11 N. W. 472; *Kilvington v. Superior*, 83 Wis. 222, 53 N. W. 487; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885; *Oconto City W. S. Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1113; *Bennet v. Nebagamom*, 122 Wis. 295.

² *Forrest City v. Bank*, 116 Ark. 377, 172 S. W. 1148.

³ *Forrest City v. Bank*, 116 Ark. 377, 172 S. W. 1148.

vision such note can not be made to bear interest.⁴ A township is held to have an implied power to issue bonds as an incident to its functions.⁵ Under power to borrow for municipal purposes a city may issue bonds to retire the floating debt,⁶ or to refund prior bonds.⁷ In opposition to this view it has been held that power to issue bonds does not include power to issue new negotiable bonds to take up the old bonds.⁸ A statute which violates a mandatory provision of the constitution can not authorize an issue of bonds;⁹ nor can the legislature make bonds payable elsewhere than at the city treasury.¹⁰

On the other hand, the fact that a negotiable instrument issued by a public corporation, if within its powers, is fully negotiable, and that in the hands of a bona fide holder defenses such as fraud, failure of consideration, and the like, can not be made,¹¹ leads to the result that a public corporation which has power to issue negotiable instruments may frequently incur liability on transactions against which it could have interposed defenses if the instrument which it issued had not been negotiable. For this reason it is held in many jurisdictions that a public corporation has no implied power to issue negotiable instruments and that it does not possess such power unless it is conferred by constitutional or statutory provision.¹² Where this view is entertained power to improve a street, raising the money therefor by a special assessment, is not

⁴ *Forrest City v. Bank*, 116 Ark. 377, 172 S. W. 1148.

⁵ *Bennett v. Nebagamon*, 122 Wis. 295, 99 N. W. 1039.

⁶ *Morris v. Taylor*, 31 Or. 62, 49 Pac. 660 [citing, *Quincy v. Warfield*, 25 Ill. 317, 79 Am. Dec. 330; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Solon v. Bank*, 114 N. Y. 122, 21 N. E. 168; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278; *Rogan v. Watertown*, 30 Wis. 259].

⁷ *Pierre v. Dunscomb*, 106 Fed. 611, 45 C. C. A. 499.

⁸ *Coquard v. Oquawka*, 192 Ill. 355, 61 N. E. 660.

⁹ *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065; *Wilkes Co. v. Call*, 123 N. Car. 308, 44 L. R. A. 252, 31 S. E. 481.

¹⁰ *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580.

¹¹ See §§ 2346 et seq.

¹² *United States, Brenham v. Bank*, 144 U. S. 173, 36 L. ed. 390; *Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 625 [citing, *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77]; *Hopper v. Cowington*, 8 Fed. 777; *Coffin v. Indianapolis*, 59 Fed. 221; *Dudley v. Lake County*, 80 Fed. 672; *Watson v. Huron*, 97 Fed. 449, 38 C. C. A. 264. *Illinois. Coquard v. Oquawka*, 192 Ill. 355, 61 N. E. 660.

Iowa. Swanson v. Ottumwa, 151 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

Louisiana. Neugass v. New Orleans, 42 La. Ann. 163, 21 Am. St. Rep. 368, 7 So. 565.

power to issue bonds.¹³ Power to purchase land does not confer power to issue negotiable bonds for the purchase price.¹⁴ The fact that a city was authorized to incur a debt, that it was authorized to issue its warrants for such debt, and that it had power to refund its indebtedness by issuing negotiable bonds, does not confer upon it power to issue negotiable bonds instead of warrants when the debt is originally incurred.¹⁵ A city incorporated after the passage of a statute authorizing cities then incorporated to issue bonds, can not issue them.¹⁶ Even an express power to borrow does not include power to issue negotiable bonds.¹⁷

Power to issue negotiable instruments such as bonds is frequently conferred by statute.¹⁸ Where such power exists, bonds which are issued by a public corporation in the exercise of its power are negotiable, as are instruments issued by a private corporation or a natural person.¹⁹

If a negotiable instrument is issued by a corporation having authority to issue only non-negotiable instruments, it is void.²⁰ If the instrument which is issued is intended to be negotiable, it is

Nebraska. *Brinkworth v. Grable*, 45 Neb. 647, 63 N. W. 952.

New Jersey. *State v. Newark*, 54 N. J. L. 624, 23 Atl. 129; *Schultze v. Manchester*, 61 N. J. L. 513, 40 Atl. 589.

Tennessee. *Johnson City v. R. R.*, 100 Tenn. 138, 44 S. W. 670; *Richardson v. Marshall County*, 100 Tenn. 346, 45 S. W. 440.

Texas. *Waxahachie v. Brown*, 67 Tex. 519, 4 S. W. 207; *Thornburgh v. Tyler*, 16 Tex. Civ. App. 439, 43 S. W. 1054.

¹³ *Redondo Beach v. Cate*, 136 Cal. 146, 68 Pac. 586.

¹⁴ *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

¹⁵ *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

¹⁶ *Oquawka v. Graves*, 82 Fed. 568, 27 C. C. A. 327.

¹⁷ *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069; *Brenham v. Bank*, 144 U. S. 173, 36 L. ed. 390; *Dodge v. Memphis*, 51 Fed. 165; *Ashuelot National Bank v. School District*, 56 Fed.

197; *Lehman v. San Diego*, 27 C. C. A. 668, 83 Fed. 669; *German Ins. Co. v. Manning*, 95 Fed. 597; *Heins v. Lincoln*, 102 Ia. 69, 71 N. W. 189 [criticizing, *Sioux City v. Weare*, 59 Ia. 95, 12 N. W. 786].

Contra, *Commonwealth v. Williamstown*, 156 Mass. 70, 30 N. E. 472.

¹⁸ *United States. Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111.

Kentucky. *Kimbley v. Owensboro*, 176 Ky. 532, 195 S. W. 1087.

North Carolina. *Cox v. Pitt County*, 146 N. Car. 584, 16 L. R. A. (N.S.) 253, 60 S. E. 516; *Highway Commission v. Webb*, 152 N. Car. 710, 68 S. E. 211.

South Carolina. *Fripp v. Coburn*, 101 S. Car. 312, 85 S. E. 774.

Washington. *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

¹⁹ *Quinlan v. Green County*, 157 Fed. 33, 84 C. C. A. 537, 19 L. R. A. (N.S.) 849. See §§ 2346 et seq.

²⁰ *Dodge v. Memphis*, 51 Fed. 165; *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

said that the court can not treat the words of negotiability as surplusage and enforce the instrument as a non-negotiable instrument which the public corporation was authorized to issue.²¹

According to the divergence of views already expressed some authorities treat municipal bonds as non-negotiable,²² while others treat both the bonds²³ and the coupons thereon²⁴ as negotiable. A statute giving authority to issue municipal bonds for certain purposes only excludes power to issue bonds for any other purpose.²⁵ If power to issue bonds exists, they may be issued where no prior debt exists, as where they are issued to buy water works.²⁶

§ 1904. Statutory restriction on power to borrow. Statutory provisions as to the power of a public corporation to borrow money and the methods by which it may borrow, are at present in most states very full and ample.¹ As has been indicated in the preceding section, much of the discussion as to the implied power of a public corporation to borrow turns on the effect of the statutes on that subject.² In order to be valid and enforceable, bonds must be issued substantially in compliance with the provisions of the statute.³ Bonds issued after a repeal of the law under which they

²¹ *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

²² *Goodwin v. East Hartford*, 70 Conn. 18, 38 Atl. 876; *State, ex rel., Slingerland v. Newark*, 54 N. J. L. 62, 23 Atl. 129.

²³ *Gelpcke v. Dubuque*, 67 U. S. (1 Wall.) 175, 17 L. ed. 520; *Thomson v. Lee County*, 70 U. S. (3 Wall.) 327, 18 L. ed. 177; *Lexington v. Butler*, 81 U. S. (14 Wall.) 282, 20 L. ed. 809; *Humboldt Township v. Long*, 92 U. S. 642, 23 L. ed. 752; *Roberts v. Bolles*, 101 U. S. 119, 25 L. ed. 880; *Wilson County v. Bank*, 103 U. S. 770, 26 L. ed. 488; *Ottawa v. Bank*, 105 U. S. 342, 26 L. ed. 1127; *Ackley School District v. Hall*, 113 U. S. 135, 28 L. ed. 954; *Klamath Falls v. Sachs*, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 329.

²⁴ *Lexington v. Butler*, 81 U. S. (14 Wall.) 282, 20 L. ed. 809; *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526; *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866; *Thompson v. Perrine*, 106 U. S. 589, 27 L. ed. 298.

²⁵ *Uncas National Bank v. Superior*, 115 Wis. 340, 91 N. W. 1004.

²⁶ *State v. Topeka*, 68 Kan. 177, 74 Pac. 647.

¹ *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111; *Thompson v. Hance*, 174 Cal. 572, 163 Pac. 1021; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885; *Maxcy v. Oshkosh*, 144 Wis. 238, 31 L. R. A. (N.S.) 787, 128 N. W. 899.

² *United States. Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111. *Colorado. Hayden Realty Co. v. Aurora*, 62 Colo. 563, 163 Pac. 843.

Maryland. Seyboldt v. Mt. Ranier, 130 Md. 69, 99 Atl. 960.

Massachusetts. Commonwealth v. Williamstown, 156 Mass. 70, 30 N. E. 472.

Wisconsin. Maxcy v. Oshkosh, 144 Wis. 238, 31 L. R. A. (N.S.) 787, 128 N. W. 899.

³ *Seward v. Revere Water Co.*, 201 Mass. 453, 87 N. E. 749.

were issued,⁴ or under an unconstitutional law,⁵ are void. A law allowing a specified township to issue bonds is not of general nature and hence is constitutional, even if not uniform, under a constitutional provision requiring laws of a general nature to be uniform.⁶ A statute authorizing a town to vote bonds to aid a railroad, without formally amending its charter,⁷ or special authority to borrow without formally amending a general statute limiting such power,⁸ confers such authority. A limited power of borrowing excludes implied power.⁹ Statutes on the subject of issuing bonds should be construed together if possible, as in *pari materia*, even if passed at different times.¹⁰ If statutes passed at different times can not be reconciled, the latter controls. Thus a general law may be superseded by a charter.¹¹ So a grant of general power to borrow money and issue bonds for municipal purposes is not restricted by a prior grant for special purposes.¹² Power to incur indebtedness for municipal improvements is not limited by a grant of power in another section of the statute to make specific kinds of improvements.¹³ Clerical errors and grammatical inaccuracies are to be disregarded if the meaning of the statute is clear. Thus a statute authorizing bonds if "two-thirds of the qualified electors voting an assent," means if two-thirds of the qualified electors voting, assent.¹⁴ Restrictions as to requiring bond in case the cost of constructing a street is assessed upon abutting property owners

⁴ *Lehman v. San Diego*, 73 Fed. 105.

⁵ *Slocomb v. Fayetteville*, 125 N. Car. 362, 34 S. E. 436.

⁶ *Battleboro Savings Bank v. Hardy Township*, 98 Fed. 524 [citing, *Cass v. Dillon*, 2 O. S. 607; *State v. Judges*, 21 O. S. 1; *State v. Covington*, 29 O. S. 102; *McGill v. State*, 34 O. S. 228; *State v. Hoffman*, 35 O. S. 435; *State v. Commissioners*, 35 O. S. 458; *State v. Board*, 38 O. S. 3; *State v. Powers*, 38 O. S. 54; *Hart v. Murray*, 48 O. S. 606, 29 N. E. 576; *State v. Kendle*, 62 O. S. 346, 39 N. E. 947; *Ex parte Falk*, 42 O. S. 638; *State v. Winch*, 45 O. S. 663, 18 N. E. 380; *State v. Ellet*, 47 O. S. 90, 21 Am. St. Rep. 772, 23 N. E. 931; *Commissioners v. Rosche*, 50 O. S. 103, 40 Am. St. Rep. 653, 19 L. R. A. 584, 33 N. E. 408; *Loeb v. Trustees*, 91 Fed. 37; *disapproving, Hixson v.*

Burson, 54 O. S. 470, 43 N. E. 1000; *State v. Davis*, 55 O. S. 15, 44 N. E. 511].

⁷ *Glenn v. Wray*, 126 N. Car. 730, 36 S. E. 167.

⁸ *Peabody v. Waterworks*, 20 R. I. 176, 37 Atl. 807.

⁹ *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120.

Contra, Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557.

¹⁰ *Roberts v. Taft*, 109 Fed. 825, 48 C. C. A. 681.

¹¹ *McHugh v. San Francisco*, 132 Cal. 381, 64 Pac. 570.

¹² *Pierre v. Dunscomb*, 106 Fed. 611, 45 C. C. A. 499.

¹³ *Hammond v. San Leandro*, 135 Cal. 450, 67 Pac. 692.

¹⁴ *Fritz v. San Francisco*, 132 Cal. 373, 64 Pac. 566.

have no application to contracts for constructing a sidewalk.¹⁵ Power to issue bonds with interest coupons payable at a given place is not power to issue bonds with interest coupons payable elsewhere.¹⁶ Power to refund "bonded indebtedness actually existing" is power to include unpaid interest coupons in the face of the new bonds.¹⁷

§ 1905. Construction of statutory provisions. Power to refund a debt includes power to issue negotiable bonds therefor,¹ though in such case the corporation can not issue bonds in excess of such debt.² Power to issue bonds to fund the floating indebtedness and legal warrants of a public corporation includes power to issue bonds to fund an unsatisfied judgment.³ Power to issue "bonds" is power to issue negotiable bonds;⁴ power to "donate money or other securities" is power to issue bonds;⁵ and power to "borrow money and for that purpose to issue bonds" includes power to refund.⁶ Power to issue bonds for the purpose of erecting, constructing and completing a school confers power to issue bonds in order to erect, construct and equip a school.⁷ Power to issue interest-bearing bonds includes power to attach interest coupons;⁸ and power to sell bonds and pay proceeds includes power to deliver bonds.⁹ Power to issue bonds is generally held to include power to make them payable in gold.¹⁰ Under a statute which requires bonds to bear an appropriate name indicating the purpose for

¹⁵ *Tennessee Paving-Brick Co. v. Barker* (Ky.), 59 S. W. 755.

¹⁶ *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227, 29 So. 421.

¹⁷ *Kelly v. Cole*, 63 Kan. 385, 65 Pac. 672.

¹ *Rathbone v. Hopper*, 57 Kan. 240, 34 L. R. A. 674, 45 Pac. 610.

² *Louisville, etc., v. Zimmerman*, 101 Ky. 432, 41 S. W. 428.

³ *Hayden Realty Co. v. Aurora*, 62 Colo. 563, 163 Pac. 843.

⁴ *Klamath v. Sachs*, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 329. (Other provisions of the statute showed that negotiable bonds were contemplated.) *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668 [rehearing denied, 22 S. W. 960; reversing, 21 S. W. 375].

⁵ *Lund v. Chippewa County*, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927.

⁶ *Huron v. Bank*, 86 Fed. 272, 30 C. A. 38, 49 L. R. A. 534 [citing, *Quincy v. Warfield*, 25 Ill. 317, 79 Am. Dec. 330; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Morris v. Taylor*, 31 Or. 62, 49 Pac. 660; *Rogan v. Watertown*, 30 Wis. 259].

⁷ *Maxcy v. Oshkosh*, 144 Wis. 238, 31 L. R. A. (N.S.) 787, 128 N. W. 899.

⁸ *Atchison Board, etc., v. De Kay*, 148 U. S. 591, 37 L. ed. 573.

⁹ *Clifton Forge v. Electric Co.*, 92 Va. 289, 23 S. E. 288.

¹⁰ *United States v. Woodruff v. Mississippi*, 162 U. S. 291, 40 L. ed. 973 [reversing, *Woodruff v. State*, 66 Miss. 298, 6 So. 233]; *Moore v. Walla Walla*, 60 Fed. 961.

which they are issued, a bond which is headed "manual training school bond" of such public corporation, complies with such statute.¹¹ Under a statute which authorizes a public corporation to issue bonds up to a certain amount for two specific purposes, the public corporation may issue certain bonds for one of such purposes and certain bonds for the other of such purposes if the aggregate amount does not exceed the limit fixed by statute.¹²

Power to issue bonds must be strictly followed. Thus a vote to issue bonds to two persons, on their erecting a mill, does not authorize issuing bonds to a partnership consisting of them and others,¹³ and if the amount of each bond is fixed, the bonds are invalid if in larger amounts though aggregating the same.¹⁴ However, where bonds were to run ten years, they are valid if payable more than ten years from their date but within ten years from their issue.¹⁵ A statute which provides that the issuing of bonds shall be conclusive evidence of the regularity of the proceedings up to that point, does not make the issuing of such bonds conclusive as to the power of the public corporation to levy an assessment for the improvement for which the bonds were issued.¹⁶ The fact that bonds contain recitals for which no provision was made in the ordinance under which the bonds were issued, does not render such bonds invalid.¹⁷

Under many statutes a public corporation must issue its bonds at par,¹⁸ or at market value.¹⁹ Such a provision requires the public

Alabama. Judson v. Bessemer, 87 Ala. 240, 4 L. R. A. 742, 6 So. 267.

California. Skinner v. Santa Rosa, 107 Cal. 464, 29 L. R. A. 512, 40 Pac. 742; Murphy v. San Luis Obispo, 119 Cal. 624, 39 L. R. A. 444, 51 Pac. 1085 [affirming in banc, 48 Pac. 974].

Georgia. Heilbron v. Cuthbert, 96 Ga. 312, 23 S. E. 206.

Kentucky. Farson v. Louisville, etc., 97 Ky. 119, 30 S. W. 17.

Texas. Winston v. Fort Worth (Tex.), 47 S. W. 740.

Washington. Packwood v. Kittitas County, 15 Wash. 88, 55 Am. St. Rep. 875, 33 L. R. A. 673, 45 Pac. 640; Kenyon v. Spokane, 17 Wash. 57, 48 Pac. 783.

Contra, Burnett v. Maloney, 97 Tenn. 697, 34 L. R. A. 541, 37 S. W. 689.

¹¹ Maxcy v. Oshkosh, 144 Wis. 238, 31 L. R. A. (N.S.) 787, 128 N. W. 899.

¹² Seyboldt v. Mt. Ranier, 130 Md. 69, 99 Atl. 960.

¹³ George v. Cleveland, 53 Neb. 716, 74 N. W. 266.

¹⁴ Livingston v. School District, 9 S. D. 345, 69 N. W. 15.

¹⁵ Syracuse Township v. Rollins, 104 Fed. 958, 44 C. C. A. 277.

¹⁶ Thompson v. Hance, 174 Cal. 572, 163 Pac. 1021.

¹⁷ Newbern v. National Bank, 234 Fed. 209, 148 C. C. A. 111.

¹⁸ Fort Edward v. Fish, 156 N. Y. 363, 50 N. E. 973; State v. Sapulpa, 58 Okla. 550, 160 Pac. 489.

¹⁹ Hansard v. Green, 54 Wash. 161, 103 Pac. 40 [sub nomine, Hansard v. Harrington, 24 L. R. A. (N.S.) 1273].

corporation to sell its bonds at their face value with accrued interest down to the date of the sale,²⁰ or else to sell such bonds under an agreement that interest shall begin to run at the date of sale and not at the date which the bonds bear.²¹ If bonds have been delivered with coupons attached covering a period prior to the date of the sale, and the purchaser does not pay for such coupons, the public corporation is not bound to pay such coupons to such purchaser or to one who takes with notice.²² The public corporation may, however, be liable to a bona fide purchaser.²³ If a public corporation is bound to sell bonds at their market value it can not enter into a contract to deliver bonds in payment for property which the public corporation purchases, since it is possible that such a transaction will result in the delivery of the bonds for less than their market value.²⁴ If a public corporation delivers bonds to A, and A pays therefor, the transaction is to be regarded as a sale and not as the appointment of an agent for reselling the bonds, although A expects to resell such bonds to A's customers and in fact does so.²⁵ If a public corporation is required to sell bonds at par or at their market value, it can not sell them for less by agreeing to pay to the purchaser a commission to induce him to purchase them.²⁶

If bonds are issued by authority of law, they are not made invalid because their proceeds are misapplied.²⁷ A city can not issue bonds for a greater sum than that borrowed by selling them below par, which must include interest due,²⁸ and officials selling state bonds below par are liable, even if the bonds would not sell at par.²⁹ So a city can not sell at the face value, paying large commissions.³⁰ So a city can not add enough to the amount of its war-

²⁰ *State v. Sapulpa*, 58 Okla. 550, 160 Pac. 489.

²¹ *State v. Sapulpa*, 58 Okla. 550, 160 Pac. 489.

²² *State v. Sapulpa*, 58 Okla. 550, 160 Pac. 489.

²³ *Beiser v. Supervisor's District*, 114 Miss. 842, 75 So. 594.

²⁴ *Hansard v. Green*, 54 Wash. 161, 103 Pac. 40 [sub nomine, *Hansard v. Harrington*, 24 L. R. A. (N.S.) 1273].

²⁵ *Bay City v. Lumberman's State Bank*, 193 Mich. 533, 160 N. W. 425.

²⁶ *Bay City v. Lumberman's State Bank*, 193 Mich. 533, 160 N. W. 425.

²⁷ *Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61; *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111; *Jones v. City of Camden*, 44 S. Car. 319, 51 Am. St. Rep. 819, 23 S. E. 141; *Clifton Forge v. Electric Co.*, 92 Va. 289, 23 S. E. 288; *Clifton Forge v. Bank*, 92 Va. 283, 23 S. E. 284.

²⁸ *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973 [affirming, 86 Hun (N. Y.) 548].

²⁹ *State v. Buchanan* (Tenn. Ch. App.), 52 S. W. 480.

³⁰ *Whelen's Appeal*, 108 Pa. St. 162, 1 Atl. 88; *Hunt v. Fawcett*, 8 Wash.

rants to compensate for the discount at which they must be sold.³¹ Power to settle claims includes power to issue warrants for amounts due;³² and power to retire warrants includes power to issue them, even if there will be no money to pay them with for over a year.³³ Power to borrow for running expenses is not power to borrow for erecting a court house.³⁴ Under a statute which requires all the interest and part of the principal of an issue of bonds to be paid annually, an issue of bonds the principal of which is payable one hundred dollars a year for nineteen years, and thirty-three thousand, one hundred dollars at the twentieth year, is valid.³⁵ A power to make a contract for water and to levy a tax of a certain amount therefor does not restrict the contract price to the amount of the tax.³⁶

§ 1906. Power to incur indebtedness. In the absence of constitutional or statutory restrictions, a public corporation is generally held to have power to incur debts where the incurring of a debt is a proper and necessary means of carrying into effect one or more of the powers of the public corporation and where it can fairly be presumed from the grant of power that the creation of a debt was contemplated.¹ The fact that power to borrow money is not given to the public corporation in question, although it is given to other corporations in the same general class, does not show that the legislature intends to prevent such corporation from incurring debts for proper purposes, as in anticipation of the collection of

396, 36 Pac. 318. However, it has been held that a city may pay ten per cent. of the face value to a broker for lithographing and selling their bonds. *State v. Land Co.*, 75 Minn. 456 [sub nomine, *In re Texas*, etc., 78 N. W. 115].

³¹ *Municipal Security Co. v. Baker County*, 33 Or. 338, 54 Pac. 174.

³² *City of New Orleans v. Warner*, 180 U. S. 199, 45 L. ed. 493 [affirming, 101 Fed. 1005, 41 C. C. A. 676].

³³ *City of Little Rock v. United States*, 103 Fed. 418, 43 C. C. A. 261.

³⁴ *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57 (a county).

³⁵ *Kemp v. Hazelhurst*, 80 Miss. 443, 31 So. 908.

³⁶ *Ft. Madison v. Water Co.*, 114 Fed. 292, 52 C. C. A. 204 [affirming, 110 Fed. 901]; *Marion Water Co. v. Marion*, 121 Ia. 306, 96 N. W. 883.

¹ *Alabama*. *Allen v. LaFayette*, 89 Ala. 641, 9 L. R. A. 497, 8 So. 30.

Indiana. *Richmond v. McGirr*, 78 Ind. 192.

New Jersey. *Slingerland v. Newark*, 54 N. J. L. 62, 23 Atl. 129.

Oklahoma. *Hoffman v. County Commissioners*, 3 Okla. 325, 41 Pac. 566.

South Carolina. *Luther v. Wheeler*, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 6 Am. & Eng. Ann. Cas. 754, 52 S. E. 874.

taxes which have been levied.² Power to buy land is generally regarded as power to incur a debt for that purpose,³ and to give a non-negotiable evidence of indebtedness therefor.⁴ In some jurisdictions the power of a public corporation to incur indebtedness is construed more strictly;⁵ and it is held that power to erect a public building does not include power to incur a debt for such purposes.⁶ Power to incur a debt ordinarily implies power to agree to pay interest thereon.⁷

§ 1907. Statutory prohibition against incurring debt. The extravagance of American municipalities has led to various attempts on the part of legislatures to prevent or restrict future indebtedness. Contracts in violation of such statutes are invalid,¹ except in cases in which such statute is held to be directory and not mandatory.² If the contract of a public corporation is attacked on the ground that the public corporation had no funds for the discharge of such obligation and also incurred a debt in violation of statute, such contract must either be all valid or all invalid.³ Certain clauses of such contract can not be treated as invalid leaving the remainder of such clauses in effect.⁴ Such a statute is not retroactive and does not apply to debts which were incurred before it

² *Luther v. Wheeler*, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 6 Am. & Eng. Ann. Cas. 754, 52 S. E. 874.

³ *Allen v. LaFayette*, 89 Ala. 641, 9 L. R. A. 497, 8 So. 30; *Richmond v. McGirr*, 78 Ind. 192; *Slingerland v. Newark*, 54 N. J. L. 62, 23 Atl. 129.

⁴ *Slingerland v. Newark*, 54 N. J. L. 62, 23 Atl. 129.

⁵ *Leavenworth v. Norton*, 1 Kan. 432.

⁶ *Leavenworth v. Norton*, 1 Kan. 432.

⁷ *Alabama City Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91; *State v. Stout*, 43 Wash. 501, 10 Am. & Eng. Ann. Cas. 208, 86 Pac. 848.

Contra, *Daggett v. Lynch*, 18 Utah 49, 54 Pac. 1095.

¹ *Indiana*. *Voas v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 208; *Wabash County v. Workman (Ind.)*, 103 N. E. 99.

Louisiana. *Geary v. Board of Commissioners*, 139 La. 781, 72 So. 245.

Massachusetts. *Adams v. County of Essex*, 205 Mass. 189, 91 N. E. 557.

Oklahoma. *Fairbanks-Morse Co. v. Geary*, — Okla. —, 157 Pac. 720; *Eureka Fire Hose Mfg. Co. v. Granite*, — Okla. —, 159 Pac. 308.

Oregon. *Portland v. Albee*, 67 Or. 221, 135 Pac. 516, 897.

Washington. *Wolfe v. School District*, 58 Wash. 212, 27 L. R. A. (N.S.) 891, 108 Pac. 442.

West Virginia. *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604.

² *Argenti v. San Francisco*, 16 Cal. 255.

³ *Geary v. Board of Commissioners*, 139 La. 781, 72 So. 245.

⁴ *Geary v. Board of Commissioners*, 139 La. 781, 72 So. 245.

was enacted.⁵ A restriction on the amount that can be raised by taxation for a given purpose is not a restriction on the amount that can be expended for such purpose, if funds from other sources are available.⁶

A statute restraining the power of cities to incur debts, in the exact language of the constitution, is abrogated by a subsequent enlargement of power to incur debts given by a later constitutional amendment.⁷

Various methods of restraint have been tried. Some of the more common types are discussed in the following sections. There is this inherent difficulty underlying them all. Local government without the exercise of discretion, is an impossibility, yet the existence of discretion generally involves the power to abuse it as well as to exercise it. The problem for the legislature to solve is to obtain the maximum of discretionary power with the minimum of abuse.

§ 1908. Necessity of appropriation. One group of statutes intended to prevent municipalities from incurring indebtedness, seeks to restrict expenditure to income. Different statutes of this group seek to attain this result in different ways. Some of these statutes forbid a contract unless an appropriation has been made by the proper authorities available for payment on such contract.¹ A contract entered into when no such appropriation has been made is unenforceable,² and no recovery can be had for property or

⁵ *Myers v. Jeffersonville*, 145 Ind. 431, 44 N. E. 452; *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

⁶ *In re Plattsburgh*, 157 N. Y. 78, 51 N. E. 512.

⁷ *Bray v. Florence*, 62 S. Car. 57, 39 S. E. 810.

¹ *Arkansas. Weigel v. Pulaaski County*, 61 Ark. 74, 32 S. W. 116; *Hilliard v. Bunker*, 68 Ark. 340, 58 S. W. 362.

Indiana. Indianapolis v. Wann, 144 Ind. 175, 31 L. R. A. 743, 42 N. E. 901.

Nebraska. Kelley v. Broadwell (Neb.), 92 N. W. 643.

New Hampshire. Clark v. Portsmouth, 68 N. H. 263, 44 Atl. 388.

North Dakota. Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292.

² *Kansas City v. Woerishoeffer*, 249 Mo. 1, 155 S. W. 779; *Hurley v. Trenton*, 67 N. J. L. 350, 51 Atl. 1109 [affirming, 66 N. J. L. 538, 49 Atl. 518; *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726]. An entire contract for repairing a court house and for wiring, heating and plumbing it, is void if the contract for repairing is void, there being no appropriation and no specifications for part thereof, although the contract for wiring, heating and plumbing could have been enforced if severable. *Ness v. Commissioners*, 178 Ind. 221, 98 N. E. 33 [modifying, 95 N. E. 548, which denies further rehearing after first rehearing in 93 N. E. 283, modifying 91 N. E. 618; rehearing denied, 178 Ind. 221, 98 N. E. 1002].

services furnished thereunder.³ Thus a contract to complete a building made when an appropriation for part of its cost only has been made, is invalid, although the city had agreed to make a subsequent appropriation to complete such building.⁴ So no recovery can be had in excess of the appropriation made.⁵ A general appropriation for the expense of building a bridge is sufficient to make valid a contract with an adjoining landowner whereby the city agrees to pay damages, and allow him to use a vault built by the city under the street, in consideration of his allowing the city to swing its bridge over his land.⁶ A general appropriation for constructing a street intended to cover future repairs is sufficient to make valid a contract therefor.⁷ If an appropriation lapses at the end of a fiscal year it can not validate subsequent contracts unless reappropriated.⁸ Such a statute is superseded by a subsequent grant of power to incur indebtedness for specified purposes, from which grant restrictions are omitted.⁹

Since the promise of the public corporation is not binding upon the corporation, it is not binding upon the adversary party.¹⁰

§ 1909. Necessity of levying tax to meet obligation. Other statutes provide that, either in all cases or where the debt has reached a certain amount, no contract is valid unless a means is provided by taxation for paying principal and interest,¹ although it is sometimes provided that such provision does not apply if the question of entering into such contract receives an affirmative pop-

³ Board of Water Commissioners v. Commissioners, 126 Mich. 459, 85 N. W. 1132; Kansas City v. Woerishoef-fer, 249 Mo. 1, 155 S. W. 779; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726.

⁴ Johnston v. Philadelphia, 113 Fed. 40.

⁵ Hurley v. Trenton, 67 N. J. L. 350, 51 Atl. 1109 [affirming, 46 N. J. L. 538, 49 Atl. 518].

⁶ Chicago v. Milling Co., 196 Ill. 580, 63 N. E. 1043 [affirming, 97 Ill. App. 651].

⁷ Louisville v. Gosnell (Ky.), 61 S. W. 476.

⁸ Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518.

⁹ Belding, etc., Co. v. Belding, 128 Mich. 79, 87 N. W. 113.

¹⁰ Hinkle v. Philadelphia, 214 Pa. St. 126, 63 Atl. 590.

¹ United States. Brazoria Co. v. Bridge Co., 80 Fed. 10, 25 C. C. A. 306; John Hancock, etc., Co. v. Huron, 80 Fed. 652 [affirmed, 100 Fed. 1001, 40 C. C. A. 683].

Alabama. Board of Revenue v. Far-son, 197 Ala. 375, L. R. A. 1918B, 881, 72 So. 613.

Georgia. Dawson v. Waterworks Co., 102 Ga. 594, 29 S. E. 755; Wilkins v. Waynesboro, 116 Ga. 359, 42 S. E. 767; Epping v. Columbus, 117 Ga. 263, 43 S. E. 803.

Kentucky. Winchester v. Nelson, 175 Ky. 63, 193 S. W. 1040.

Ohio. State v. Zangerle, 95 O. S. 58, 115 N. E. 511.

ular vote.² It is generally necessary to impose such a tax as will keep the interest down and form a sinking fund which will discharge the principal within the time specified by law. Where such provision is found in the constitution the statute authorizing the debt need not fix the tax rate, but may leave it to county officers,³ and it is complied with by a tax to begin at a considerable time in the future.⁴ An ordinance which provides for the amount of the bonds, their maturity and the rate of interest, and which then provides that an annual tax levy shall be made sufficient to pay such principal and interest, is sufficient although the amount to be raised is not specified in dollars and cents.⁵ If a constitutional provision fixes the time within which a debt must be discharged by state taxation the legislature can not shorten such time.⁶ There must be a specific levy for the sinking fund, a general levy being insufficient.⁷ It is not necessary that the legislation which provides for the tax levy shall be enacted before the bonds are issued.⁸ Such provision applies to a contract of compromise of a prior claim.⁹ If the contract price exceeds the amount to be raised by such tax, the excess over the amount raised by taxation can not be recovered.¹⁰ Such statutes apply only to interest-bearing contracts extending over a term of years, and not to contracts to be paid out of the taxes of the current year.¹¹ Such a provision does not apply to a long time contract for a water supply payable in installments.¹² A special tax for which provision has been made can not apply to any other objects until the debt for which the tax was provided has been paid.¹³

Texas. *Howard v. Smith*, 91 Tex. 8, 38 S. W. 15; *Mineralized Rubber Co. v. Cleburne*, 22 Tex. Civ. App. 621, 56 S. W. 220.

Wisconsin. *Maxcy v. Oshkosh*, 144 Wis. 238, 31 L. R. A. (N.S.) 787, 128 N. W. 899.

² *Walters v. Orth*, — Okla. —, 158 Pac. 352.

³ *Mitchell County v. Bank*, 91 Tex. 361, 43 S. W. 880 [reversing, 15 Tex. Civ. App. 172, 39 S. W. 628].

⁴ *City of Boise City v. Trust Co.*, 7 Ida. 342, 63 Pac. 107. (Tax to begin in 1909.)

⁵ *Maxcy v. Oshkosh*, 144 Wis. 238, 31 L. R. A. (N.S.) 787, 128 N. W. 899.

⁶ *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040.

⁷ *Wade v. Travis County*, 72 Fed. 985.

⁸ *State v. Zangerle*, 95 O. S. 58, 115 N. E. 511.

⁹ *Austin v. McCall*, 95 Tex. 566, 66 S. W. 791 [reversing (Tex. Civ. App.), 67 S. W. 192].

¹⁰ *Gray v. Bourgeois*, 107 La. 671, 32 So. 42.

¹¹ *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

¹² *Blanks v. Monroe*, 110 La. 944, 34 So. 921.

¹³ *Board of Revenue v. Farson*, 197 Ala. 375, L. R. A. 1918B, 881, 72 So. 613.

§ 1910. Liabilities forbidden in excess of current income. Other statutes of this group forbid contracts incurring liability which can not be paid out of taxes for that fiscal year,¹ although under some statutes it is provided that such restriction does not apply to liabilities which are incurred in accordance with a popular vote.²

Under a statute of this class the fact that interest on the debt incurred, and an amount to be paid into the sinking fund sufficient to discharge the debt ultimately are, when added together, within the annual income of the city, does not prevent a debt in excess of the income from being invalid.³ Persons who work for the city must take notice of such provision.⁴ Debts contracted in violation of such provision can not be paid out of the taxes of any subsequent year.⁵ A debt incurred in violation of such provisions can not be ratified by a subsequent vote of the electors of the public corporation,⁶ in the absence of statutory authority for such ratification.

No recovery can be had upon a liability incurred in violation of such statute, although such liability is one which is imposed by law,⁷ such as the liability to compensate an attorney who defends

¹ **California.** *Weaver v. San Francisco*, 111 Cal. 319, 43 Pac. 972; *Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912; *Montague v. English*, 119 Cal. 225, 51 Pac. 327.

Idaho. *Feil v. Coeur d'Alene*, 23 Ida. 32, 43 L. R. A. (N.S.) 1095, 129 Pac. 643.

Iowa. *Phillips v. Reed*, 107 Ia. 331, 76 N. W. 850, 77 N. W. 1031 [citing, *Shaw v. Statler*, 74 Cal. 258, 15 Pac. 833; *Putnam v. Grand Rapids*, 58 Mich. 416, 25 N. W. 330; *State v. Martin*, 27 Neb. 441, 43 N. W. 244].

Kentucky. *Overall v. Madisonville*, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278; *Southern Bitulithic Co. v. De Treville*, 156 Ky. 513, 161 S. W. 560; *Grady v. Landram (Ky.)*, 63 S. W. 284.

Louisiana. *State v. St. Paul, Judge, etc.*, 107 La. 777, 32 So. 88.

Michigan. *Mitchell v. Negaunee*, 113 Mich. 359, 67 Am. St. Rep. 468, 38 L. R. A. 157, 71 N. W. 646; *Trump Mfg. Co. v. Buchanan*, 116 Mich. 113, 74 N.

W. 466; *Greenville v. Laurent*, 75 Miss. 456, 23 So. 185. (This restriction exists only by statute.)

Oklahoma. *In re Afton*, 43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184.

Utah. *State v. Quayle*, 26 Utah 26, 71 Pac. 1060.

² *Pardee v. Salt Lake County*, 39 Utah 482, 36 L. R. A. (N.S.) 377, 118 Pac. 122.

³ *Richmond v. Powell*, 101 Ky. 7, 27 S. W. 1.

⁴ *Weaver v. San Francisco*, 111 Cal. 319, 43 Pac. 972.

⁵ *Montague v. English*, 119 Cal. 225, 51 Pac. 327; *Trask v. Livingston County*, 210 Mo. 582, 37 L. R. A. (N.S.) 1045, 109 S. W. 636; *In re Afton*, 43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184.

⁶ *In re Afton*, 43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184.

⁷ *Pardee v. Salt Lake County*, 39 Utah 482, 36 L. R. A. (N.S.) 377, 118 Pac. 122.

one who is accused of having committed a crime and who has not the means to employ counsel.⁸

Such provisions can not be evaded by buying goods on credit extending to the next fiscal year.⁹

Under some constitutional and statutory provisions expenses may be incurred in anticipation of the taxes for the current year.¹⁰ A constitutional provision which authorizes a public corporation to anticipate its revenue for the current year does not authorize it to anticipate revenue for a special purpose for a number of years in advance.¹¹ If a public corporation is authorized to anticipate its revenue for the current year, an obligation which is incurred in a proper manner and under reasonable expectation that it can be met from the revenue for the current year, can be enforced against the public corporation, although by reason of unforeseen circumstances the revenue does not prove adequate to meet such obligation.¹² A liability incurred when there was sufficient money on hand to discharge it is not avoided because the fund is exhausted before the claim is presented,¹³ even if the officers who have charge of the finances have diverted such fund to other purposes,¹⁴ and a debt contracted against a special fund must be paid, though prior debts not out of such fund can not be paid.¹⁵

Under some constitutional provisions the fact that the revenue for the current year has been exhausted before payment of a debt which was incurred when such revenue was sufficient to meet it, is held to prevent the creditor from recovering payment out of the revenues of any succeeding years,¹⁶ although it is said that the exhaustion of the revenue does not affect the validity of the claim, but only the remedy of the creditor to obtain payment.¹⁷

⁸ *Pardee v. Salt Lake County*, 39 Utah 482, 36 L. R. A. (N.S.) 377, 118 Pac. 122.

⁹ *Trump Mfg. Co. v. Buchanan*, 116 Mich. 113, 74 N. W. 466; *Merchants' National Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681.
¹⁰ *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 15 L. R. A. (N.S.) 567, 60 S. E. 149; *Luther v. Wheeler*, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 674.

¹¹ *Feil v. Coeur d'Alene*, 23 Ida. 32, 43 L. R. A. (N.S.) 1095, 129 Pac. 643.

¹² *Luther v. Wheeler*, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

¹³ *Montague v. English*, 119 Cal. 225, 51 Pac. 327; *Doss v. O'Toole*, 80 W. Va. 46, 92 S. E. 139.

¹⁴ *Doss v. O'Toole*, 80 W. Va. 46, 92 S. E. 139.

¹⁵ *Meyer v. Widber*, 126 Cal. 252, 58 Pac. 532.

¹⁶ *Arthur v. Petaluma*, 175 Cal. 216, 165 Pac. 698.

¹⁷ *Arthur v. Petaluma*, 175 Cal. 216, 165 Pac. 698.

If a public corporation is authorized to levy a special tax for a water supply, the public corporation can not be compelled to pay the rent stipulated in a lease of wells if such rent exceeds the amount raised by such special tax.¹⁸

Where debts are invalid if they exceed the amount of taxes for that year, less certain specified municipal expenditures for necessary purposes, it is error to deduct other items of expense than those fixed by statute from the year's taxes.¹⁹ The year for which such debts and revenues are to be estimated is *prima facie* a calendar year.²⁰ If a fiscal year is intended the council may change the time of beginning thereof if they do not thereby make two fiscal years out of one.²¹ A public corporation may buy different portions of a public utility if each portion is within the income for the current year, although the aggregate cost of the entire utility is in excess of the income for any one year,²² although the property thus purchased would have no value to the public corporation unless the entire plan were carried into effect.²³ Under a statute which forbids contracts in excess of the income and revenue of a public corporation, all income,²⁴ including income from licenses,²⁵ is to be estimated; and such words are not intended to refer to the income from taxation upon realty and personalty alone.²⁶

In determining what the revenue is, money lost by a bank failure must be included in the estimate of revenue.²⁷

If a statute authorizes borrowing money where made necessary by an unexpected deficit in the revenue, money can not be borrowed for ordinary current expenses not so occasioned,²⁸ even if it is expected to pay such loan from the anticipated revenue of the current year.²⁹

¹⁸ *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

¹⁹ *Lebanon, etc., Co. v. Lebanon*, 193 Mo. 246, 63 S. W. 809.

²⁰ *Garfield Township v. Dodsworth Book Co.*, 9 Kan. App. 752, 58 Pac. 665.

²¹ *First National Bank v. Keith*, 183 Ill. 475, 56 N. E. 179.

²² *Overall v. Madisonville*, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

²³ *Overall v. Madisonville*, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

²⁴ *Lamar Water & Electric Light Co.*

v. Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756.

²⁵ *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756.

²⁶ *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756.

²⁷ *Higgins v. San Diego*, 131 Cal. 294, 63 Pac. 470.

²⁸ *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 15 L. R. A. (N.S.) 567, 60 S. E. 149.

²⁹ *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 15 L. R. A. (N.S.) 567, 60 S. E. 149.

If a public corporation has sufficient revenue to meet certain obligations, the validity of such obligation is not affected by the fact that such public corporation has obtained such revenue by neglecting other duties imposed upon it by law.³⁰

§ 1911. Necessity of certificate showing sufficient funds. Other statutes avoid contracts unless the proper officer, such as the auditor, certifies that there is a sufficient fund on hand unappropriated to discharge the liability.¹ A contract employing an attorney is void unless such certificate is filed.²

Unless the statute requires such certificate to be filed before the contract is entered into, it may be added after it is entered into,³ even after the contract has been performed.⁴

Such a statute applies only to obligations which are to be paid out of general taxation.⁵ Such a statute applies only to so much of the cost of an improvement as is to be paid from general taxation and not to the part to be raised by assessment;⁶ and does not apply where the fund is to be raised by taxation thereafter,⁷ or out of the income of the property for the purchase of which the debt is incurred,⁸ or to bonds issued to refund prior valid debts.⁹

§ 1912. Limitation on amount of indebtedness. Statutes of a second group are intended to prevent a corporation from incurring debts in excess of a certain limit which is either a fixed sum, or a percentage upon the valuation of the taxable property within the

³⁰Overall v. Madisonville, 125 Ky. 664, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

¹Continental Construction Co. v. Altoona, 92 Fed. 822, 35 C. C. A. 27; Jutte, etc., Co. v. Altoona, 94 Fed. 61, 36 C. C. A. 84; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824 [modified on rehearing, 50 Pac. 670]; Comstock v. Nelsonville, 61 O. S. 288, 56 N. E. 15; City of Findlay v. Pendleton, 62 O. S. 80, 56 N. E. 649.

²Findlay v. Pendleton, 62 O. S. 80, 56 N. E. 649.

³Harrisburg v. Shepler, 190 Pa. St. 374, 42 Atl. 893.

⁴Harrisburg v. Shepler, 190 Pa. St. 374, 42 Atl. 893.

⁵Comstock v. Nelsonville, 61 O. S. 288, 56 N. E. 15.

⁶Comstock v. Nelsonville, 61 O. S. 288, 56 N. E. 15.

⁷Defiance Water Co. v. Defiance, 90 Fed. 753. (A contract for water supply.)

⁸Kerr v. Bellefontaine, 59 O. S. 446, 52 N. E. 1024. (A contract for gas works.) A voucher not drawn on particular fund, where there are not enough funds to the credit of the account on which it should have been drawn, is properly refused. State v. Boyden, 18 Ohio C. C. 282, 10 Ohio C. D. 137.

⁹Clapp v. Marice City, 111 Fed. 103, 49 C. C. A. 251.

corporate limits, or an amount which can be paid out of a certain prescribed rate of taxation.¹ Under some statutes such limitation upon indebtedness does not apply to an indebtedness which is incurred by a popular vote.² The fact that a statute excepts a debt or obligation from certain limitations does not mean that it is excepted from other limitations.³ Contracts in excess of such limitation,⁴ including bonds,⁵ are invalid. A contract which gives to an officer power to order unlimited extras is invalid.⁶

A statute which imposes a legal limit upon indebtedness is not abrogated by the fact that under the existing circumstances the legal limit of indebtedness can not be ascertained.⁷ Specific authority to incur indebtedness up to a certain percentage of the tax valuation may authorize an indebtedness not in excess of such limit, although it constitutes an excess in the tax rate.⁸ Some of the

¹ *Hagan v. Commissioner's Court*, 160 Ala. 544, 37 L. R. A. (N.S.) 1027, 49 So. 417; *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040; *Kimbley v. Owensboro*, 176 Ky. 532, 195 S. W. 1087; *Anderson v. International School District*, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54.

² *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99; *Dunagan v. Red Rock*, 58, Okla. 218, 158 Pac. 1170.

³ *Cincinnati v. Puchta*, 94 O. S. 431, 115 N. E. 278.

⁴ *United States. Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132; *Rathbone v. Kiowa County*, 73 Fed. 395.

Alabama. *Hagan v. Commissioner's Court*, 160 Ala. 544, 37 L. R. A. (N.S.) 1027, 49 So. 417.

California. *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98.

Illinois. *Schnell v. Rock Island*, 232 Ill. 89, 14 L. R. A. (N.S.) 874, 83 N. E. 462; *Leonard v. Metropolis*, 278 Ill. 287, 115 N. E. 813.

Indiana. *Laporte v. Gamewell, etc.*, Co., 146 Ind. 466, 58 Am. St. Rep. 359, 35 L. R. A. 686, 45 N. E. 588; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 208.

Iowa. *McPherson v. Foster*, 43 Ia.

48, 22 Am. Rep. 215; *Mosher v. School District*, 44 Ia. 122.

Missouri. *State v. Gordon*, 251 Mo. 303, 158 S. W. 663.

Montana. *Helena Waterworks Co. v. Helena*, 27 Mont. 205, 70 Pac. 513.

New Mexico. *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1916A, 904, 141 Pac. 613.

North Dakota. *Anderson v. International School District No. 5*, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54.

Ohio. *Cincinnati v. Puchta*, 94 O. S. 431, 115 N. E. 278.

Oklahoma. Board of Commissioners v. Smartt, — Okla. —, L. R. A. 1916F, 892, 158 Pac. 601; *Eureka Fire Hose Mfg. Co. v. Granite*, — Okla. —, 159 Pac. 308.

⁵ *People v. Chicago & Alton Ry.*, 253 Ill. 191, 97 N. E. 310; *Walsh v. Pineville*, 152 Ky. 556, 153 S. W. 1002; *Cincinnati v. Puchta*, 94 O. S. 431, 115 N. E. 278; *Highway Commission v. Webb*, 152 N. Car. 710, 68 S. E. 211.

⁶ *N. P. Perine, etc., Co. v. Pasadena*, 116 Cal. 6, 47 Pac. 777.

⁷ *Sidey v. Marceline*, 237 Fed. 168, 150 C. C. A. 314.

⁸ *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040.

constitutional provisions which impose such limitations are so worded as to be self-executing and to need no further legislation.⁹

Since the purpose of the statute would be defeated by allowing recovery in quasi-contract for the value of the consideration furnished in excess of the legal limit of indebtedness, no recovery can be had in quasi-contract by one who has furnished anything of value to a public corporation under such a contract.¹⁰

In some states, however, such a contract is voidable, but not void.¹¹ A later statute will not be presumed to repeal the earlier statute though it does not in terms re-enact it.¹² A "general welfare" clause does not authorize the issue of bonds in excess of the amount specifically fixed by statute.¹³ Where such limitation is found in the state constitution the legislature can not authorize a debt in excess thereof.¹⁴ So if it is created by the federal statute for the government of a territory, the territorial legislature can not authorize further indebtedness.¹⁵ A statute will be presumed to refer to the constitutional limitation though it does not repeat it expressly.¹⁶ A statute authorizing the issuing of railroad aid bonds "to any amount," will be construed as meaning to any amount within constitutional limits.¹⁷

If the debt in question causes the excess over the debt limit, the excess only is void, and not the entire debt.¹⁸

Such a limitation, whether created by statute¹⁹ or by a constitutional provision,²⁰ does not invalidate a pre-existing valid debt.²¹

⁹ *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 23 L. R. A. 402, 24 S. W. 872.

¹⁰ *McGillivray v. School District*, 112 Wis. 354, 88 Am. St. Rep. 969, 58 L. R. A. 100, 88 N. W. 310; *Fairbanks-Morse Co. v. Geary*, — Okla. —, 157 Pac. 720.

¹¹ *Sioux City, etc., Co. v. Trust Co.*, 173 U. S. 99, 43 L. ed. 628.

¹² *Beck v. St. Paul*, 87 Minn. 381, 92 N. W. 328.

¹³ *Grace v. Mayor, etc., of Hawkinsville*, 101 Ga. 553, 28 S. E. 1021.

¹⁴ *Doon Township v. Cummins*, 142 U. S. 366, 35 L. ed. 1044; *Hodges v. Crowley*, 186 Ill. 305, 57 N. E. 889; *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 553.

¹⁵ *Martin v. Territory*, 5 Okla. 188,

48 Pac. 106; *Spencer v. Gray*, 5 Okla. 216, 48 Pac. 110.

¹⁶ *Swanson v. Ottumwa*, 118 Ia. 161, 59 L. R. A. 620, 91 N. W. 1048.

¹⁷ *Germania Savings Bank v. Darlington*, 50 S. Car. 337, 27 S. E. 846.

¹⁸ *Flanders v. Board of Trustees*, 170 Ky. 627, 186 S. W. 506.

¹⁹ *Mitchell v. Smith*, 12 S. D. 241, 80 N. W. 1077.

²⁰ *Myers v. Jeffersonville*, 145 Ind. 431, 44 N. E. 452; *Benjamin v. Mayfield*, 170 Ky. 446, 186 S. W. 169; *McCreight v. Camden*, 49 S. Car. 78, 26 S. E. 984.

²¹ *City of Kansas City v. Gas Co.*, 9 Kan. App. 325, 61 Pac. 317; *Benjamin v. Mayfield*, 170 Ky. 446, 186 S. W. 169; *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52, 60 S. W. 988.

If a contract which a public corporation has made before the adoption of a constitutional limitation upon the amount of indebtedness and upon the tax rate imposes an obligation upon the public corporation which will either exceed its amount of indebtedness or will require it to exceed the constitutional tax rate, the public corporation may exercise its discretion as to which course it will take.²² If the limit is not reached when the contract is made, an unlawful diversion of public funds,²³ as a loss due to a bank failure,²⁴ can not make such contract invalid.

§ 1913. Claims subject to limitation. The general view taken of such statutory provisions is that they apply to all forms of indebtedness, no matter how incurred or what is received therefor. Thus such limitation applies to debts incurred in the purchase of property,¹ even if such property is necessary for the management of the public corporation,² such as a water supply,³ or electric lights,⁴ or school furniture and school supplies.⁵ So where the limit of debt is exceeded a contract for seven thousand lamps, "more or less," is invalid.⁶

²² *Benjamin v. Mayfield*, 170 Ky. 446, 186 S. W. 169.

²³ *State Savings Bank v. Davis*, 22 Wash. 406, 61 Pac. 43.

²⁴ *United States. New Orleans v. United States*, 49 Fed. 40.

California. Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

Missouri. Mountain Grove Bank v. Douglas Co., 146 Mo. 42, 47 S. W. 944.

Oklahoma. Johnson v. Board of County Commissioners, 7 Okla. 686, 56 Pac. 701; *Huddleston v. Board of County Commissioners*, 8 Okla. 614, 58 Pac. 749; *Buxton & Skinner Stationery Co. v. Craig County*, 53 Okla. 65, 155 Pac. 215.

Washington. New York, etc., Co. v. Tacoma, 21 Wash. 303, 57 Pac. 810.

¹ *Stephens Co. v. Charlotte*, 172 N. Car. 564, 90 S. E. 588; *Anderson v. International School District No. 5*, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54; *Superior Manufacturing Co. v. School District*, 28 Okla. 293, 37 L. R.

A. (N.S.) 1034, 114 Pac. 328; *Crogster v. Bayfield Co.*, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167. (Where bonds were issued for railroad stock.)

² *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Laporte v. Gamewell, etc., Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 35 L. R. A. 666, 45 N. E. 588; *Windsor v. Des Moines*, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476; *Grand Island, etc., R.R. Co. v. Baker*, 6 Wyom. 369, 71 Am. St. Rep. 926, 34 L. R. A. 835, 45 Pac. 494.

³ *State v. Helena*, 24 Mont. 521, 81 Am. St. Rep. 453, 55 L. R. A. 336, 63 Pac. 99.

⁴ *Windsor v. Des Moines*, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476 (even if the contract price was no greater than had been paid).

⁵ *Superior Manufacturing Co. v. School District*, 28 Okla. 293, 37 L. R. A. (N.S.) 1054, 114 Pac. 328.

⁶ *City of Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731 [citing, *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed.

These provisions apply to debts incurred in carrying out powers conferred on the municipality by statute,⁷ such as a liability for public printing.⁸ Thus where no debt can be created in excess of income there is no implied liability resting on a county for burying indigent dead after the limit of indebtedness has been reached, though omission of burial is a misdemeanor.⁹ A public corporation can not enter into a contract for the construction of a sewer in violation of a constitutional limitation upon the amount of its indebtedness, although if such sewer is not constructed the public corporation will be liable for damages.¹⁰ The fact that the indebtedness is incurred to protect the health of the public does not authorize a public corporation to contract obligations in excess of its debt limit,¹¹ at least if there has been ample time in which to submit the question to a popular election and thus to obtain legal authority to exceed such limits.¹² A statute which makes attendance at a school compulsory does not authorize a public corporation to incur a debt for a school building in excess of its constitutional limit.¹³ A school district can not make a valid contract for the employment of a teacher which will result in exceeding the debt limit of such school district.¹⁴ If the statute which imposes a limitation upon the amount of indebtedness does not make an exception in favor of certain necessary expenses, the courts can not interpolate such exception into the statute.¹⁵

Such limitation applies to obligations imposed by statute as well as to those created by express contract.¹⁶

1060; *Thompson-Houston Electric Co. v. Newton*, 42 Fed. 723; *City of Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 23 L. R. A. 402, 24 S. W. 872; overruling, *City of East St. Louis v. Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97; *City of Carlyle v. Power Co.*, 140 Ill. 445, 29 N. E. 556].

⁷ *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060; *Arthur v. Petaluma*, 175 Cal. 216, 165 Pac. 698; *Logansport v. Jordan*, 171 Ind. 121, 37 L. R. A. (N.S.) 1036, 85 N. E. 959.

⁸ *Arthur v. Petaluma*, 175 Cal. 216, 165 Pac. 698.

⁹ *Pacific Undertakers v. Widber*, 113 Cal. 201, 45 Pac. 273.

¹⁰ *Logansport v. Jordan*, 171 Ind. 121, 37 L. R. A. (N.S.) 1036, 85 N. E. 959.

¹¹ *Renfroe v. Atlanta*, 140 Ga. 81, 45 L. R. A. (N.S.) 1173, 78 S. E. 449.

¹² *Renfroe v. Atlanta*, 140 Ga. 81, 45 L. R. A. (N.S.) 1173, 78 S. E. 449.

¹³ *Stephens Co. v. Charlotte*, 172 N. Car. 564, 90 S. E. 588.

¹⁴ *Wolfe v. School District*, 58 Wash. 212, 27 L. R. A. (N.S.) 891, 108 Pac. 442.

¹⁵ *Wolfe v. School District*, 58 Wash. 212, 27 L. R. A. (N.S.) 891, 108 Pac. 442.

¹⁶ *Grand Island, etc., R. R. Co. v. Baker*, 6 Wyom. 369, 71 Am. St. Rep. 926, 34 L. R. A. 835, 45 Pac. 494; *Board of Commissioners v. Smartt*, — Okla. —, L. R. A. 1916F, 892, 158 Pac. 601.

According to the foregoing cases the fact that the debt in question is incurred in the necessary and legitimate exercise of the corporation does not make the case an exception to the plain provisions of the statute.¹⁷

The authorities are not unanimous upon this point however. In some jurisdictions the provisions limiting indebtedness are held not to apply to certain forms of indebtedness which are required by mandatory constitutional or statutory provisions.¹⁸ The ordinary statutes restricting the indebtedness of a public corporation has been said not to apply to an indebtedness incurred in complying with a valid order of the state board of health, under a different statute.¹⁹ Even where the limit of indebtedness has been reached it has been held that a county is liable for the fees of jurors;²⁰ or for the expense of keeping its prisoners in the jail of another county;²¹ and that a city is liable on warrants issued for the salaries of its policemen, marshal and treasurer;²² or for expenses of printing ballots, quarantining, impounding stock and insuring city buildings.²³ Even where there is a limitation of debts to a certain per cent. of the assessed value, a new county may borrow money for necessary running expenses before the first assessment.²⁴ Under a constitutional provision which authorizes incurring debts in excess of the regular limit for the purpose of constructing public utilities, a street is not regarded as a public utility.²⁵

¹⁷ *Law v. People*, 87 Ill. 385; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Sackett v. New Albany*, 68 Ind. 473, 45 Am. Rep. 467; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 208.

¹⁸ *State v. Bentley*, 98 Kan. 442, 157 Pac. 1197; *State v. Dean*, 95 O. S. 108, 116 N. E. 37; *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 36 L. R. A. 407, 48 Pac. 253; *State v. Everett*, 101 Wash. 561, L. R. A. 1918E, 411, 172 Pac. 752.

Such as the expense of maintaining a fire department. *State v. Everett*, 101 Wash. 561, L. R. A. 1918E, 411, 172 Pac. 752.

¹⁹ *State v. Dean*, 95 O. S. 108, 116 N. E. 37.

²⁰ *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 36 L. R. A. 407, 48 Pac. 253.

²¹ *Potter v. Douglas County*, 87 Mo. 239.

²² *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391.

²³ *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189.

²⁴ *Hall, etc., Co. v. Board, etc., of Roger Mills County*, 8 Okla. 378, 58 Pac. 620; *Board, etc., of Roger Mills County v. Rowden*, 8 Okla. 406, 58 Pac. 624; *Board, etc., of Roger Mills County v. Sauer*, 8 Okla. 409, 58 Pac. 625.

²⁵ *Coleman v. Frame*, 26 Okla. 193, 31 L. R. A. (N.S.) 556, 109 Pac. 928.

The limitation of the statute can not be evaded by having the purchase assume the form of a lease, the rental to pay the purchase price;²⁵ nor by deferring the payment of the purchase price.²⁷

If a contract provides for its performance as an entirety and imposes an obligation upon the public corporation in consideration of such performance, the entire amount of such consideration is to be estimated in determining whether the debt limit of the public corporation has been incurred, and the provision limiting the amount of indebtedness can not be evaded by dividing such consideration into installments each within the limit.²⁸

Since the object of such legislation is to prevent public corporations from incurring debts and to limit their power to borrow money, the term "debt" is to be construed in such legislation as applying to obligations which are incurred under executory contracts, although nothing will be due from the public corporation until such contract has been performed.²⁹ The public corporation, accordingly, is to be regarded as becoming indebted within the meaning of the limitation upon the amount of debt which it can incur at the time that it lets a contract for the construction of a public improvement, although nothing will be due under such contract until such public improvement is completed in whole or in part.³⁰ Cases of this sort are to be distinguished from cases in

²⁵ *Baltimore & Ohio South Western Ry. Co. v. People*, 200 Ill. 541, 66 N. E. 148; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 208; *Hall v. Cedar Rapids*, 115 Ia. 199, 88 N. W. 448; *Earles v. Wells*, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964.

²⁷ *Georgia. Renfroe v. Atlanta*, 140 Ga. 81, 45 L. R. A. (N.S.) 1173, 78 S. E. 449.

Illinois. Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781.

Iowa. Windsor v. Des Moines, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476.

Kentucky. Covington v. McKenna, 99 Ky. 508, 36 S. W. 518.

Pennsylvania. Brown v. Corry, 175 Pa. St. 528, 34 Atl. 854.

West Virginia. Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279.

Wisconsin. Earles v. Wells, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964.

²⁸ *Alabama. Hagan v. Commissioner's Court*, 160 Ala. 544, 37 L. R. A. (N.S.) 1027, 49 So. 417.

Indiana. Logansport v. Jordan, 171 Ind. 121, 37 L. R. A. (N.S.) 1036, 85 N. E. 959.

Montana. Hoffman v. Gallatin County, 18 Mont. 224, 44 Pac. 973; 18 Mont. 246, 44 Pac. 979.

North Dakota. Anderson v. International School District, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54.

Pennsylvania. Pepper v. Philadelphia, 181 Pa. St. 566, 37 Atl. 579.

²⁹ *Anderson v. International School District*, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54.

³⁰ *Trask v. Livingston County*, 210 Mo. 582, 37 L. R. A. (N.S.) 1045, 109 S. W. 656; *Anderson v. International*

which the public corporation acquires property under a contract by which it agrees to pay therefor out of the income arising therefrom.³¹

A contract by which a public corporation pledges property which belongs to it, and which is used for a public purpose, for an advance of money, is held to be the creation of an indebtedness, although there is an express agreement to the effect that the public corporation shall not be liable personally for the repayment of such advance.³² This principle applies where the public corporation owns an equity of redemption in property which is used for public purposes and it pledges such equity under a similar arrangement.³³ So where the limit is reached a city can not buy property encumbered with liens though it assumes no liability.³⁴ So a mortgage on land purchased by a city was counted as a debt, the city taking subject thereto, though not promising to pay such debt, since without paying it, the city can not keep the land.³⁵ While a contract for selling property to a public corporation which has exceeded its debt limit is unenforceable, the vendor of such property who has retained a lien thereon for the purchase price, may enforce his lien by a sale of such property.³⁶ A contract for rentals for hydrants is usually considered as creating a debt when each installment becomes due.³⁷

If such contract does not exceed the limit when made, but exceeds the limit when due, it is invalid.³⁸

School District, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54.

³¹ See § 1914, note 5.

³² Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861; East Moline v. Pope, 224 Ill. 386, 79 N. E. 587; Lobdell v. Chicago, 227 Ill. 218, 81 N. E. 354; Schnell v. Rock Island, 232 Ill. 89, 14 L. R. A. (N.S.) 874, 83 N. E. 462; Leonard v. Metropolis, 278 Ill. 287, 115 N. E. 813; Reynolds v. Waterville, 92 Me. 292, 42 Atl. 553; Palmer v. Albuquerque, 19 N. M. 285, L. R. A. 1915A, 1106, 142 Pac. 929.

³³ Leonard v. Metropolis, 278 Ill. 287, 115 N. E. 813.

³⁴ Ironwood Waterworks Co. v. Ironwood, 99 Mich. 454, 58 N. W. 371.

³⁵ Eddy Valve Co. v. Crown Point, 166 Ind. 613, 3 L. R. A. (N.S.) 684, 76 N. E. 536; Browne v. Boston, 179 Mass. 321, 60 N. E. 934.

Contra, unpaid installments of the purchase price of a park which constitute a lien only are not counted as debts. Kelly v. Minneapolis, 63 Minn. 125, 30 L. R. A. 281, 65 N. W. 115; Burnham v. Milwaukee, 98 Wis. 128, 73 N. W. 1018; Swanson v. Ottumwa, 118 Ia. 161, 59 L. R. A. 620, 91 N. W. 1048.

³⁶ Bardwell v. Southern Engine & Boiler Works, 130 Ky. 222, 20 L. R. A. (N.S.) 110, 113 S. W. 97.

³⁷ See § 1920.

³⁸ Keihl v. South Bend, 76 Fed. 921, 22 C. C. A. 618, 36 L. R. A. 228.

The date at which an indebtedness is to be computed for determining the validity of an indebtedness authorized by public vote is a question upon which there is a difference in actual result due in part to the difference in some of the statutes which control. It has been held that such indebtedness is to be computed at the time of issuing the bonds thus authorized and not at the time of the election to issue such bonds.³⁸ In other jurisdictions it has been held that it is the date of the election and not the date of the issuing of the bonds.⁴⁰

§ 1914. Claims not subject to limitation. A constitutional or statutory limitation upon the amount of indebtedness or liability which a public corporation may incur is held in many jurisdictions not to apply to contracts which do not create a personal liability against the public corporation and which will not lead to taking corporate property in case such claims are unpaid.¹ Limitations upon indebtedness have been held not to apply to debts which are to be paid out of the special fund and not out of the general income of the public corporation,² such as claims which are payable out of special assessments only,³ or out of a special tax,⁴ or out of

³⁸ *Goodson v. Dean*, 173 Ala. 301, 55 So. 1010.

⁴⁰ *State v. Gordon*, 251 Mo. 303, 158 S. W. 683.

¹ *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71; *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

² *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71; *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

³ *United States. Denny v. Spokane*, 79 Fed. 719, 25 C. C. A. 164.

Georgia. Monk v. Moultrie, 145 Ga. 843, 90 S. E. 71; *Waycross v. Tomberlin*, 146 Ga. 504, 91 S. E. 560.

Illinois. Jacksonville Ry. Co. v. Jacksonville, 114 Ill. 562, 2 N. E. 478; *People v. Honeywell*, 258 Ill. 319, 101 N. E. 571.

Indiana. Quill v. Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *South Park Floral Co. v. Newcastle*, 185 Ind. 103, 113 N. E. 5.

Iowa. Clinton v. Walliker, 98 Ia. 655, 68 N. W. 431; *Ft. Dodge, etc., Co. v. Ft. Dodge*, 115 Ia. 568, 89 N. W. 7.

Kentucky. Wickliffe v. Greenville, 170 Ky. 528, 186 S. W. 476.

Missouri. Morrison v. Morey, 146 Mo. 543, 48 S. W. 629.

North Dakota. Vallyelly v. Grand Forks Park Commissioners, 16 N. D. 25, 15 L. R. A. (N.S.) 61, 111 N. W. 615.

Oregon. Little v. Portland, 28 Or. 235, 37 Pac. 911; *Ladd v. Gambell*, 35 Or. 393, 59 Pac. 113.

Washington. Baker v. Seattle, 2 Wash. 576, 27 Pac. 462; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612. See § 1915.

A personal liability, payable out of funds to be raised by general taxation, is subject to such limitation although such liability could have been paid by special assessment. *German National Bank v. Covington*, 164 Ky. 292, 175 S. W. 330.

⁴ *City of New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96 [modifying, 81

the gross receipts of the water works, for the erection of which the debt is incurred.⁵

In other jurisdictions, however, such transactions are regarded as mere subterfuges for the purpose of evading the constitutional and statutory limitation.⁶ If the purchase price of a water works system, with the existing debt of a public corporation, will exceed the debt limit, and the water works system may be sold in case of non-payment of the purchase price, the fact that the purchase price is payable solely out of the revenues of the water works does not make the contract valid.⁷ A contract for a public building by which it is agreed that the price thereof is not to be a debt of the public corporation, but that it is to be paid out of a special tax levy which the public corporation agrees to make for a number of years, is regarded as the creation of a debt.⁸ In some of these cases the contract contains additional provisions which make it invalid, such as a provision for pledging the existing water works system of a city for a debt incurred in constructing an extension,⁹ or a provision by which the public corporation agrees to maintain such water rates as will pay the running expenses of the water works system and six per cent. interest and establish a sinking fund which will pay the purchase price within a certain number of years.¹⁰

If funds are on hand which are available for the purpose of discharging its contract liabilities, such contracts are not regarded as

Fed. 645, 26 C. C. A. 508; *People v. May*, 9 Colo. 404, 12 Pac. 838; *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Swanson v. Ottumwa*, 118 Ia. 161, 59 L. R. A. 620, 91 N. W. 1048].

Contra, *Ottumwa v. Water Supply Co.*, 119 Fed. 315, 59 L. R. A. 604, in which the federal court refused to take the same view of the liability of the city and the validity of the bond issue as that taken by the supreme court of the state in *Swanson v. Ottumwa*, 118 Ia. 161, 59 L. R. A. 620, 91 N. W. 1048; *Waycross v. Tomberlin*, 146 Ga. 504, 91 S. E. 560.

⁵ *Schnell v. Rock Island*, 232 Ill. 89, 83 N. E. 462 (personal credit of city can not be pledged, however); *Winston v.*

Spokane, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

⁶ *Hagan v. Commissioner's Court*, 160 Ala. 544, 37 L. R. A. (N.S.) 1027, 49 So. 417; *Feil v. Coeur d'Alene*, 23 Ida. 32, 43 L. R. A. (N.S.) 1095, 129 Pac. 643; *Schnell v. Rock Island*, 232 Ill. 89, 14 L. R. A. (N.S.) 874, 83 N. E. 462.

⁷ *Lesser v. Warren*, 237 Pa. St. 501, 43 L. R. A. (N.S.) 839, 85 Atl. 839.

⁸ *Hagan v. Commissioner's Court*, 160 Ala. 544, 37 L. R. A. (N.S.) 1027, 49 So. 417.

⁹ *Schnell v. Rock Island*, 232 Ill. 89, 14 L. R. A. (N.S.) 874, 83 N. E. 462.

¹⁰ *Feil v. Coeur d'Alene*, 23 Ida. 32, 43 L. R. A. (N.S.) 1095, 129 Pac. 643.

incurring debts.¹¹ A liability which can be paid out of current revenues is not a debt.¹²

If the "necessary expenditures" of a public corporation are excepted from a provision which requires contracts exceeding the limitation of indebtedness to be submitted to a popular vote, such provision includes a contract of the repair of a water works system which had been injured,¹³ and the construction of a county home for the poor.¹⁴ If the debt is one for which a tax could be laid, but no tax has been laid, it is invalid if in excess of the legal limit.¹⁵ A limitation by statute as to the amount to be paid for a court house does not apply to a donation by private citizens.¹⁶ A judgment on a claim is not a contract within the limitation, and if on a debt which exceeded the limit, this fact must be set up in such action and can not be a matter of collateral attack on the judgment.¹⁷ Such limitation does not apply to a judgment in tort.¹⁸

If a certain form of indebtedness is, by express statutory or constitutional provision, authorized in excess of the limit of ordinary indebtedness, such limitation is valid.¹⁹

§ 1915. Claims payable out of assessments. If the parties who enter into a contract with a public corporation are required, either by statute or by the terms of their contract, to look solely to local

¹¹ *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71; *Waycross v. Tomberlin*, 146 Ga. 504, 91 S. E. 560; *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99.

¹² *Harrold v. Huntington*, 74 W. Va. 538, 82 S. E. 476.

¹³ *Hickey v. Nampa*, 22 Ida. 41, 124 Pac. 280.

¹⁴ *Caldwell County v. Spitzer* (N. Car.), 91 S. E. 707.

¹⁵ *Laporte v. Gamewell, etc., Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 35 L. R. A. 686, 45 N. E. 588; *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 23 L. R. A. 402, 24 S. W. 872.

¹⁶ *Way v. Fox*, 109 Ia. 340, 80 N. W. 405.

¹⁷ *Edmundson v. School District*, 98 Ia. 639, 60 Am. St. Rep. 224, 67 N. W. 671. See *Grand Island, etc., R. R. Co. v. Baker*, 6 Wyom. 369, 71 Am. St. Rep. 926, 34 L. R. A. 835, 45 Pac. 494.

¹⁸ *Menar v. Sanders*, 169 Ky. 285, L. R. A. 1917E, 422, 183 S. W. 949; *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256.

For injury sustained by defect in highway. *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588.

¹⁹ *Idaho. Hickey v. Nampa*, 22 Ida. 41, 124 Pac. 280.

Iowa. Marion Water Co. v. Marion, 121 Ia. 306, 96 N. W. 683.

Massachusetts. Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446.

North Carolina. Bramham v. Durham, 171 N. Car. 196, 88 S. E. 347; *Caldwell County v. Spitzer* (N. Car.), 91 S. E. 707.

Utah. People v. Salt Lake City, 23 Utah 13, 64 Pac. 460.

Washington. Schooley v. Chehalis, 84 Wash. 667, 147 Pac. 410.

assessments for their compensation, they can not, in the absence of special circumstances, recover on the contract against the corporation personally.¹ Even if the city contracts to collect such assessments and fails to take proper steps to do so, many authorities hold that the city does not incur any personal liability on the contract.² The remedy of the creditors is to compel the officers by mandamus to collect the assessment,³ or to sue in equity to compel the city to exercise its powers in making and collecting the assessments.⁴ Some courts hold that the city is liable for breach of its contract to collect such assessments,⁵ on the theory that it is charged as trustee

¹ **United States.** *Vickrey v. Sioux City*, 115 Fed. 437.

California. *Meyer v. San Francisco*, 150 Cal. 131, 10 L. R. A. (N.S.) 110, 88 Pac. 722.

Illinois. *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76 [affirming, 74 Ill. App. 511].

Indiana. *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443.

Michigan. *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151.

Missouri. *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Wheeler v. Popular Bluff*, 149 Mo. 36, 49 S. W. 1088.

Wisconsin. *Heller v. Milwaukee*, 96 Wis. 134, 70 N. W. 1111.

The same principle applies where the debt incurred is payable exclusively out of a special tax. *Raton Waterworks Co. v. Raton*, 9 N. M. 70, 49 Pac. 898 [reversed on another point, 174 U. S. 360, 43 L. ed. 1005].

² **United States.** *Pontiac v. Paving Co.*, 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326 [rehearing denied, 96 Fed. 679].

Indiana. *Greencastle v. Allen*, 43 Ind. 347.

Michigan. *Goodrich v. Detroit*, 12 Mich. 279.

Washington. *Soule v. Seattle*, 6 Wash. 315, 324; 33 Pac. 384 [rehearing denied, 33 Pac. 1080]; *German, etc., Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 40 Pac. 542 [overruling, *McEwen v. Spokane*, 16 Wash. 212, 47 Pac. 433]; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524;

Rhode Island, etc., Co. v. Spokane, 19 Wash. 616, 53 Pac. 1104; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935.

Wisconsin. *Fletcher v. Oshkosh*, 18 Wis. 228.

"The city is not required to collect the tax and pay it over to the contractor." *Thornton v. Clinton*, 148 Mo. 648, 50 S. W. 295.

³ *People v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006 (though in New York such remedy is not exclusive); *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524.

⁴ *Burlington Savings Bank v. Clinton*, 111 Fed. 439; *Farson v. Sioux City*, 106 Fed. 278.

⁵ *Clayburgh v. Chicago*, 25 Ill. 636, 79 Am. Dec. 346; *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76 [affirming, 74 Ill. App. 511]; *Reilly v. Albany*, 112 N. Y. 30, 19 N. E. 508; *Weston v. Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [reversing, 82 Hun (N. Y.) 67]; *Commercial National Bank v. Portland*, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532.

"It could not be supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government over which he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations." *Reilly v. Albany*, 112 N. Y. 30, 42, 19 N. E. 508.

with the duty of collecting and applying the assessments.⁶ If the special assessment is collected by the city, and the funds arising therefrom are then embezzled by a city official in whose custody they are, the city becomes liable for warrants drawn on such fund, though it was not liable originally.⁷ The liability of the city in case the assessment proves to be unenforceable is a question on which there is a conflict of authority. In some jurisdictions the city is liable if by reason of its own lack of compliance with the law the assessments fail, even if it is not primarily liable,⁸ and even if the limit of the city's indebtedness has been exceeded.⁹ So if the city has no authority to make the improvement at the expense of the abutting property, the contractor is allowed to recover from the city even if he has agreed that he will be entitled in no event to recover from the city.¹⁰ In other jurisdictions a different view obtains. If the special assessment is invalid, because the ordinance levying it is irregular, it has been held that the contractor has no remedy and can not recover.¹¹ If, however, the contract is one on which the corporation is primarily liable, a partial or total failure of the assessments does not discharge the liability of the corporation.¹²

One who holds bonds issued by a public corporation which are paid out of special assessments exclusively, may maintain an action against the public corporation to obtain a judgment which shall declare such bonds to be valid obligations and to prevent the running of the period of limitations,¹³ although in such action a general judgment can not be rendered against the public corporation.¹⁴

§ 1916. Refunding bonds. Bonds issued after the limit has been exceeded, for the purpose of taking up pre-existing valid

⁶ *Vickrey v. Sioux City*, 104 Fed. 164.

⁷ *Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394.

⁸ *Addyson, etc., Co. v. Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035; *Gable v. Altoona*, 200 Pa. St. 15, 49 Atl. 367.

⁹ *Ft. Dodge, etc., Co. v. Ft. Dodge*, 115 Ia. 568, 89 N. W. 7.

¹⁰ *Louisville v. Bitzer*, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115.

¹¹ *Village of Park Ridge v. Robinson*, 198 Ill. 571, 92 Am. St. Rep. 276, 63 N. E. 104.

¹² *Burlington Savings Bank v. Clinton*, 106 Fed. 269; *State v. Commissioners*, 37 O. S. 526; *Lewis v. Taylor*, 18 Ohio C. C. 443, 10 Ohio C. D. 205; *Addyston, etc., Co. v. Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035; *Belton v. Stirling* (Tex. Civ. App.), 50 S. W. 1027.

¹³ *Meyer v. San Francisco*, 150 Cal. 131, 10 L. R. A. (N.S.) 110, 88 Pac. 722.

¹⁴ *Meyer v. San Francisco*, 150 Cal. 131, 10 L. R. A. (N.S.) 110, 88 Pac. 722.

bonds,¹ or warrants,² or a valid indebtedness,³ or a valid judgment,⁴ are valid, even if the bonds are to be sold and their proceeds used to take up valid bonds, and for a short time they increased the debt beyond the limit.⁵ In any event the new bonds must be so dated that double interest is not paid by the city for any period of time.⁶ There is a conflict of authority on this question, however; and some courts hold that the new bonds thus issued are invalid, since there is no assurance that the money received from the sale of the new bonds will be applied to discharge the earlier issue.⁷ The correct procedure is said to be to place the

¹ **United States.** *Huron v. Bank*, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 634; *Keene, etc., Bank v. Lyon Co.*, 97 Fed. 159; *Lyon Co. v. Bank*, 100 Fed. 337, 40 C. C. A. 391 [affirming, 90 Fed. 523]; *Fairfield v. School District*, 116 Fed. 838.

Colorado. *Lake County v. Standley*, 24 Colo. 1, 49 Pac. 23.

Idaho. *Veatch v. Moscow*, 18 Ida. 313, 109 Pac. 722.

Indiana. *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31.

Iowa. *Heins v. Lincoln*, 102 Ia. 69, 71 N. W. 189.

Montana. *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209.

Oklahoma. *State v. West*, 29 Okla. 503, 118 Pac. 146.

South Dakota. *National, etc., Ins. Co. v. Mead*, 13 S. D. 342, 83 N. W. 335 [affirming on rehearing, 13 S. D. 37, 82 N. W. 78]; *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474.

² *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Morris v. Taylor*, 31 Or. 62, 49 Pac. 660.

³ **United States.** *Board, etc., of Lake County v. Platt*, 79 Fed. 567, 25 C. C. A. 87; *Board, etc., of Lake County v. Bank*, 108 Fed. 505, 47 C. C. A. 464; *Independent School District v. Rew*, 111 Fed. 1, 55 L. R. A. 364, 49 C. C. A. 198.

California. *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580.

Pennsylvania. *Schuldice v. Pittsburgh*, 251 Pa. St. 28, 95 Atl. 938.

South Carolina. *McCreight v. City of Camden*, 49 S. Car. 78, 26 S. E. 984.

South Dakota. *Western, etc., Co. v. Lane*, 7 S. D. 599, 65 N. W. 17; *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474.

⁴ *Board, etc., of Lake County v. Platt*, 79 Fed. 567, 25 C. C. A. 87; *Board, etc., of Pratt County v. Society, etc.*, 90 Fed. 233, 32 C. C. A. 596; *Jamison v. School District*, 90 Fed. 387. But such bonds are invalid if the judgment has been bonded already. *District of Rock Rapids v. Society, etc.*, 98 Ia. 581, 67 N. W. 370.

⁵ **United States.** *Huron v. Bank*, 86 Fed. 272, 49 L. R. A. 534, 30 C. C. A. 38.

California. *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580.

Indiana. *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31.

Montana. *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209.

New York. *Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764.

Wyoming. *Miller v. School District*, 5 Wyom. 217, 39 Pac. 879.

⁶ *Louisville v. Zimmerman*, 101 Ky. 432, 41 S. W. 428.

⁷ *Doon Township v. Cummins*, 142 U. S. 366, 35 L. ed. 1044; *Heins v. Lincoln*, 102 Ia. 69, 71 N. W. 189; *Birkholz v. Dinnie*, 6 N. D. 511, 72 N. W. 931; *State v. McGraw*, 12 Wash. 541, 41 Pac. 893.

new bonds in the hands of a trustee for delivery when the old bonds were delivered up and canceled,⁸ or to exchange the new bonds for the old.⁹ So if the valuation of property has shrunk so that earlier bonds, valid when issued, are in excess of the per cent. of the valuation allowed by law, refunding bonds issued to take up such earlier bonds are valid.¹⁰ If the bonds issued in excess of the limit are used in part to refund valid debts, they are valid up to such amount.¹¹ Refunding bonds are invalid if in excess of the limit of such bonds fixed by statute.¹² If the pre-existing bonds are invalid as in excess of the limit of indebtedness the refunding bonds are invalid.¹³ Refunding bonds if issued to the proper parties may be made payable to bearer.¹⁴ Warrants issued for a prior valid debt are not invalid though issued after the limit of indebtedness is exceeded.¹⁵

§ 1917. Method of valuing property. If the power of a public corporation to incur debts is limited to a certain percentage of the value of the taxable property in such public corporation, the method of ascertaining such value depends upon the intention of the law-making power as shown by the language which is employed. Under many statutes it is held that it is the value of the property as fixed by the bodies who are authorized to fix the valuation of such property for the purpose of taxation and not the actual market value of the property which controls.¹ Under other statutes, however, it is held that the legislature intends the actual value to control and not the valuation for the purpose of general taxation.² If a constitutional provision limits the indebtedness of a public corporation to a certain percentage of the value of the taxable prop-

⁸ *Heins v. Lincoln*, 102 Ia. 60, 71 N. W. 189.

⁹ "There was a legal method—the method of exchange—by which they could have issued the bonds without increasing the debt a mill." *Lyon County v. Bank*, 100 Fed. 337, 339.

¹⁰ *Ewert v. Mallery*, 18 S. D. 151, 91 N. W. 479.

¹¹ *Aetna Life Ins. Co. v. Lyon County*, 82 Fed. 929; same case, 95 Fed. 325.

¹² *Guckenberger v. Dexter*, 17 Ohio C. C. 115 [affirming, 5 Ohio N. P. 429].

¹³ *Holliday v. Hildebrandt*, 97 Ia. 177, 66 N. W. 39.

¹⁴ *West Plains Township v. Sage*, 69 Fed. 943, 16 C. C. A. 553.

¹⁵ *United States v. Capdevielle*, 118 Fed. 809, 55 C. C. A. 421.

¹ *City Water Supply Co. v. Ottumwa*, 120 Fed. 309; *City of Chicago v. Fishburn*, 189 Ill. 367, 59 N. E. 791; *State v. Babcock*, 20 Neb. 522, 31 N. W. 8; *State v. Babcock*, 24 Neb. 640, 39 N. W. 763.

² *Halsey v. Belle Plaine*, 128 Ia. 467, 104 N. W. 494; *Hansen v. Hoquiam*, 93 Wash. 132, 163 Pac. 391.

erty in such corporation, and if the statute provides that for ordinary taxation, property is not to be assessed in excess of fifty per cent. of its value, the real value of the property and not its value as assessed for taxation is to be taken in ascertaining whether the public corporation has exceeded the legal limit of indebtedness.³ If the value fixed by local assessors is subsequently modified by lawful authority, the assessed value ultimately fixed controls.⁴ If the constitutional or statutory provision takes the taxable valuation of the property as the basis, the assessments of franchises must be added to ascertain the total valuation of the property.⁵

Under some statutes even a bona fide holder is bound to take notice of the assessment lists;⁶ under others he is justified in relying on the clerk's abstract of assessments without going back to the books of the precinct assessors and boards of equalization.⁷

If the public corporation whose debt limit is under consideration is situated within the territorial limits of another corporation, the question of which valuation shall be taken if the legislature intends the valuation for general taxation to serve as the basis for determining the debt limit of such public corporation, is a question which depends upon the wording of the statute. It is held under some statutes that the valuation for city purposes is to be taken;⁸ and under other statutes the state and county valuation is to be taken as the basis.⁹ If it is clear from the statute that the valuation for taxation is to be taken as a basis, the public corporation can not make a special valuation for the purpose of determining whether the limitation of indebtedness has been reached,¹⁰ in the absence of statutory authority.

Under some provisions the valuation of property is to be that which was fixed at the last regular assessment. This has been held to be the last assessed value before the bonds are issued and not before they are voted,¹¹ though another theory is that it is "the last assessment preceding the incurring of the indebtedness" and

³ *Hansen v. Hoquiam*, 95 Wash. 132, 163 Pac. 391.

⁴ *Chicago, etc., Ry. v. Wilber*, 63 Neb. 624, 88 N. W. 660.

⁵ *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040.

⁶ *Holliday v. Hilderbrandt*, 97 Ia. 177, 66 N. W. 89.

⁷ *Valley County v. McLean*, 79 Fed. 728 [affirming, 74 Fed. 389].

⁸ *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 553.

⁹ *Sidey v. Marceline*, 237 Fed. 168, 150 C. C. A. 314; *Windsor v. Des Moines*, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476.

¹⁰ *State v. Tolby*, 37 S. Car. 551, 16 S. E. 195.

¹¹ *Rathbone v. Board, etc., of Kiowa County*, 83 Fed. 125, 132; 27 C. C. A.

not "the last preceding the completion of the work."¹² If it is expressly provided that the valuation is to be ascertained by the assessment next previous to incurring the debt, an indebtedness which is incurred before two complete assessments have been made is to be determined by the last township assessment before the incorporation of such city.¹³ The fact that no city valuation has been made does not authorize the city to incur indebtedness without any restriction.¹⁴ In other jurisdictions under similar circumstances it has been held that the validity of a debt which is incurred before a city valuation is made, is to be measured by the first assessment for city purposes.¹⁵

§ 1918. Method of ascertaining debt. The method of ascertaining indebtedness in such cases is important. The principal and unpaid interest due on all outstanding debts on the day that the amount of the new debt is fixed must be ascertained.¹ Interest to become due thereafter must not be counted.² A floated indebtedness at the close of the last preceding fiscal year is to be ascertained under a limitation upon the amount of indebtedness incurred in any year.³ License fees and fines which the public corporation has collected may be included as assets.⁴ In determining whether the legal debt limit has been exceeded for the current year, the revenue of that year which has been misapplied to obligations of a prior year is to be considered as if it were on hand.⁵ Warrants payable out of funds on hand,⁶ or out of taxes levied and unappropriated,⁷ even if anticipating a levy already made but not col-

477; *Board of Lake County v. Sutliff*, 97 Fed. 270, 281; 38 C. C. A. 167; *Corning v. Meade County*, 102 Fed. 57, 42 C. C. A. 154.

¹² *Crogster v. Bayfield County*, 99 Wis. 1, 74 N. W. 635, 74 N. W. 167 [overruling *State v. Tomahawk*, 96 Wis. 73, 71 N. W. 86].

¹³ *Sidey v. Marceline*, 237 Fed. 168, 150 C. C. A. 314.

¹⁴ *Sidey v. Marceline*, 237 Fed. 168, 150 C. C. A. 314.

¹⁵ *In re Woolley*, 75 Wash. 206, 134 Pac. 825.

¹ *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803; *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040.

² *Ashland v. Culbertson*, 103 Ky. 161, 44 S. W. 441.

³ *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040.

⁴ *Overall v. Madisonville*, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

⁵ *Fairbanks Co. v. Sulphur*, — Okla. —, 161 Pac. 811.

⁶ *State v. Tomahawk*, 96 Wis. 73, 71 N. W. 86.

⁷ *Iowa. Cedar Rapids v. Bechtel*, 110 Ia. 196, 81 N. W. 468.

Maine. Adams v. Waterville, 95 Me. 242, 49 Atl. 1042.

Pennsylvania. Spangler v. Leitheiser, 182 Pa. St. 277, 37 Atl. 832.

Rhode Island. Rogan v. Sherman, 20 R. I. 388, 39 Atl. 568.

lected,⁹ are not to be counted among the debts to determine if the limit is exceeded. If cash on hand is to be deducted from the amount of indebtedness outstanding warrants must be first deducted from the amount of cash on hand.⁹ Taxes which are levied,¹⁰ or which may be levied,¹¹ are to be deducted. Even taxes due from former years but not collected have been deducted from debts,¹² unless such taxes have been unpaid for so long a time that a presumption of payment has arisen,¹³ and it has been held proper to deduct the sinking fund from debts.¹⁴ Taxes uncertain in amount, as licenses for the sale of liquor or taxes on the earnings of a street railway can not be deducted from the gross debts.¹⁵ Taxes which have become a lien but are not yet collectible can not be counted as an asset.¹⁶ Taxes not yet placed in the hands of the proper officers for collection can not be deducted.¹⁷ Special assessments are to be deducted only when they are completed and the amount thereof has been fixed.¹⁸

If the statute which imposes a limit of indebtedness contemplates net indebtedness, cash on hand, it is to be deducted from the gross indebtedness.¹⁹ If the statute which imposes a limit of indebtedness refers to gross indebtedness, cash on hand, and the like, can not

⁹ South Dakota. Shannon v. Huron, 9 S. D. 356, 69 N. W. 598; Kenyon v. Spokane, 17 Wash. 57, 48 Pac. 783.

But in State v. Tomahawk, 96 Wis. 73, 71 N. W. 86, it seemed to be held that only warrants against cash on hand were to be counted.

¹⁰ Darling v. Taylor, 7 N. D. 538, 75 N. W. 766 [citing, Grant v. Davenport, 36 Ia. 396; Shannon v. Huron, 9 S. D. 356, 69 N. W. 598; Lawrence Co. v. Meade County, 10 S. D. 175, 72 N. W. 405; In re State Warrants, 6 S. D. 518, 62 N. W. 101; Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279; disapproving, Prince v. Quincy, 105 Ill. 138, 44 Am. Rep. 785].

¹¹ Balch v. Beach, 119 Wis. 77, 95 N. W. 132.

¹² Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

¹¹ Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

¹² Overall v. Madisonville, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278; State v. Hopkins, 14 Wash. 59, 66; 44 Pac. 134, 550.

¹³ Seymour v. Ellensburg, 81 Wash. 365, 142 Pac. 875.

¹⁴ Kelly v. Minneapolis, 63 Minn. 125, 30 L. R. A. 281, 65 N. W. 115.

¹⁵ Rice v. Milwaukee, 100 Wis. 516, 76 N. W. 341.

¹⁶ Herman v. Oconto, 110 Wis. 660, 86 N. W. 681.

¹⁷ Balch v. Beach, 119 Wis. 77, 95 N. W. 132.

¹⁸ Schuldice v. Pittsburgh, 251 Pa. St. 28, 95 Atl. 938.

¹⁹ Johnson v. Pawnee County, 7 Okla. 696, 56 Pac. 701; Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

be deducted from the gross indebtedness.²¹ Money borrowed for a specific purpose can not be counted as an asset of the city, though in the treasury, and though no contract for its expenditure has been made.²¹ There is some conflict on these points, however. It has been held improper to deduct cash on hand,²² or uncollected taxes,²³ or claims against others.²⁴ If taxes are not to be deducted, current expenses payable out of the taxes can not be counted as debts.²⁵

Claims which are in genuine dispute are not to be counted as a part of the indebtedness of the public corporation.²⁶ In determining whether the limit of indebtedness has been reached, invalid claims which are not debts, such as invalid bonds,²⁷ including prior debts,²⁸ and illegal warrants,²⁹ can not be counted as a part of the indebtedness, even if voluntarily paid.³⁰

A debt payable solely out of special assessments, not creating a personal liability against the city, is not to be counted.³¹

In some jurisdictions the purchase price of a public utility such as a water works system is regarded as a debt, although such purchase price is secured solely by a charge upon the system and the revenues thereof, and although it has provided expressly that such obligation shall not constitute a debt of the public corporation.³² In other jurisdictions such purchase price is not to be included in the indebtedness of the public corporation.³³ If a debt is incurred

²⁰ *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982.

²¹ *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

²² *City Water Supply Co. v. Ottumwa*, 120 Fed. 309; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982.

²³ *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Municipal Security Co. v. Baker County*, 33 Or. 338, 54 Pac. 174.

²⁴ *Jordan v. Andrus*, 27 Mont. 22, 69 Pac. 118.

²⁵ *O'Bryan v. Owensboro*, 113 Ky. 680, 68 S. W. 858 [rehearing denied, 69 S. W. 800]; *Redding v. Esplen Borough*, 207 Pa. St. 248, 56 Atl. 431.

²⁶ *Schuldice v. Pittsburgh*, 251 Pa. St. 28, 95 Atl. 938.

²⁷ *Ashuelot National Bank v. Lyon County*, 81 Fed. 127; *German Ins. Co. v. Manning*, 95 Fed. 597; *State v. Hop-*

kins, 14 Wash. 59, 66; 44 Pac. 134, 559; *Lillard v. Melton*, 103 S. Car. 10, 87 S. E. 421.

²⁸ *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

²⁹ *Keene, etc., Bank v. Lyon County*, 97 Fed. 159.

³⁰ *Lyon County v. Bank*, 87 Fed. 137, 30 C. C. A. 582 [affirming, 81 Fed. 127].

³¹ *Davis v. Des Moines*, 71 Ia. 500, 32 N. W. 470; *Vallely v. Grand Forks Park Commissioners*, 16 N. D. 25, 15 L. R. A. (N.S.) 61, 111 N. W. 615.

³² *Eddy Valve Co. v. Crown Point*, 166 Ind. 613, 3 L. R. A. (N.S.) 684, 76 N. E. 536; *Palmer v. Albuquerque*, 19 N. M. 285, L. R. A. 1915A, 1106, 142 Pac. 929; *Lesser v. Warren*, 237 Pa. St. 501, 43 L. R. A. (N.S.) 839, 85 Atl. 839.

³³ *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

for which the city is primarily liable, it must be counted in determining whether the statutory limit is exceeded, even if the city is to be reimbursed out of local assessments,³⁴ or in some other manner, as in case of bonds to be paid out of the proceeds of the water works.³⁵ If a bond is a personal liability against the corporation, it must be counted though provision is made for a tax to pay such bond.³⁶ The legislature may provide specifically that a certain debt is not to be counted in determining the limit of indebtedness.³⁷ Under a constitutional provision which restricts a public corporation from incurring indebtedness in excess of a certain percentage of the value of its taxable property, indebtedness which had been created before the adoption of such constitutional provision should not be counted.³⁸ If, however, such indebtedness is paid, the city can not thereafter exceed the constitutional limit of indebtedness.³⁹ If a special provision is made by statute for issuing bonds in excess of the amount usually permitted, as where they are issued for some specific purpose, as for furnishing water,⁴⁰ or where they are issued in a specific manner, as by vote of the electors,⁴¹ bonds issued under such special provisions are not to be counted in determining whether the usual limit of indebtedness has been exceeded. Since the special issue could be made, though the ordinary indebtedness of the city had then reached the statutory limit, it follows that if the special issue is made before the ordinary indebtedness has reached such limit, it should not prevent the ordinary indebtedness from reaching such limit thereafter.⁴² Bonds issued under a special statute for erecting a county insane asylum are not to be included to determine whether debt exceeds the limit.⁴³ In order to determine whether a public corporation has exceeded its limit of indebt-

³⁴ *Burlington Savings Bank v. Clinton*, 111 Fed. 439; *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532; *Stehmeyer v. Charleston*, 53 S. Car. 259, 31 S. E. 322; *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800.

³⁵ *Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861.

³⁶ *Ottumwa v. Water Supply Co.*, 119 Fed. 315, 59 L. R. A. 604.

³⁷ *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446; *Lillard v. Melton*, 103 S. Car. 10, 87 S. E. 421.

³⁸ *Kimbley v. Owensboro*, 176 Ky. 532, 195 S. W. 1087.

³⁹ *Walsh v. Pineville*, 152 Ky. 556, 153 S. W. 1002.

⁴⁰ *Los Angeles v. Hance*, 137 Cal. 490, 70 Pac. 475; *Wells v. Sioux Falls*, 16 S. D. 547, 94 N. W. 425.

⁴¹ *State v. Blake*, 26 Wash. 237, 66 Pac. 396; *Hazeltine v. Blake*, 26 Wash. 231, 66 Pac. 394.

⁴² *Keller v. Scranton*, 202 Pa. St. 586, 52 Atl. 26; *State v. Blake*, 26 Wash. 237, 66 Pac. 396; *Hazeltine v. Blake*, 26 Wash. 231, 66 Pac. 394.

⁴³ *Kyes v. St. Croix Co.*, 108 Wis. 136, 83 N. W. 637.

edness, its debt upon a public improvement is to be regarded as arising when the work is completed and accepted,⁴⁴ and the creation of such indebtedness is not postponed until the collection of the assessment apportioning the cost between the city and the property holders.⁴⁵ An unliquidated claim for damages for breach of contract by a contractor can not be subtracted from the amount due on the contract in estimating debts.⁴⁶ The expenses of the current year are ordinarily not to be counted in computing the indebtedness of a public corporation, since it will be presumed that such indebtedness will be paid for out of the current income.⁴⁷

§ 1919. Debts of other coterminous or inclusive public corporations. In determining whether a public corporation has exceeded its debt limit, debts which are incurred by other public corporations are not to be counted in the absence of specific statutory provision, although the territorial limits of such other public corporation may include the public corporation in question, and although the debts of such other corporation must ultimately be paid in whole or in part by taxes which are imposed upon the property in the public corporation whose debt limit is in question.¹

Thus the debt of a school district coterminous with a city can not be counted as city debt;² nor can the debt of a water district be so counted;³ nor the proportionate share of the county debt payable by the city;⁴ nor the proportionate share of the state debt.⁵ Nor are bonds to be paid by a tax on a township, which is to be collected and paid over by the county, debts of the county.⁶

⁴⁴ *Logansport v. Jordan*, 171 Ind. 121, 37 L. R. A. (N.S.) 1036, 85 N. E. 959.

⁴⁵ *Logansport v. Jordan*, 171 Ind. 121, 37 L. R. A. (N.S.) 1036, 85 N. E. 959.

⁴⁶ *Herman v. Oconto*, 110 Wis. 600, 86 N. W. 681.

⁴⁷ *Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040.

¹ *Brown v. Guthrie*, 185 Ind. 609, 114 N. E. 443; *Ex parte Newport*, 141 Ky. 329, 37 L. R. A. (N.S.) 1034, 132 S. W. 580; *Vallelly v. Grand Forks Park Commissioners*, 16 N. D. 25, 15 L. R. A. (N.S.) 61, 111 N. W. 615; *Beacham v. Greenville*, 104 S. Car. 421, 89 S. E. 401.

² *Indiana. Heintz v. Terre Haute*, 161 Ind. 44, 66 N. E. 450.

Kentucky. Ex parte Newport, 141

Ky. 329, 37 L. R. A. (N.S.) 1034, 132 S. W. 580.

North Dakota. Vallelly v. Grand Forks Park Commissioners, 16 N. D. 25, 15 L. R. A. (N.S.) 61, 111 N. W. 615.

South Carolina. Beacham v. Greenville, 104 S. Car. 421, 89 S. E. 401.

South Dakota. Hyde v. Ewert, 16 S. D. 133, 51 N. W. 474.

³ *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774.

⁴ *Todd v. Laurens*, 48 S. Car. 395, 20 S. E. 682; *Beacham v. Greenville*, 104 S. Car. 421, 89 S. E. 401.

⁵ *Lancaster School District v. Robinson-Humphrey Co.*, 64 S. Car. 545, 42 S. E. 998.

⁶ *Board, etc., of Monroe Co. v. Harrell*, 147 Ind. 500, 46 N. E. 124.

§ 1920. Amounts to become due under installment contracts.

A contract lasting for a considerable time calling for the performance of services to the corporation and payment therefor in installments as such services are rendered, is, by the weight of authority, a liability of the corporation only for so much as is earned and due and not for future unearned installments, in determining the debts of the corporation.¹ The distinction between a contract of this sort and a contract which provides for an entire performance and for the payment therefor, by the public corporation in installments,² is said to be that the contract which provides for entire performance creates a debt which is absolute, although payable in

¹ **United States.** *Walla Walla v. Water Co.*, 172 U. S. 1, 43 L. ed. 341 [affirming, 60 Fed. 957]; *Budd v. Budd*, 59 Fed. 735; *Kiehl v. South Bend*, 76 Fed. 921, 36 L. R. A. 228; *Cunningham v. Cleveland*, 98 Fed. 657, 39 C. C. A. 211; *Anoka, etc., Co. v. Anoka*, 109 Fed. 580; *Fidelity, etc., Co. v. Water Co.*, 113 Fed. 560; *Centerville v. Guaranty Co.*, 118 Fed. 332, 55 C. C. A. 348.

California. *Smilie v. Fresno Co.*, 112 Cal. 311, 44 Pac. 556; *State v. McCauley*, 15 Cal. 429; *Koppikus v. State Capitol Commissioners*, 16 Cal. 248; *People v. Pacheco*, 27 Cal. 175; *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358; *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824 [modified on rehearing, 50 Pac. 670].

Colorado. *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993.

Illinois. *East St. Louis v. Coke Co.*, 98 Ill. 415, 36 Am. Rep. 97; *Carlyle v. Carlyle Water & Power Co.*, 140 Ill. 445, 29 N. E. 556.

Indiana. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Crowder v. Sullivan*, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. 94; *Seward v. Liberty*, 142 Ind. 551, 42 N. E. 39; *Foland v. Frankton*, 142 Ind. 546, 41 N. E. 1031; *Laporte v. Gamewell, etc., Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 35 L. R. A. 686, 45 N. E. 588; *South Bend v. Rey-*

nolds, 155 Ind. 70, 49 L. R. A. 795, 57 N. E. 706; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 96, 71 N. E. 208.

Iowa. *Dively v. Cedar Falls*, 27 Ia. 227; *Grant v. Davenport*, 36 Ia. 396; *Creston Waterworks Co. v. Creston*, 101 Ia. 687, 70 N. W. 739.

Louisiana. *New Orleans, etc., Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559.

Massachusetts. *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

Michigan. *Ludington, etc., Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

Missouri. *Saleno v. Neosho*, 127 Mo. 627, 48 Am. St. Rep. 653, 27 L. R. A. 769, 30 S. W. 190; *Lamar, etc., Co. v. Lamar*, 128 Mo. 188, 32 L. R. A. 157, 31 S. W. 756, 26 S. W. 1025; *Lamar Water, etc., Co. v. Lamar*, 140 Mo. 145, 39 S. W. 768.

New York. *Weston v. Syracuse*, 17 N. Y. 110; *Territory v. Oklahoma*, 2 Okla. 158, 37 Pac. 1094.

Pennsylvania. *Wade v. Oakmont Borough*, 165 Pa. St. 479, 30 Atl. 959; *Seitzinger v. Tamaqua*, 187 Pa. St. 539, 41 Atl. 454.

West Virginia. *Allison v. Chester*, 69 W. Va. 533, 37 L. R. A. (N.S.) 1042, 72 S. E. 472.

Wisconsin. *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

² See § 1913.

future installments, while the contract for the performance of continuous services in the state and payment therefor in installments, as they are rendered, is a contract for a future indebtedness which is contingent and which does not come into existence until the consideration has been furnished.³ Contracts for a supply of light and water are the most common examples of this sort. Where this view is taken, the financial condition of the city when any given installment becomes due, determines the validity of the contract as to that installment.⁴ If the funds of the public corporation are not adequate for the payment of an installment when it becomes due, the public corporation has reached its limit of indebtedness, and no recovery for such installment can be had.⁵

Other authorities hold that all the sums which may be payable under such contract in the future must be added to determine whether the limit is exceeded.⁶ All the installments to become due under such a contract have been counted as a present debt under a provision forbidding incurring a debt without provision for paying the same.⁷

In many cases it has not been necessary to decide whether installments payable when services are rendered should be added

³ *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, 43 L. ed. 341; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, 2 Am. & Eng. Ann. Cas. 978, 66 L. R. A. 95, 71 N. E. 208.

⁴ *United States. Keihl v. South Bend*, 76 Fed. 921, 36 L. R. A. 228.

California. Doland v. Clark, 143 Cal. 176, 76 Pac. 958.

Oklahoma. Rogers v. Oklahoma City, 45 Okla. 269, 145 Pac. 357.

West Virginia. Allison v. Chester, 69 W. Va. 533, 37 L. R. A. (N.S.) 1042, 72 S. E. 472.

Wisconsin. Herman v. Oconto, 110 Wis. 660, 86 N. W. 681.

⁵ *Schnell v. Rock Island*, 232 Ill. 89, 14 L. R. A. (N.S.) 874, 83 N. E. 462; *Voss v. Waterloo Water Co.*, 165 Ind. 69, 106 Am. St. Rep. 201, 66 L. R. A. 95, 71 N. E. 208; *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

⁶ *Georgia. City of Dawson v. Waterworks Co.*, 106 Ga. 696, 32 S. E. 907 [overruling, in part, *Spann v. Webster Co.*, 64 Ga. 498; *Cabaniss v. Hill*, 74 Ga. 845].

Michigan. Niles Waterworks v. Niles, 59 Mich. 311, 26 N. W. 525.

Minnesota. Kuchli v. Electric Co., 58 Minn. 418, 49 Am. St. Rep. 523, 59 N. W. 1088.

Montana. State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 453, 55 L. R. A. 336, 63 Pac. 99.

New Jersey. State v. City of Bayonne, 55 N. J. L. 241, 26 Atl. 81.

Oregon. Salem Water Co. v. Salem, 5 Or. 29.

Pennsylvania. Erie's Appeal, 91 Pa. St. 398.

South Carolina. Duncan v. Charleston, 60 S. Car. 532, 39 S. E. 265.

⁷ *Dawson v. Waterworks Co.*, 102 Ga. 594, 29 S. E. 755; *State v. Bayonne*, 55 N. J. L. 241, 26 Atl. 81.

in determining the existing amount of indebtedness. If the limit of indebtedness has already been reached such contract creates a debt for at least the first installment, and if no tax is levied to pay such installment, the contract is void.⁸ A similar result follows if the liability exceeds the appropriation.⁹ Even if the income from the property thus brought,¹⁰ or from taxes which the city means to levy,¹¹ will probably exceed the amount of the annual installments, the contract is invalid if it imposes a liability on the city. In other cases a somewhat different view of such a contract is taken. It is held void if it is not shown that the annual revenues from the property will pay for the installments.¹² If the contract is really one of purchase of a plant outright, the price to be paid under the guise of annual rentals, the total cost must be counted as a debt existing when the contract is made; and if the limit of indebtedness is then exceeded, such contract is invalid.¹³ If the annual installments are to be paid out of the receipts from the property bought and no liability attaches to the city, such contract is valid, even if the limit of indebtedness is exceeded.¹⁴ If the contract for the purchase of property provides for a payment at the outset and the public corporation pledges its faith to make appropriations for annual installments thereafter, and there is a

⁸ *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982 (holding remarks in *East St. Louis Co. v. Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97; and *Carlyle v. Power Co.*, 140 Ill. 445, 29 N. E. 556; obiter as in those cases the limit was not reached when the debt was incurred); *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 23 L. R. A. 402, 24 S. W. 872; *State v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759.

⁹ *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665, 15 Atl. 10.

¹⁰ *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 23 L. R. A. 402, 24 S. W. 872; *State ex rel. Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759.

¹¹ *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.

¹² *Erie's Appeal*, 91 Pa. St. 398.

¹³ *Georgia. Renfroe v. Atlanta*, 140

Ga. 81, 45 L. R. A. (N.S.) 1173, 78 S. E. 449.

Illinois. Baltimore, etc., Ry. v. People, 200 Ill. 541, 66 N. E. 148.

Indiana. Logansport v. Jordan, 171 Ind. 121, 37 L. R. A. (N.S.) 1036, 85 N. E. 959.

West Virginia. Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279 (the electric-light plant to be sold to the city for one dollar when the rentals were paid).

Wisconsin. Earles v. Wells, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964 (the waterworks to become the property of the city when the rentals are paid) [distinguishing, *Crowder v. Sullivan*, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. 94; *Smith v. Dedham*, 144 Mass. 177, as true installment contracts].

¹⁴ *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

provision that if such payments are not made the property is to revert to the contractor, the contract is invalid if all the installments, together with the existing indebtedness, exceed the debt limit.¹⁵ Other authorities have held that no appropriation in advance for future installments was necessary where a contract could be based only on an appropriation.¹⁶ It is sufficient if an appropriation be made each year to cover the installment accruing in that year.¹⁷ Under such a statute a five-year contract for lighting was held invalid where there was no appropriation for more than two months.¹⁸ So where the statute requires the certificate of the proper officer that there are sufficient funds in the treasury, such certificate need not be made for future installments.¹⁹ An ordinance fixing the rate of hydrant rentals is not a contract, does not create a debt, and hence is valid even if the limit is reached.²⁰

Whether a contract by which a public corporation is to pay a certain amount at certain periods of time for the use of property and at the end of such period of time it is to become the owner of such property, is a contract which creates a present debt for the entire amount, but which postpones payment of future installments, or whether it is a contract for future services, use of property, and the like, which does not create a debt until such property has been used or such services have been furnished, is a question which depends upon the real intention of the parties as apparent from the contract and the surrounding circumstances, rather than upon the outward form of such contract.²¹ If the amount which is to be paid at certain intervals is so computed as to include a part of the purchase price of the property as well as payment for its use or for services furnished during such installment periods, the contract creates a present debt although it may assume the form of a lease.²² If the amount of each installment is so computed as to be only consideration for the use of the property or for the rendition of services during such installment period, the contract does not create

¹⁵ *Renfroe v. Atlanta*, 140 Ga. 81, 45 L. R. A. (N.S.) 1173, 78 S. E. 449.

¹⁶ *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349.

¹⁷ *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993.

¹⁸ *Indianapolis v. Wann*, 144 Ind. 175, 31 L. R. A. 743, 42 N. E. 901.

¹⁹ *Defiance v. Defiance*, 23 Ohio C. C. 96.

²⁰ *Danville v. Water Co.*, 180 Ill. 235, 54 N. E. 224; s. c., 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118.

²¹ *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

²² *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

For buying a plant by piecemeal, see *Overall v. Madisonville*, 125 Ky. 684, 12 L. R. A. (N.S.) 433, 102 S. W. 278.

a present debt for the aggregate amount of the installments, but only a debt for each installment as it comes due.

§ 1921. Validity of debt which causes excess over limit. When bonds are issued for a debt which, when added to the pre-existing valid debts, exceeds the limit, some authorities hold that the bonds are invalid in toto,¹ while others hold that they are good for such amount as added to pre-existing debts equals the legal limit of indebtedness;² and if the bonds are issued simultaneously the deficiency is to be pro-rated among the bonds,³ while if issued in different series at different times those first issued are good up to the legal limit.⁴

Other debts which cause the limit to be exceeded are valid up to the limit.⁵ A contract for the construction of streets,⁶ or a contract for the erection of a schoolhouse, which incurs the debt which exceeds the statutory limit, can be enforced up to the limit.⁷

§ 1922. Popular vote on incurring debt. Many statutes require a popular vote as a pre-requisite to incurring certain kinds

¹ *Hedges v. Dixon Co.*, 150 U. S. 182, 37 L. ed. 1044; *Massachusetts, etc., Co. v. Cane Creek Tp.*, 45 Fed. 336; *Croger v. Bayfield Co.*, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

² *United States. Rathbone v. Board, etc., of Kiowa Co.*, 83 Fed. 125, 27 C. C. A. 477; *Everett v. Independent School District*, 109 Fed. 697; *Columbus v. Woonsocket Institution*, 114 Fed. 162, 52 C. C. A. 118.

California. Meyer v. San Francisco, 150 Cal. 131, 10 L. R. A. (N.S.) 110, 88 Pac. 722.

Illinois. Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781.

Indiana. Winamac School Town v. Hess, 151 Ind. 229, 50 N. E. 81.

Kansas. Turner v. Woodson Co., 27 Kan. 314.

³ *Columbus v. Woonsocket Institution*, 114 Fed. 162, 52 C. C. A. 118; *Francis v. Howard Co.*, 50 Fed. 44;

Nolan Co. v. State, 83 Tex. 182, 17 S. W. 823.

⁴ *California. Meyer v. San Francisco*, 150 Cal. 131, 10 L. R. A. (N.S.) 110, 88 Pac. 722.

Indiana. Sheridan v. Rothschild (Ind.), 104 N. E. 66.

North Dakota. Anderson v. International School District, 32 N. D. 413, L. R. A. 1917E, 428, 156 N. W. 54.

Texas. Citizens' Bank v. Terrell, 78 Tex. 450, 14 S. W. 1003.

⁵ *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Webb City, etc., Co. v. Carterville*, 153 Mo. 128, 54 S. W. 557; *Atlantic Bitulithic Co. v. Edgewood*, 76 W. Va. 630, 87 S. E. 183.

⁶ *Atlantic Bitulithic Co. v. Edgewood*, 76 W. Va. 630, 87 S. E. 183.

⁷ *McGillivray v. School District*, 112 Wis. 354, 88 Am. St. Rep. 969, 58 L. R. A. 100, 68 N. W. 310.

of debts,¹ as to exceed the limit of indebtedness.² A statute which confers special authority upon a public corporation to incur indebtedness may require the submission of the proposition to a popular vote, although under the general law it would not be necessary to submit such proposition.³ Under some statutes an exception to the general rule requiring a popular vote as a pre-requisite to incurring debts is made in case of emergencies.⁴ A statute which confers authority to issue bonds will not be regarded as forming exceptions to a general statute which requires such questions to be submitted to popular vote.⁵ A statute which imposes upon a public corporation the duty of making a certain improvement upon order of a state board, will be regarded as excepting such indebtedness from

¹ Delaware. *Saxton v. Mayor and Council of Delaware City*, — Del. —, 88 Atl. 605.

Georgia. *Renfroe v. Atlanta*, 140 Ga. 81, 45 L. R. A. (N.S.) 1173, 78 S. E. 449.

Idaho. *Fell v. Coeur d'Alene*, 23 Ida. 32, 43 L. R. A. (N.S.) 1095, 129 Pac. 643.

Kansas. *State v. Kansas City*, 60 Kan. 518, 57 Pac. 118; *Eberhardt Construction Co. v. Board of Commissioners*, 100 Kan. 394, 164 Pac. 281.

Massachusetts. *Seward v. Revere Water Co.*, 201 Mass. 453, 87 N. E. 749.

Michigan. *Farr v. Grand Rapids*, 112 Mich. 99, 70 N. W. 411.

Mississippi. *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

Missouri. *State v. Gordon*, 261 Mo. 303, 158 S. W. 683.

New Mexico. *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

North Carolina. *Stephens Co. v. Charlotte*, 172 N. Car. 564, 90 S. E. 588.

Oklahoma. *In re Afton*, 43 Okla. 720, L. R. A. 1915D, 978, 144 Pac. 184; *Eureka Fire Hose Mfg. Co. v. Granite*, — Okla. —, 159 Pac. 308.

South Dakota. *Spangler v. Mitchell*, 35 S. D. 335, 152 N. W. 339.

Tennessee. *Imboden v. Bristol*, 192 Tenn. 562, 179 S. W. 147.

Washington. *Paine v. Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

Wisconsin. *McVichie v. Knight*, 92 Wis. 137, 51 N. W. 1094; *Appleton Waterworks Co. v. Appleton*, 116 Wis. 363, 93 N. W. 262.

Issuing bonds, *Belknap v. Louisville*, 99 Ky. 474, 59 Am. St. Rep. 478, 34 L. R. A. 256, 36 S. W. 1118; *Royce v. Columbia*, 192 Pa. St. 146, 43 Atl. 597.

Constructing sewers, *Kennedy v. Belmar*, 61 N. J. L. 20, 38 Atl. 756.

Constructing roads, *Theis v. Board, etc., of Washita Co.*, 9 Okla., 643, 60 Pac. 605.

Contract for school house, *Grady v. Pruitt*, 111 Ky. 100, 63 S. W. 283.

Contract for waterworks, *Painter v. Norfolk*, 62 Neb. 330, 87 N. W. 31; *Defiance v. Defiance*, 23 Ohio C. C. 96; *Duncan v. Charleston*, 60 S. Car. 532, 39 S. E. 265.

Contract for water supply, *Harrodsburg v. Water Co. (Ky.)*, 64 S. W. 658.

² *Christie v. Duluth*, 82 Minn. 202, 84 N. W. 754; *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99; *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613; *State v. Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265.

³ *Bramham v. Durham*, 171 N. Car. 196, 88 S. E. 347.

⁴ *Chartz v. Carson City*, 39 Nev. 285, 156 Pac. 925.

⁵ *Sick v. Bay St. Louis*, 113 Miss. 175, 74 So. 272.

a general statute requiring the submission of such question to the voters.⁶

The assent of the voters to a transaction can not confer power upon the public corporation to engage in such transaction unless such power has been granted by constitutional or statutory provision.⁷

An election is necessary only when required by statute.⁸ Thus if an election is necessary for the validity of an issue of bonds amounting to one hundred thousand dollars or over, the council may issue a less amount for a proper purpose without an election, although the total bonded indebtedness exceeds such limit.⁹ A constitutional provision which requires a county to submit to the voters the question of borrowing money will be regarded as not applicable to a debt incurred by such county acting as a special taxing district for the improvement of state highways.¹⁰ Where the statute requires a vote on purchases over five hundred dollars, such provision can not be evaded by giving several warrants for the purchase each less than five hundred dollars.¹¹ Such provisions usually apply only to the creation of new debts and not to the refunding of old ones,¹² but if the rate of interest is increased an election is necessary for refunding.¹³ A contract by which a viaduct is to be erected without any expense to the city, but the city assumes the damages to abutting property, incurs debts within the meaning of a constitutional provision requiring an election.¹⁴ If an election on the question of issuing aid bonds is held before the adoption of a constitutional provision forbidding such issue and the bonds are issued afterwards, they are invalid.¹⁵ The bonds must be restricted to the purpose for which the special tax is voted.¹⁶

⁶ *State v. Dean*, 95 O. S. 108, 116 N. E. 37.

⁷ *Hunter v. Roseburg*, 80 Or. 586, 157 Pac. 1065 [denying rehearing, *Hunter v. Roseburg*, 80 Or. 588, 156 Pac. 267].

⁸ *Board, etc., of Seward Co. v. Ins. Co.*, 90 Fed. 222, 32 C. C. A. 585; *Borrowdale v. County Commissioners*, 23 N. M. 1, L. R. A. 1917E, 456, 163 Pac. 721; *Klamath Falls v. Sachs*, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 329; *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

⁹ *Le Tourneau v. Duluth*, 85 Minn. 219, 88 N. W. 529.

¹⁰ *Borrowdale v. County Commissioners*, 23 N. M. 1, L. R. A. 1917E, 456, 163 Pac. 721.

¹¹ *Fire Extinguisher Mfg. Co. v. Perry*, 8 Okla. 429, 58 Pac. 635.

¹² *Geer v. Ouray Co.*, 97 Fed. 435, 38 C. C. A. 250; *Lexington v. Bank*, 75 Miss. 1, 22 So. 291; *McCreight v. City of Camden*, 49 S. Car. 78, 26 S. E. 984.

¹³ *Broadfoot v. Fayetteville*, 128 N. Car. 529, 39 S. E. 20.

¹⁴ *Keller v. Scranton*, 200 Pa. St. 130, 86 Am. St. Rep. 706, 49 Atl. 781.

¹⁵ *Stebbins v. Perry Co.*, 167 Ill. 567, 47 N. E. 1048 [reversing, 66 Ill. App. 427]. (The prior election was in this case not authorized by law.)

¹⁶ *Callaghan v. Alexandria*, 52 La. Ann. 1013, 27 So. 540.

The indebtedness which the public corporation incurs upon the authority of a popular vote can not exceed the amount of indebtedness which was submitted at such election.¹⁷ If authority is given at an election to incur a debt up to a certain amount, the public corporation is not thereby authorized to incur a greater amount of indebtedness.¹⁸ A vote to buy land and build a market does not give power to build on land already owned.¹⁹

If the authority conferred at a popular election is made subject to express conditions, such conditions must be performed before such authority can be exercised.²⁰ If authority is given by popular vote to issue bonds in aid of a railway, but only upon condition that the public corporation is discharged from payment of a subscription to the capital stock of such railway, the bonds can not be issued until the public corporation is discharged from such subscription.²¹ The statute may limit the time within which the validity of a bond election may be attacked.²²

An obligation for which the assent of the voters is necessary may be ratified by the subsequent assent of such voters at an election held after such obligation is incurred.²³ Such a contract can be ratified only by the assent of the voters in the manner necessary for authorizing such contract in the first instance.²⁴ It has, however, been held that a subsequent election can not ratify an obligation in excess of the limit of indebtedness,²⁵ since otherwise no subsequent additional debt could be incurred by popular vote, as there would always be a chance that such prior debt might be ratified, and the total limit of indebtedness might thus be exceeded.²⁶

Provision is sometimes made for a proceeding in court for the purpose of determining the validity of the bonds of a public corporation in advance.²⁷ If certain bonds have been adjudged valid,

¹⁷ *Ashland Waterworks Co. v. Ashland*, 230 Fed. 254; *Raff v. Philadelphia*, 256 Pa. St. 312, 100 Atl. 815.

¹⁸ *Ashland Waterworks Co. v. Ashland*, 230 Fed. 254; *Raff v. Philadelphia*, 256 Pa. St. 312, 100 Atl. 815.

¹⁹ *Tukey v. Omaha*, 54 Neb. 370, 69 Am. St. Rep. 711, 74 N. W. 613.

²⁰ *Quinlan v. Green County*, 157 Fed. 33, 84 C. C. A. 537, 19 L. R. A. (N.S.) 849.

²¹ *Quinlan v. Green County*, 157 Fed. 33, 84 C. C. A. 537, 19 L. R. A. (N.S.) 849.

²² *Gray v. Bourgeois*, 107 La. 671, 32 So. 42.

²³ *Youngerman v. Murphy*, 107 Ia. 686, 76 N. W. 648.

²⁴ *Niles Waterworks Co. v. Niles*, 69 Mich. 311, 26 N. W. 525.

²⁵ *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

²⁶ *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

²⁷ *Holton v. Camilla*, 134 Ga. 560, 31 L. R. A. (N.S.) 116, 68 S. E. 472.

they can not be attacked thereafter on the ground that there was not sufficient notice of the election or that two or more propositions were submitted together so that the voters could not vote upon each separately.²⁸

§ 1923. Submission of question. The method in which the question to be voted upon is to be submitted to the voters is usually provided by statute, and it is sufficient if such question is submitted in substantial compliance with the provisions of such statute.¹ The question to be voted upon is usually submitted by ordinance or resolution. In the absence of specific statutory provision requiring a formal ordinance, a resolution is sufficient as a means of submitting such question.²

The resolution or ordinance which provides for the submission of the question must show the question which is to be voted upon and the purpose for which the debt is to be incurred.³ Describing the debt to be bonded as "outstanding indebtedness other than municipal bonds" is not sufficient.⁴ Describing the purpose of the indebtedness as "fire department improvements" has been held to be insufficient.⁵ It has been held, however, that it is sufficient to state that the bonds are to be issued for a "municipal purpose" without further particularity.⁶ Submission of a question of issuing bonds for the erection of a courthouse and jail is insufficient if such bonds are in fact refunding bonds.⁷

The amount of the debt must be given.⁸ A submission by which the voters attempt to empower the city council to fix the amount of bonds to be issued is insufficient.⁹ A proposition to borrow

²⁸ *Holton v. Camilla*, 134 Ga. 560, 31 L. R. A. (N.S.) 116, 68 S. E. 472.

¹ *Ex parte Covington*, 160 Ky. 146, 169 S. W. 718; *Minden-Edison Light & Power Co. v. Minden*, 94 Neb. 161, 142 N. W. 673; *Connolly v. Beason*, 100 S. Car. 74, 84 S. E. 297.

² *Bernheim v. Anchorage*, 159 Ky. 315, 167 S. W. 139; *Hamilton v. Detroit*, 83 Minn. 119, 85 N. W. 933; *Kerlin v. Devil's Lake*, 25 N. D. 207, 141 N. W. 756.

³ *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403; *Coleman v. Frame*, 26 Okla. 193, 31 L. R. A. (N.S.) 556, 109 Pac. 928; *In re State-house Fund*, 19 R. I. 393, 33 Atl. 870.

⁴ *Coffin v. Richards*, 6 Ida. 741, 744; 59 Pac. 562.

⁵ *Coleman v. Frame*, 26 Okla. 193, 31 L. R. A. (N.S.) 556, 109 Pac. 928.

⁶ *Perry v. Panama City*, 67 Fla. 285, 65 So. 6.

⁷ *Helton v. Martin*, 141 La. 835, 75 So. 740.

⁸ *Dawson v. Waterworks Co.*, 106 Ga. 696, 32 S. E. 907; *Oawego v. Davis*, 97 Kan. 371, 154 Pac. 1124; *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

⁹ *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

money for construction and maintenance of a public utility is insufficient unless it shows how much is to be borrowed for each purpose,¹⁰ especially if there is no authority for borrowing for maintenance.¹¹

In some jurisdictions the proposition submitted must specify the exact amount to be issued, and not merely the maximum amount for which authority is wished;¹² in others it is sufficient to state the maximum amount.¹³ The rate of interest which such debt is to bear must be given,¹⁴ but if the rate of interest is given, it is not necessary to compute it.¹⁵

The question which is submitted to popular vote must state the maturity of the indebtedness,¹⁶ and the manner in which such indebtedness is to be paid.¹⁷ It has been held, however, that the question need not state that the bonds are to be paid by general taxation.¹⁸

§ 1924. Formalities of election—Voting on several propositions.

The formalities necessary to a valid election depend so entirely on the details of local statutes that no general statement of them is practicable. In the absence of statute, more than one proposition may be submitted at one election if the electors are given a fair chance to vote on each issue separately.¹ A vote may be taken at the same time on two separate bond issues,² or two propositions for incurring indebtedness.³

A submission of two distinct propositions in such a way that the electors can not vote upon each separately, is improper.⁴ A sub-

¹⁰ *Richardi v. Bellaire*, 153 Mich. 560, 116 N. W. 1066.

¹¹ *Richardi v. Bellaire*, 153 Mich. 560, 116 N. W. 1066.

¹² *State ex rel. Schultze v. Manchester Township*, 61 N. J. L. 513, 40 Atl. 589; *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

¹³ *Chicago, etc., Ry. v. Wilber*, 63 Neb. 624, 88 N. W. 660.

¹⁴ *State v. Clausen*, 87 Wash. 111, 151 Pac. 251.

¹⁵ *Ponder v. Forsyth*, 96 Ga. 572, 23 S. E. 498.

¹⁶ *State v. Clausen*, 87 Wash. 111, 151 Pac. 251.

¹⁷ *Hansard v. Green*, 54 Wash. 161,

103 Pac. 40 [sub nomine, *Hansard v. Harrington*, 24 L. R. A. (N.S.) 1273].

¹⁸ *Humphrey v. Commissioners*, 93 Kan. 413, 144 Pac. 197.

¹ *Kerlin v. Devil's Lake*, 25 N. D. 207, 141 N. W. 756.

² *Hartigan v. Los Angeles*, 170 Cal. 313, 149 Pac. 590; *Maybin v. Biloxi*, 77 Miss. 673, 28 So. 566.

³ *Wetzell v. Paducah*, 117 Fed. 647.

⁴ *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; *Cain v. Smith*, 117 Ga. 902, 44 S. E. 5; *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403; *State v. Brasington*, 93 S. Car. 447, 76 S. E. 1086; *Herbert v. Griffith*, 99 S. Car. 1, 82 S. E. 986.

mission of the question of the construction of a water works pumping station and an electric light plant in connection therewith, is not a submission of a single question but a submission of two independent propositions in such a way that the electors are obliged to vote for or against both,⁵ and such election is invalid.⁶

Whether the propositions are separate or not does not depend on whether or not each proposition could stand by itself, but whether the different parts of the plan are so connected that in fact they form an entire scheme.⁷ A plan for excavating a canal to connect two bodies of water, to improve the channel of one river and to divert the channel of another, and to acquire sites for wharves and docks, may form a part of an entire plan so that the entire question can be submitted to the voters as a single proposition.⁸ If a proposition which is submitted consists of a principle proposition and a number of incidental details, the fact that such incidental details are submitted in the disjunctive by the use of the conjunction "or," does not render the election invalid.⁹

§ 1925. Notice of election. Notice is necessary only if required by statute.¹

Notice of the indebtedness to be voted on is often necessary by statute. An election is void if legal notice is not given substantially in the form and manner required by statute.² But where the statute requires bond by the commissioners, before any act done, and the election must be held before such bond, it is valid if held before.³

⁵ *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

⁶ *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

⁷ *Hartigan v. Los Angeles*, 170 Cal. 313, 149 Pac. 590; *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A. (N.S.) 577, 116 Pac. 1076.

⁸ *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A. (N.S.) 577, 116 Pac. 1076.

⁹ *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A. (N.S.) 577, 116 Pac. 1076.

¹ *Asheville v. Webb*, 134 N. Car. 72, 46 S. E. 19.

² *Georgia*. *Sewell v. Tallapoosa*, 145 Ga. 19, 88 S. E. 577.

Indiana. *Demaree v. Johnson*, 150 Ind. 419, 424; 49 N. E. 1062 [rehearing denied, judgment modified, 50 N. E. 376].

Kansas. *Eberhardt Construction Co. v. Board of Commissioners*, 100 Kan. 394, 164 Pac. 281.

Kentucky. *Kash v. Jackson*, 159 Ky. 523, 167 S. W. 676.

Louisiana. *Henderson v. Shreveport*, 137 La. 667, 69 So. 88.

North Dakota. *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

Pennsylvania. *McGuire v. Philadelphia*, 245 Pa. St. 307, 91 Atl. 628.

Or in New Jersey if held in less than twenty days after the resolution becomes effective. *State ex rel. Mittag v. Park Ridge*, 61 N. J. L. 151, 38 Atl. 750.

³ *Champlain v. McCrea*, 165 N. Y. 264, 59 N. E. 83.

The notice must advise the electors of the proposition to be voted on.⁴ A notice which describes the debt as to be incurred for a specific public purpose, and which does not state that the debt is the refunding of a prior obligation, is insufficient.⁵ If notice of the election is given as required by statute, omissions to comply with the provisions of the resolution of the council calling such election may be waived by the council.⁶

Technical accuracy in the notice is not necessary if it conveys in a reasonably clear manner the information necessary.⁷ A notice must be construed in accordance with popular and ordinary meaning of the words which are employed.⁸ The notice must show with certainty the amount of indebtedness to be voted on.⁹ The indebtedness which is incurred can not exceed the amount which is named in the notice.¹⁰

Substantial compliance with the statutory requirements of notice is sufficient.¹¹ The fact that the mayor omits to sign a notice does not render the election invalid if the notice is otherwise correct.¹² Omission to state the hours of the election on the question of the bond issue does not invalidate the notice where this omission may be supplied from the regular election notices.¹³ If ten days' notice is required, thirty days' notice is sufficient.¹⁴ If five weeks' notice is required, notice once a week for five weeks is sufficient, even if the first notice was given only thirty-two days before the election.¹⁵ If the law requires fifteen days' notice, it is sufficient if notices are given nineteen, twelve, and five days, respectively, before the

⁴ *Smith v. Dublin*, 113 Ga. 833, 39 S. E. 327; *Wilkins v. Waynesboro*, 116 Ga. 350, 42 S. E. 767; *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

⁵ *Helton v. Martin*, 141 La. 835, 75 So. 740.

⁶ *Hamilton v. Detroit*, 83 Minn. 119, 85 N. W. 933.

⁷ *Raff v. Philadelphia*, 256 Pa. St. 312, 100 Atl. 815; *Packwood v. Kittitas Co.*, 15 Wash. 88, 55 Am. St. Rep. 875, 33 L. R. A. 673, 45 Pac. 640.

⁸ *Raff v. Philadelphia*, 256 Pa. St. 312, 100 Atl. 815.

⁹ *Stern v. Fargo*, 18 N. D. 289, 26 L. R. A. (N.S.) 665, 122 N. W. 403.

¹⁰ *Raff v. Philadelphia*, 256 Pa. St. 312, 100 Atl. 815.

¹¹ *Sommerecamp v. Kelly*, 8 Ida. 712, 71 Pac. 147; *C. W. Smith Electric & Ice Co. v. Larned*, 96 Kan. 33, 149 Pac. 704; *Kimbley v. Owensboro*, 176 Ky. 532, 195 S. W. 1087.

See also, *Bernheim v. Anchorage*, 159 Ky. 315, 167 S. W. 139.

Literal compliance is, of course, sufficient. *Kerlin v. Devil's Lake*, 25 N. D. 207, 141 N. W. 756.

¹² *Perry v. Davis*, 97 Kan. 369, 154 Pac. 1127.

¹³ *Packwood v. Kittitas Co.*, 15 Wash. 88, 55 Am. St. Rep. 875, 33 L. R. A. 673, 45 Pac. 640.

¹⁴ *Hesseltine v. Wilbur*, 29 Wash. 407, 69 Pac. 1094.

¹⁵ *State v. Weston*, 67 Neb. 385, 93 N. W. 728.

election.¹⁶ If the law requires publication in a daily paper for not less than fifteen days before the election, publication in one paper for seventeen days excepting on Monday, and in another paper for eleven days except on Saturday, is sufficient.¹⁷ Under a statute which requires thirty days' notice to be given once a week for four consecutive weeks, twenty-six days' notice once a week for four consecutive weeks has been held to be sufficient,¹⁸ in the absence of a showing that any elector was denied the right to vote by failure to publish such notice in strict compliance with statute.¹⁹

§ 1926. Number of votes necessary. The number of votes which must be cast in favor of a proposition to incur indebtedness in order to carry such proposition depends upon constitutional or statutory provision, and it is usually a majority or two-thirds. If the constitution requires a two-thirds vote, the statutes which authorize the submission of a question may not repeal such constitutional provision,¹ and an election under such statute at which two-thirds of the votes are cast in favor of such proposition, is valid, although the statute does not require two-thirds majority.² Where a general statute provided that a majority should be sufficient, and the charter of a railroad provided that counties through which it passed might aid it on a two-thirds vote, it was held that a county through which it did not pass might aid it by a majority vote.³ The question most frequently arising in this connection is of what votes this majority or two-thirds consists. It usually means a majority of those voting, not of those authorized to vote.⁴ If other questions are voted on at the same election as the question of indebtedness, some statutes are construed to require a majority of all votes cast at such election;⁵ others to require only a majority on two-thirds of the votes cast on the question of the bond issue.⁶ Where the statute required the assent of "two-thirds of the voters

¹⁶ *State v. Allen*, 178 Mo. 535, 77 S. W. 868.

¹⁷ *Kimbly v. Owensboro*, 176 Ky. 532, 195 S. W. 1087.

¹⁸ *Cincinnati v. Puchta*, 94 O. S. 431, 115 N. E. 278.

¹⁹ *Cincinnati v. Puchta*, 94 O. S. 431, 115 N. E. 278.

¹ *Render v. Louisville*, 142 Ky. 409, 32 L. R. A. (N.S.) 530, 134 S. W. 458.

² *Render v. Louisville*, 142 Ky. 409, 32 L. R. A. (N.S.) 530, 134 S. W. 458.

³ *Carpenter v. Greene County*, 130 Ala. 613, 29 So. 194.

⁴ *State v. Ruhe*, 24 Nev. 251, 52 Pac. 274.

⁵ *Stebbins v. Grand Rapids*, 108 Mich. 693, 66 N. W. 594; *Bryan v. City of Lincoln et al.*, 50 Neb. 620, 35 L. R. A. 752, 70 N. W. 252; *State ex rel. v. Cornell*, 54 Neb. 72, 74 N. W. 432.

⁶ *United States. Cass Co. v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Carroll Co. v. Smith*, 111 U. S. 556, 28 L. ed.

thereof, voting at an election to be held for that purpose," it was held to require only two-thirds of those voting on the bond question and not two-thirds of all voting at that election.⁷ The statute may require two-thirds of those authorized to vote. The number authorized is to be determined by the registration lists, if there are such lists; and if not, by the votes at the last election, if greater in number than those cast at the bond election,⁸ but if the number cast at the bond election is greater, that number will control.⁹ If the statute requires a certain proportion of the votes of the qualified voters voting at such election, ballots which are not counted as being unintelligible or not in conformity to the requirements of law, should not be counted in telling the number of qualified voters voting at such election.¹⁰ If women are authorized to vote at a school election, they may vote on the question of issuing school bonds.¹¹

§ 1927. Method of holding election. Statutes usually provide with considerable detail the method of holding the election. Registration of voters at such election may be required.¹ In such case bona fide holders are not bound to go back of the registration books, but may rely on the certificate of the registrar as to the legality of the registration.² Canvassing of the returns by the county board is not necessary if the statute does not require it.³ The vote may be recanvassed if the election laws allow it and the bonds have not been delivered.⁴ Slight irregularities in the form

517; *Armour, etc., Co. v. Finney Co.*, 41 Fed. 321.

California. *Howland v. San Joaquin Co.*, 109 Cal. 152, 41 Pac. 864.

Illinois. *Holcomb v. Davis*, 56 Ill. 413; *Marion County v. Winkley*, 29 Kan. 36.

New York. *Smith v. Proctor*, 130 N. Y. 319, 14 L. R. A. 403, 29 N. E. 312.

Washington. *Metcalf v. Seattle*, 1 Wash. 297, 25 Pac. 1010.

⁷*Montgomery County v. Trimble*, 104 Ky. 629, 42 L. R. A. 738, 47 S. W. 773 [overruling, *Belknap v. Louisville*, 99 Ky. 474, 59 Am. St. Rep. 478, 34 L. R. A. 256, 36 S. W. 1118]; *McGoodwin v. Franklin (Ky.)*, 38 S. W. 481; *Owensboro v. Baker (Ky.)*, 37 S. W. 1129.

⁸*Wilkins v. Waynesboro*, 116 Ga. 359, 42 S. E. 767.

⁹*McKnight v. Senoia*, 115 Ga. 915, 42 S. E. 256.

¹⁰*State ex rel. v. Clausen*, 72 Wash. 409, 45 L. R. A. (N.S.) 714, 130 Pac. 479.

¹¹*Olive v. School District*, 36 Neb. 135, 27 L. R. A. (N.S.) 522, 125 N. W. 141.

¹*Pacific Improvement Co. v. Clarksdale*, 74 Fed. 528, 20 C. C. A. 635.

²*Claybrook v. Rockingham Co.*, 117 N. Car. 436, 23 S. E. 360; same case, 114 N. Car. 453, 19 S. E. 593.

³*Brown v. Ingalls Township*, 86 Fed. 261, 30 C. C. A. 27.

⁴*Louisville v. Park Commissioners*, 112 Ky. 400, 65 S. W. 860.

of ballot which do not tend to mislead the voters, do not render the election invalid.⁵ Thus where some ballots were for "electric light contract and tax levy," and others for "electric light contract,"⁶ or where the ballots were marked, "For taxation, yes —; against taxation, no —," the voter to mark in the blank,⁷ the election was held valid.

The ordinary election laws apply.⁸ Irregularity as to the time of opening and closing the polls does not render the election invalid unless they are of such character that the voters would not have a fair opportunity to vote upon the proposition submitted.⁹ The fact that the polls open at an earlier hour and close at a later hour than that provided by statute does not render the election invalid.¹⁰ Irregularity in holding an election in one ward only does not necessarily invalidate the election.¹¹

§ 1928. Petition of voters. Under other statutes there must be a petition signed by a majority of the qualified voters to authorize certain contracts,¹ or by a majority of the property owners.² Authority conferred by a petition in the alternative to issue bonds or to incur a specified indebtedness is not terminated by the fact that the question of issuing such bonds is submitted and is defeated,³ but the public corporation may incur the indebtedness which is authorized by such petition.⁴

The signers of a petition may withdraw therefrom before final action has been taken thereon.⁵ If so many withdraw their consent before action is taken that less than the requisite number is left, authority to make such contract is lacking.⁶

A petition for incurring an indebtedness must specify the purpose for which such indebtedness is to be incurred with reasonable

⁵ Seyboldt v. Mt. Ranier, 130 Md. 69, 99 Atl. 960.

⁶ Lebanon, etc., Co. v. Lebanon, 163 Mo. 246, 63 S. W. 809.

⁷ Bras v. McConnell, 114 Ia. 401, 87 N. W. 290.

⁸ Hammond v. San Leandro, 135 Cal. 450, 67 Pac. 692 (as to the time of closing the polls).

⁹ State v. Francisco, 98 Kan. 806, 160 Pac. 217.

¹⁰ State v. Francisco, 98 Kan. 806, 160 Pac. 217.

¹¹ Lebanon, etc., Co. v. Lebanon, 163 Mo. 246, 63 S. W. 809.

¹ Horton v. Thompson, 71 N. Y. 513; Ex rel. McWhirter v. Newberry, 47 S. Car. 418 [sub nomine, State ex rel. McWhirter v. Evans, 25 S. E. 216].

² Hubbell v. Custer City, 15 S. D. 55, 87 N. W. 520.

³ W. S. Nott Co. v. Sawyer, 35 N. D. 587, 161 N. W. 202.

⁴ W. S. Nott Co. v. Sawyer, 35 N. D. 587, 161 N. W. 202.

⁵ Biddle v. Riverton, 58 N. J. L. 289, 33 Atl. 279.

⁶ Biddle v. Riverton, 58 N. J. L. 289, 33 Atl. 279.

certainty.⁷ A petition that the municipality let contracts and that three thousand dollars will be necessary therefor and will benefit the town, is sufficient to indicate the wish of the petitioners that the municipality borrow such sum.⁸ In the absence of specific statutory requirements a petition need not recite the fact that it is signed by the requisite number of voters or property owners.⁹ Under a statute, however, which requires the petition to state all the facts which are necessary to the validity of the obligation and to be verified upon oath, the petition must show upon its face that it is signed by the requisite number of voters or property owners.¹⁰

If the petition must be signed by freeholders the name of one owning no property in such municipality and living on his wife's property therein is not sufficient.¹¹

§ 1929. Employment of attorney. Where there is statutory provision therefor, a public corporation may retain a special counsel.¹ This has been recognized as an implied power where the interests of the corporation were affected in another state,² or where the services of an attorney were needed suddenly, as to obtain an injunction.³

If no public official is designated by statute as the attorney for a public corporation, it may employ an attorney to represent it wherever its corporate interests are involved.⁴ The power to employ attorneys is, however, limited to the corporate interests of the corporation.⁵ If the litigation involves matters which are personal to its officers,⁶ as where the issue is as to who are the legal officers of the corporation,⁷ or if it concerns the private interests of

⁷ *Horton v. Thompson*, 71 N. Y. 513.

⁸ *Hubbell v. Custer City*, 15 S. D. 55, 87 N. W. 520.

⁹ *Cleveland v. Spartanburg*, 54 S. Car. 83, 31 S. E. 871.

¹⁰ *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *Rich v. Mentz*, 134 N. Y. 632.

¹¹ *Hamilton v. Detroit*, 85 Minn. 83, 88 N. W. 419.

¹ *State v. Butler County*, 164 Mo. 214, 64 S. W. 176; *Wilson v. Omro*, 52 Wis. 131, 8 N. W. 821; *Appel v. State*, 9 Wyom. 187, 61 Pac. 1015.

² *Memphis v. Adams*, 56 Tenn. (9 Heisk.) 518, 24 Am. Rep. 331.

³ *Louisville v. Murphy*, 86 Ky. 53, 5 S. W. 194.

⁴ *State v. Aven*, 70 Ark. 291, 67 S. W. 752; *Holdenville v. Lawson*, 40 Okla. 38, 135 Pac. 405; *Cheesebrew v. Point Pleasant*, 71 W. Va. 199, L. R. A. 1917D, 237, 76 S. E. 424, 79 S. E. 350; *Charleston v. Littlepage*, 73 W. Va. 156, 51 L. R. A. (N.S.) 353, 80 S. E. 131; *Knight v. Ashland*, 61 Wis. 233, 21 N. W. 65; *McCaffrey v. School District*, 74 Wis. 100, 42 N. W. 103.

⁵ *Cheesebrew v. Point Pleasant*, 71 W. Va. 199, L. R. A. 1917D, 237, 76 S. E. 424, 79 S. E. 350.

⁶ *Smith v. Nashville*, 72 Tenn. (4 Lea) 69.

⁷ *Smith v. Nashville*, 72 Tenn. (4 Lea) 69.

certain of the inhabitants,⁸ as where the question is one of the propriety of an increase in telephone rates,⁹ even if the public corporation is itself one of the customers of the telephone company,¹⁰ it has no power to employ an attorney. If the proceeding is one to compel its officers to perform duties imposed upon them by law,¹¹ it has no power to employ an attorney to resist such proceedings.

The power to employ an attorney is not limited to a case in which the public corporation is a party if its corporate interests are involved.¹² A public corporation may employ an attorney to represent its interests in a criminal case in which the public corporation is not a party but which involves substantial corporate rights of the public corporation.¹³

Power to retain an attorney has been implied from power to see that the laws are enforced,¹⁴ or from power to appoint "other officers."¹⁵

If a public official is designated by statute as an attorney of a public corporation, it is held in many jurisdictions that the public corporation can not employ another attorney.¹⁶ A public corporation can not employ special counsel to represent it if the action is one of which the attorney-general is placed in charge by the provisions of the statute,¹⁷ and can not be held to pay attorney fees for suit on the bond of a defaulting county trustee, to the district attorney-general, his partner, and the county attorney, where the members of the county court knew of the rendition of services, but did not know that the services were rendered in a private capacity.¹⁸ So where bonds are issued under an unconstitutional statute, the board thus created can not bind the city by employing an attorney to defend actions growing out of the act.¹⁹

⁸ *Purcell v. Wadlington*, 43 Okla. 728, 144 Pac. 380.

⁹ *Purcell v. Wadlington*, 43 Okla. 728, 144 Pac. 380.

¹⁰ *Purcell v. Wadlington*, 43 Okla. 728, 144 Pac. 380.

¹¹ *Ross v. Bibb County*, 130 Ga. 585, 61 S. E. 465.

¹² *Cheesebrew v. Point Pleasant*, 71 W. Va. 199, L. R. A. 1917D, 237, 76 S. E. 424, 79 S. E. 350.

¹³ *Cheesebrew v. Point Pleasant*, 71 W. Va. 199, L. R. A. 1917D, 237, 76 S. E. 424, 79 S. E. 350.

¹⁴ *Hosner v. Leonard*, 163 Mich. 92, 127 N. W. 749.

¹⁵ *Gansser v. Vanderveen*, 176 Mich. 517, 142 N. W. 744.

The prosecuting attorney can not bind the public corporation by employing detectives, in the absence of statutory authority. *Irwin v. Klamath County*, — Or. —, 183 Pac. 780.

¹⁶ *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *McHenderson v. Anderson Co.*, 105 Tenn. 591, 59 S. W. 1016.

¹⁷ *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23.

¹⁸ *McHenderson v. Anderson Co.*, 105 Tenn. 591, 59 S. W. 1016.

¹⁹ *City of Findlay v. Pendleton*, 62 O. S. 80, 56 N. E. 649.

In other jurisdictions it is held that a public corporation may employ an attorney if such contract is fair and reasonable in view of all the circumstances, although a public official is designated by law to act as the attorney of the public corporation.²⁰ In jurisdictions in which this view has been expressed it has been held that the public corporation can not employ another attorney in litigation of comparatively small importance and in which the public attorney has not been consulted.²¹ On the other hand, the public corporation may retain counsel if the litigation is one of great importance to the public corporation.²² If the public attorney represents two or more public corporations whose interests are conflicting, either of them may retain a different attorney.²³

In the absence of specific statutory provision a public corporation may retain an attorney to assist the public attorney, whose duty it is by law to act as attorney for such public corporation.²⁴ Occasionally the employment of assistant counsel is forbidden by statute.²⁵

If the public corporation is authorized to retain an attorney, it may enter into a contract with him for a contingent fee,²⁶ wherever such a contract would be proper in the case of a natural person. A public corporation may retain an attorney upon a contingent fee to compel a judgment which has long been dormant.²⁷ A public corporation which is attempting to secure a reduction in the amount of a tax levy may enter into contracts by which it

²⁰ *Buchanan v. Farmer*, 122 Ark. 562, 184 S. W. 33; *Sumpter v. Buchanan*, 128 Ark. 498, 194 S. W. 27; *Mollohan v. Cavender*, 75 W. Va. 36, L. R. A. 1917D, 248, 83 S. E. 78.

See also, *Reynolds v. Clark County*, 162 Mo. 680, 63 S. W. 382.

See also, for a case in which compensation was denied to the attorney on the theory that he represented the public officer, personally, rather than the public corporation. *Oglesby v. Ft. Smith District*, 119 Ark. 567, 179 S. W. 178.

²¹ *Buchanan v. Farmer*, 122 Ark. 562, 184 S. W. 33.

See also, *Oglesby v. Ft. Smith District*, 119 Ark. 567, 179 S. W. 178.

²² *Sumpter v. Buchanan*, 128 Ark. 498, 194 S. W. 27.

²³ *Spence v. Clay County*, 122 Ark. 157, 182 S. W. 573.

²⁴ *Moorehead v. Murphy*, 94 Minn. 123, 110 Am. St. Rep. 345, 68 L. R. A. 400, 102 N. W. 219; *Vicksburg Waterworks Co. v. Vicksburg*, 99 Miss. 132, 33 L. R. A. (N.S.) 844, Ann. Cas. 1913D, 917, 54 So. 852; *Holdenville v. Lawson*, 40 Okla. 38, 135 Pac. 405.

²⁵ *Horn v. St. Paul*, 80 Minn. 360, 83 N. W. 388.

²⁶ *Sumpter v. Buchanan*, 128 Ark. 498, 194 S. W. 27; *Heath v. Albrook*, 123 Ia. 559, 98 N. W. 619; *Miles v. Cheyenne County*, 96 Neb. 703, L. R. A. 1917D, 258, 148 N. W. 959; *Reed v. Gormley*, 47 Wash. 355, 91 Pac. 1093.

²⁷ *Miles v. Cheyenne County*, 96 Neb. 703, L. R. A. 1917D, 258, 148 N. W. 959.

agrees to pay its attorney, if successful, a fee which is based upon the amount of interest upon deferred payments.²⁸

§ 1930. Compromise of disputed claims. A public corporation has power to compromise claims in dispute between it and other parties, such as it could have originally incurred.¹ A county may compromise and settle its claim for damages arising out of a breach of contract to construct a road.² Contracts of a public corporation which are entered into irregularly, may be the basis of a valid compromise or accord and satisfaction.³ Such contracts of compromise are binding, at least, in the absence of fraud.⁴ A public corporation which has made a payment to the widow of an employe under the Workmen's Compensation Act, and which is subrogated to her right against the person responsible for the death of such employe, may enter into a contract with the widow by which the cause of action is assigned to her in consideration of which she agrees to reimburse the city if successful for the amount of compensation which the city paid to her.⁵ A city having power to place the cost of improvements on the general duplicate, or to make special assessments, may compromise with abutting property owners if the special fund proves insufficient.⁶

A municipal corporation may pay its obligations in the absence of specific statutory provision in the same way as an individual.⁷ If an attorney is authorized to receive money on behalf of his

²⁸ *Sumpter v. Buchanan*, 128 Ark. 498, 194 S. W. 27.

¹ *California*. *People v. Board, etc., of San Francisco, etc.*, 27 Cal. 655; *Oakland v. Water Front Co.*, 118 Cal. 160, 50 Pac. 277.

Illinois. *Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230.

Iowa. *Grimes v. Hamilton Co.*, 37 Ia. 290; *Mills Co. v. R. R. Co.*, 47 Ia. 66; *First Nat. Bank v. Emmetsburg*, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

Nebraska. *State v. Martin*, 27 Neb. 441, 43 N. W. 244.

Ohio. *State v. Sayre*, 91 O. S. 85, 109 N. E. 636.

Washington. *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385.

Texas. *City of San Antonio v. Ry. Co.*, 22 Tex. Civ. App. 148, 54 S. W. 281.

Vermont. *Goslant v. Calais*, 90 Vt. 114, 96 Atl. 751.

² *State v. Sayre*, 91 O. S. 85, 109 N. E. 636.

³ *First Nat. Bank v. Emmetsburg*, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

⁴ *First Nat. Bank v. Emmetsburg*, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451; *Goslant v. Calais*, 90 Vt. 114, 96 Atl. 751.

⁵ *Saudek v. Milwaukee Electric Ry. & Light Co.*, 163 Wis. 109, 157 N. W. 579.

⁶ *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385.

⁷ *State ex rel. v. Ballinger*, 41 Wash. 23, 3 L. R. A. (N.S.) 72, 82 Pac. 1018.

client and to satisfy the judgment, a municipal corporation may satisfy a judgment against it by issuing an order in favor of the attorney of the judgment creditor, although a statute provides that in case of a judgment against a municipal corporation, the order shall be drawn in favor of the judgment creditor.⁸

§ 1931. Contracts for speculation. A public corporation can not by contract assume liabilities of private corporations or individuals, even to induce such action on their part as will benefit the individuals who comprise the public body. Such aid can not be given indirectly by agreeing to pay a given rental for a water works if the lessor builds a railroad.¹ However, power to build its own road is not subject to the objection that it is aiding a railroad.² A public corporation can not buy land to donate to a manufacturing plant;³ nor issue bonds for such purpose;⁴ nor pledge itself to aid an association;⁵ nor contract to secure a right of way for a railroad;⁶ nor contract to pay stenographer's fees in an action to which the city is not a party and from which no liability could arise;⁷ nor erect a building on the land of another;⁸ nor contract to build a bridge outside its own limits, not for the benefit of its own citizens, but to draw trade.⁹ A city can not agree to extend a lighting contract if the contractor will erect a plant to produce electric power for operating machinery for individuals, as this is not contracting for the benefit of the municipality.¹⁰ A public corporation can not contract for obtaining the location of the state capital,¹¹ or the county seat.¹² A city can not employ an attorney

⁸ State ex rel. v. Ballinger, 41 Wash. 23, 3 L. R. A. (N.S.) 72, 82 Pac. 1018.

¹ Higgins v. San Diego, 118 Cal. 524, 537; 45 Pac. 824 [modified on rehearing, 50 Pac. 670].

² Sun, etc., Association v. Mayor, etc., of New York, 152 N. Y. 257, 37 L. R. A. 788, 46 N. E. 499 [citing, Walker v. Cincinnati, 21 O. S. 14, 8 Am. Rep. 24; Taylor v. Ross Co., 23 O. S. 22; Wycaver v. Atkinson, 37 O. S. 80; Counterman v. Dublin Township, 38 O. S. 515].

³ Markley v. Mineral City, 58 O. S. 430, 65 Am. St. Rep. 776, 51 N. E. 28.

⁴ Adams v. Nemeyer, 54 O. S. 614, 46 N. E. 1154.

⁵ Park v. Modern Woodmen, 181 Ill. 214, 54 N. E. 932.

⁶ Covington, etc., Ry. v. Athens, 85 Ga. 367, 11 S. E. 663.

⁷ City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123 [reversing, 80 Ill. App. 33].

⁸ State ex rel. Knight v. Cape May, 61 N. J. L. 149, 38 Atl. 752.

⁹ Manning v. Devil's Lake, 13 N. D. 47, 99 N. W. 51.

¹⁰ Mealey v. Hagerstown, 92 Md. 741, 48 Atl. 746.

¹¹ John Hancock, etc., Co. v. Huron, 80 Fed. 652. (Bonds issued for such expenses as for printing matter to be used in securing the location of the state capital in that city. Shannon v. Huron, 9 S. D. 356, 69 N. W. 598.)

¹² Schneck v. Jeffersonville, 152 Ind. 204, 52 N. E. 212.

to appear before the Secretary of the Interior to try to induce him to locate a railroad through its limits.¹³ A public corporation can not contract for the expenses of a committee to represent the city at a convention of American municipalities;¹⁴ or for the expenses of members of a council committee to visit cities on municipal matters;¹⁵ or for placing a stone from the county in the state's building at the World's Fair;¹⁶ or for the entertainment of invited guests at an encampment of the Grand Army of the Republic,¹⁷ or at an exposition.¹⁸

§ 1932. Loan of credit. Credit can not be loaned directly or indirectly without express authority.¹ Thus a contract for issuing interest-bearing warrants to the contractor on the execution of the contract to enable him to raise money to carry out the contract, the contractor to repay the interest at the final settlement, is invalid.² A contract of guaranty, entered into by a municipal corporation, is ordinarily ultra vires.³ Power to erect a lighting plant is not implied power to guarantee bonds of an electric light company.⁴ However, giving its notes to pay assessments in a mutual insurance company of which it is a member is not a gratuity or a loan of credit,⁵ but it is an investment of funds in a private enterprise.⁶ Under some state constitutions, it is held that the legislature can

¹³ *Field v. Shawnee*, 7 Okla. 73, 54 Pac. 318.

¹⁴ *Waters v. Bonvouloir*, 172 Mass. 286, 52 N. E. 500.

¹⁵ *James v. Seattle*, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84.

¹⁶ *Hayes v. Douglass Co.*, 92 Wis. 429, 63 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482.

Contra, a county may contract for exhibiting its products at a state centennial outside the county limits. *State v. Cornell*, 53 Neb. 556, 68 Am. St. Rep. 629, 74 N. W. 59; *Shelby Co. v. Exposition Co.*, 96 Tenn. 653, 33 L. R. A. 717, 36 S. W. 694.

¹⁷ *Stem v. Cincinnati*, 6 Ohio N. P. 15 [citing, *Tash v. Adams*, 64 Mass. (10 Cush.) 252; *Hood v. Lynn*, 82 Mass. (1 Allen) 103; *Clafin v. Hopinton*, 70 Mass. (4 Gray) 502; *Hodges v. Buffalo*,

2 Denio (N. Y.) 110]. See *Daggett v. Colgan*, 92 Cal. 53, 27 Am. St. Rep. 95, 14 L. R. A. 474, 28 Pac. 51.

¹⁸ *Moore v. Hoffman*, 2 Cinn. Sup. Ct. 453.

¹ *Scott v. La Porta*, 162 Ind. 34, 68 N. E. 278.

² *Moran v. Thompson*, 20 Wash. 526, 56 Pac. 29.

³ *Nashville v. Sutherland Co.*, 99 Tenn. 335, 36 Am. St. Rep. 88, 19 L. R. A. 619, 21 S. W. 674.

⁴ *Lynchburg, etc., Co. v. Dameron*, 95 Va. 545, 28 S. E. 951 [citing, *Blake v. Mayor, etc., of Macon*, 53 Ga. 172].

⁵ *French v. Milville*, 67 N. J. L. 349, 51 Atl. 1109 [memorandum opinion affirming, 66 N. J. L. 392, 49 Atl. 465].

⁶ *School District v. Twin Falls County Mutual Fire Insurance Co.*, 30 Ida. 400, 164 Pac. 1174.

not authorize a loan of credit,⁷ or a gift to a private enterprise.⁸ A railroad is a private enterprise within the meaning of such a constitutional provision.⁹ A contract by which a public corporation gives to a railroad an option upon the interest of a public corporation in a railroad for the amount paid by such public corporation without interest, is in legal effect a gift or a loan of credit to such railroad.¹⁰ A harbor which is constructed by the public is not a private enterprise,¹¹ and a county may vote bonds for such improvement although the plans are to be made by improvement districts.¹² In other states this power may be given expressly by statute.¹³ Issuing bonds in payment of a valid stock subscription has been held not to be a loan of credit;¹⁴ and giving bonds for local improvements, the bonds to be paid out of the assessments, is not objectionable as a loan of credit.¹⁵

§ 1933. Other incidental powers. Power to issue bonds includes power to provide for paying interest thereon.¹ A constitutional provision to the effect that it is the duty of the government to protect private property impartially and completely, does not render invalid a grant of power to a public corporation to acquire and to operate an ice plant.² Power to abate nuisances includes power to contract for the removal of garbage to a place without the city limits.³ A specific grant of power to a public corporation to enter into a contract does not empower the public corporation to

⁷ *Atkinson v. Board of Commissioners*, 18 Ida. 282, 28 L. R. A. (N.S.) 412, 108 Pac. 1046; *Hunter v. Roseburg*, 80 Or. 588, 156 Pac. 267 [rehearing denied, *Hunter v. Roseburg*, 80 Or. 588, 157 Pac. 1065]; *Coleman v. Broad River Township*, 50 S. Car. 321, 27 S. E. 774.

⁸ *Sutherland-Innes Co. v. Evart*, 86 Fed. 597, 30 C. C. A. 305.

⁹ *Atkinson v. Board of Commissioners*, 18 Ida. 282, 28 L. R. A. (N.S.) 412, 108 Pac. 1046; *Hunter v. Roseburg*, 80 Or. 588, 156 Pac. 267 [rehearing denied, *Hunter v. Roseburg*, 80 Or. 588, 157 Pac. 1065].

¹⁰ *Hunter v. Roseburg*, 80 Or. 588, 156 Pac. 267 [rehearing denied, *Hunter v. Roseburg*, 80 Or. 588, 157 Pac. 1065].

¹¹ *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A. (N.S.) 577, 116 Pac. 1076.

¹² *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A. (N.S.) 577, 116 Pac. 1076.

¹³ *Neale v. Wood Co.*, 43 W. Va. 90, 27 S. E. 370.

¹⁴ *Johnson City v. R. R. Co.*, 100 Tenn. 138, 44 S. W. 670 [distinguishing, *Colburn v. R. R.*, 94 Tenn. 43, 28 S. W. 298, as a loan of credit as well as a stock subscription].

¹⁵ *Redmon v. Chacey*, 7 N. D. 231, 73 N. W. 1061.

¹ *Vallelly v. Grand Forks Park Commissioners*, 16 N. D. 25, 15 L. R. A. (N.S.) 61, 111 N. W. 615.

² *Holton v. Camilla*, 134 Ga. 560, 31 L. R. A. (N.S.) 116, 68 S. E. 472.

³ *Kelley v. Broadwell* (Neb.), 92 N. W. 643.

make a contract for public service rates which are beyond the control of a commission duly appointed by the state to fix such rates.⁴ A vote for free turnpikes is a vote to incur expenses necessary thereto.⁵ Power to provide for "health and welfare" includes power to contract with a water works company for a supply of water to extinguish fires,⁶ but not to operate a dispensary.⁷ A county may make a contract to investigate the books of the county auditor and treasurer,⁸ and may give a bond for money borrowed to support the families of soldiers during the rebellion.⁹ Power to employ teachers includes power to provide by contract that teachers must not be affiliated with labor unions as a condition of such employment.¹⁰ A contract for a public improvement is not rendered absolutely invalid by the fact that a part of such improvement is to be constructed upon property which does not belong to the public corporation.¹¹

A public corporation has implied authority to refund money which it has exacted wrongfully.¹²

III

PRESENTATION OF CLAIMS

§ 1934. Presentation of claims. In the absence of specific statutory requirement it is not necessary that persons who have claims against a municipal corporation should present them to such corporation within any specified time or as a condition precedent to bringing an action thereon.¹ If the statute has not required presentation of claims against a municipal corporation, the municipal

⁴ *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, 261, 83 S. E. 295.

⁵ *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35.

⁶ *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497; *Webb City, etc., Co. v. Webb City*, 78 Mo. App. 422.

See also, *State, ex rel., v. Tampa Waterworks Co.*, 56 Fla. 858, 19 L. R. A. (N.S.) 183, 47 So. 358.

⁷ *Leesburg v. Putnam*, 103 Ga. 110, 68 Am. St. Rep. 80, 29 S. E. 602.

⁸ *Board, etc., of Perry County v. Gardner*, 155 Ind. 165, 57 N. E. 908.

⁹ *Commissioners, etc., of Barstow County v. Conyers*, 108 Ga. 559, 34 S. E. 351.

¹⁰ *People, ex rel., v. Chicago*, 278 Ill. 318, L. R. A. 1917E, 1069, 116 N. E. 158.

¹¹ *Bell v. Kirkland*, 102 Minn. 213, 120 Am. St. Rep. 621, 113 N. W. 271.

¹² *Charles Blum Co. v. Hastings*, — Fla. —, L. R. A. 1918F, 783, 79 So. 442.

¹ *Alabama City, G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91; *Taylor v. School District*, 15 Ariz. 262, 138 Pac. 13; *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150.

corporation has no power to require such presentation by enacting an ordinance requiring it.² Under many statutes, however, it is necessary that claims against a municipal corporation should be presented either within a certain time or as a condition precedent to an action against such corporation.³ Such statutes are ordinarily construed rather strictly as against the municipal corporation.⁴ Such a statute does not apply to an action which is for equitable relief alone.⁵ A statute which requires claims for damages to be filed within a certain time does not apply to the right of a contractor to recover for work, done under a contract,⁶ even if such contract is invalid because of irregularities in preliminary proceedings.⁷ Statutes of this sort have no application to the existence of the right, but apply solely to the remedy.⁸

IV

FORM OF CONTRACT

§ 1935. Form necessary in contracts of public corporations.

In the absence of specific statutory provision, a contract of a public corporation need not be in writing or in any specific form, except in cases in which a similar contract of an individual would be required to be in writing or to be proved by writing.¹ In the absence of a specific statute, an agent or attorney may be employed by a municipal corporation to represent it in litigation without a

² *Alabama City, G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91.

³ *Adams v. Modesto* (Cal.), 61 Pac. 957; *Campbell v. Wichita Union Terminal Ry. Co.*, 101 Kan. 817, 168 Pac. 833; *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650; *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280.

⁴ *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176; *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515.

⁵ *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550; *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515.

⁶ *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176.

⁷ *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176.

⁸ *Relyea v. Tomahawk Paper & Pulp*

Co., 102 Wis. 301, 78 N. W. 412; *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327; *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515.

¹ *United States. Fanning v. Gregoire*, 57 U. S. (16 How.) 524, 14 L. ed. 1043.

Indiana. Ross v. Madison, 1 Ind. 281, 48 Am. Dec. 361.

New York. Peterson v. New York, 17 N. Y. 449.

North Carolina. Charlotte v. Alexander, 173 N. Car. 515, L. R. A. 1917F, 493, 92 S. E. 384.

North Dakota. W. S. Nott Co. v. Sawyer, 35 N. D. 587, 161 N. W. 202.

West Virginia. Charleston v. Littlepage, 73 W. Va. 156, 51 L. R. A. (N.S.) 353, 80 S. E. 131.

formal ordinance, by-law, resolution, or written contract.² In the absence of specific statutory regulations as to the form of a contract and the method of executing it, the council of a public corporation may prescribe the method of executing it,³ and it may authorize some designated officer of the corporation to execute such contract on behalf of the corporation.⁴ In the absence of specific statutory requirements as to the formality of a contract, the acceptance of a bid or proposal completes the contract.⁵

Under many statutes contracts of public corporations must be made in accordance with certain specified formalities. Under some statutes they must be in writing,⁶ in which case oral contracts are invalid,⁷ and oral modifications of written contracts are invalid.⁸ Under such statute the acceptance of a bid is not a contract, as no contract exists until reduced to writing and executed.⁹ Under such a statute no recovery can be had upon an oral contract for the employment of an attorney for the public corporation,¹⁰ or upon an oral contract for furnishing tuition in the public schools.¹¹ A statute which provides that no contract shall bind the city unless in writing and by order of the council, is exclusive, and the requirements of a valid contract are not added to by another section requiring contracts to be countersigned by the finance committee, numbered and registered.¹²

² *Charleston v. Littlepage*, 73 W. Va. 156, 51 L. R. A. (N.S.) 353, 80 S. E. 131.

³ *McCormick v. Niles*, 81 O. S. 246, 27 L. R. A. (N.S.) 1117, 90 N. E. 803.

⁴ *McCormick v. Niles*, 81 O. S. 246, 27 L. R. A. (N.S.) 1117, 90 N. E. 803.

⁵ *W. S. Nott Co. v. Sawyer*, 35 N. D. 587, 161 N. W. 202.

⁶ *California*. *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250; *Times Publishing Co. v. Weatherby*, 139 Cal. 618, 73 Pac. 465.

Indiana. *Logansport v. Blakemore*, 17 Ind. 318.

Minnesota. *Starkey v. Minneapolis*, 19 Minn. 203.

Missouri. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193; *Savage v. Springfield*, 83 Mo. App. 323.

Washington. *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063.

⁷ *Board of Trustees v. Board of Education*, 172 Ky. 424, 189 S. W. 433; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193; *McKinney v. Wagoner*, 45 Okla. 28, 144 Pac. 1071; *Smart v. Philadelphia*, 205 Pa. St. 329, 54 Atl. 1025.

⁸ *McManus v. Philadelphia*, 201 Pa. St. 619, 51 Atl. 320.

See also, *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110; *State v. Dierkes*, 214 Mo. 578, 113 S. W. 1077.

⁹ *Mann v. Rochester*, 29 Ind. App. 12, 63 N. E. 874.

¹⁰ *State v. Dierkes*, 214 Mo. 578, 113 S. W. 1077.

¹¹ *Board of Trustees v. Board of Education*, 172 Ky. 424, 189 S. W. 433.

¹² *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613, 67 Pac. 1043.

Under a mandatory statute which provides that the contracts of a public corporation must be countersigned by a specified officer, a contract which is not thus countersigned is invalid.¹³

If a written contract is entered into, it is valid, although the statute requires it to be executed in duplicate.¹⁴

Under some statutes the contracts of a public corporation must be entered upon the records of such corporation.¹⁵ Under such a statute a contract which does not appear upon the records of the public corporation is not valid.¹⁶ Under such a statute an oral contract for employing a quarantine guard is invalid.¹⁷ Where the statute requires a public contract to be recorded after it is entered into, omission so to record it, not being the fault of the contractor, does not invalidate it.¹⁸

If a mandatory statute requires an ordinance, a contract can not be made by resolution,¹⁹ though otherwise it may be made by resolution,²⁰ or on motion.²¹ If the statute requires the ye and nay vote of the council to be taken and entered on the record on the passage of a resolution to accept a bid for bonds, an acceptance of such a bid without such formality is invalid.²² Where the statute requires the purpose for which a bond is issued to appear on its face, it is sufficient if they purport to be "refunding bonds," to "extend the time of payment" of certain debts.²³

Where the statute requires the superintendent of streets to fix the date of beginning work within fifteen days from the date of the contract, it is not necessary that the exact date be fixed, if a

¹³ Press Publishing Co. v. Pittsburgh, 207 Pa. St. 623, 57 Atl. 75.

¹⁴ Saleno v. Neosho, 127 Mo. 627, 48 Am. St. Rep. 653, 27 L. R. A. 769, 30 S. W. 190.

¹⁵ Northern Drainage District v. Bolivar County, 111 Miss. 250, 71 So. 380; Gilchrist-Fordney Co. v. Keyes, 113 Miss. 742, 74 So. 619.

¹⁶ Northern Drainage District v. Bolivar County, 111 Miss. 250, 71 So. 380; Gilchrist-Fordney Co. v. Keyes, 113 Miss. 742, 74 So. 619.

¹⁷ Marion Co. v. Woulard, 77 Miss. 343, 27 So. 619.

¹⁸ Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

¹⁹ Noel v. San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

²⁰ Illinois, etc., Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; City of Alma v. Bank, 60 Fed. 203; Elyria, etc., Co. v. Elyria, 57 O. S. 374, 49 N. E. 335. (But one resolution can not provide for the issuing and sale of bonds to buy water-works and erect new ones.)

²¹ Illinois, etc., Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Wrought Iron Bridge Co. v. Arkansas City, 59 Kan. 259, 52 Pac. 869.

²² Coffin v. Portland, 43 Fed. 411.

²³ Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281. But in Keehn v. Wooster, 13 Ohio C. C. 270, it was held insufficient to recite that it was issued to refund legal debts.

time within the limit is indicated;²⁴ and the date may be fixed in the contract.²⁵

Under a provision in a contract requiring the price of extras to be agreed upon in writing and a claim for such extras to be presented within a certain time, no recovery can be had for extras if such provision of the contract is not complied with.²⁶

If a contract of a public corporation is in violation of statute,²⁷ as by reason of incurring an obligation or debt in violation of law,²⁸ such void promise on the part of the public corporation is not a consideration for the promise of the adversary party.²⁹

§ 1936. Necessity of competitive bidding. Competitive bidding upon contracts is not necessary if the statute which provides for the contracts of public corporations does not require it.¹ If the statute requires competitive bidding, a contract which is not let upon competitive bidding is invalid.² The fact that there is only one bidder who is in a position to perform the contract without incurring great expenses, does not justify the public corporation in letting a contract without competitive bidding if the statute requires competition.³ The fact that certain work was included in the original bid and was subsequently omitted when the contract was drawn and executed, does not authorize a public corporation to let a contract for such work without competitive bidding.⁴

²⁴ *Williams v. Bérgin*, 127 Cal. 578, 60 Pac. 164 [reversing on rehearing, 67 Pac. 1072].

²⁵ *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920.

²⁶ *Thomsen v. Kenosha*, 165 Wis. 204, 161 N. W. 735.

²⁷ *Hinkle v. Philadelphia*, 214 Pa. St. 126, 63 Atl. 590.

²⁸ *Hinkle v. Philadelphia*, 214 Pa. St. 126, 63 Atl. 590.

²⁹ *Hinkle v. Philadelphia*, 214 Pa. St. 126, 63 Atl. 590.

¹ *Thrift v. Ammidon*, 126 Md. 126, 94 Atl. 532; *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651; *Braaten v. Olson*, 28 N. D. 235, 148 N. W. 829; *State v. Oconto Electric Co.*, 165 Wis. 467, 161 N. W. 789.

² *California. Reams v. Cooley*, 171 Cal. 150, 162 Pac. 293.

Idaho. Seysler v. Mowery, 29 Ida. 412, 160 Pac. 262.

Iowa. Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852.

Montana. Missoula Street Ry Co. v. Missoula, 47 Mont. 85, 130 Pac. 771.

New York. Phelps v. New York, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408.

Pennsylvania. Philadelphia Co. v. Pittsburgh, 253 Pa. St. 147, 97 Atl. 1083.

Wisconsin. Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603.

³ *Philadelphia Co. v. Pittsburgh*, 253 Pa. St. 147, 97 Atl. 1083.

⁴ *Reams v. Cooley*, 171 Cal. 150, 162 Pac. 293.

§ 1937. Notice and advertisement for bids—Necessity. A statute which requires that work shall be let to the lowest bidder or to the lowest responsible bidder and the like, requires fair and reasonable notice of the letting of the proposed contract to be given in such a way as fairly to call the attention of persons who are likely to desire to bid thereon.¹ Such a statute does not make it necessary to advertise in the manner which is required by statute in public contracts in which advertisement is required specifically.²

Statutes often specifically require advertisement for bids in public contracts exceeding a certain amount and of certain classes. Contracts of these classes entered into without complying with these formalities are unenforceable.³ In the absence of specific statutory provisions which require a public corporation to advertise their bids, advertisement is not necessary.⁴ A statute which provides that certain public officials "may" advertise for bids upon certain contracts, does not make such advertisement mandatory.⁵ A statute requiring advertisement for one class of public contracts, as for work on buildings or streets, does not include other classes of contracts, as for electric lighting.⁶ If the public corporation is not required to advertise for bids and it does in fact give notice therefor, the contract can not be held to be invalid because of the inadequacy of such notice or because of the shortness of the time

¹ *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603.

² *Harris v. Cooley*, 171 Cal. 144, 152 Pac. 300; *Dillingham v. Spartanburg*, 75 S. Car. 549, 117 Am. St. Rep. 917, 8 L. R. A. (N.S.) 412, 56 S. E. 381.

³ *California. Brooks v. Satterlee*, 49 Cal. 289.

Georgia. Sammons v. Sturgis, 145 Ga. 663, 89 S. E. 774.

Massachusetts. Bowditch v. Superintendent, etc., of Boston, 168 Mass. 239, 46 N. E. 1026; *Adams v. Essex County*, 205 Mass. 189, 91 N. E. 557.

Mississippi. Town of Clarksdale v. Broadus, 77 Miss. 667, 28 So. 954.

Missouri. Barber, etc., Co. v. Hezel, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449.

Nebraska. Fairbanks v. North Bend, 66 Neb. 560, 94 N. W. 537.

Nevada. Office Specialty Mfg. Co. v.

Washoe County, 24 Nev. 359, 55 Pac. 222.

Ohio. State v. Yeatman, 22 O. S. 546; *Cincinnati v. Guckenberger*, 60 O. S. 353, 54 N. E. 376; *State v. Butler Co.*, 18 Ohio C. C. 275, 10 Ohio C. D. 118.

Washington. Duryea v. Friars, 18 Wash. 55, 50 Pac. 583 (even when bonds are to be exchanged for warrants).

⁴ *Board of Revenue v. Merrill*, 193 Ala. 521, 68 So. 971; *Harris v. Cooley*, 171 Cal. 144, 152 Pac. 300; *Crowder v. Sullivan*, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. 94; *Gillette, etc., Co. v. Board, etc., of Aitkin Co.*, 69 Minn. 297, 72 N. W. 123.

⁵ *Dillingham v. Spartanburg*, 75 S. Car. 549, 117 Am. St. Rep. 917, 8 L. R. A. (N.S.) 412, 56 S. E. 381.

⁶ *Reid v. Trowbridge*, 78 Miss. 542, 29 So. 167.

for which such notice was given.⁷ If the law does not require advertisement, but the body empowered to act requires it, the same body may waive any defect or irregularity in advertisement.⁸ If advertisement is to be given unless the mayor dispenses with it, his approval after a contract is let without advertisement does not make such contract valid.⁹

§ 1938. Contents. An advertisement for bids must give information which will enable prospective bidders to understand the terms of the proposed contract and bid intelligently thereon.¹ An advertisement which includes stipulations not authorized by law and which will increase the cost of the work, is insufficient under a statute which requires the contract to be let to the lowest bidder.² It must indicate with sufficient certainty the terms on which payment will be made.³ If the statute requires the advertisement to require bids on a cash basis, an advertisement which does not so require them is insufficient,⁴ and such defect is not cured by the fact that all the bids which were submitted were on a cash basis if it can be shown that other bidders did not submit bids because they believed that a valid contract could not be let upon such advertisement.⁵

§ 1939. Method of giving notice. Notice or advertisement which is in substantial compliance with statute, is valid.¹ A notice which is not given in substantial compliance with the statute which requires it, is invalid.² If the notice required by law is fairly given

⁷ *Board of Revenue v. Merrill*, 193 Ala. 521, 68 So. 971.

⁸ *Augusta v. McKibben* (Ky.), 60 S. W. 291.

⁹ *Warren v. Boston*, 181 Mass. 6, 62 N. E. 951.

¹ *Manly Building Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *Edmundson v. Pittsburgh School District*, 248 Pa. St. 559 [sub nomine, *Edmundson v. Board of Public Education*, 94 Atl. 248].

² *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N.S.) 1026, 41 So. 684.

³ *Manly Building Co. v. Newton*, 114 Ga. 245, 40 S. E. 274.

⁴ *McKenzie v. Mandan*, 35 N. D. 107, 160 N. W. 852.

⁵ *McKenzie v. Mandan*, 35 N. D. 107, 160 N. W. 852.

¹ *Pilcher v. English*, 133 Ga. 496, 66 S. E. 163; *Robling v. Pike County*, 141 Ind. 522, 40 N. E. 1079.

² *Georgia. Sammons v. Sturgis*, 145 Ga. 663, 89 S. E. 774.

Missouri. Sparks v. Jasper County, 213 Mo. 218, 112 S. W. 265.

New Jersey. Browning v. Bergen County, 79 N. J. L. 494, 76 Atl. 1054.

North Dakota. McKenzie v. Mandan, 35 N. D. 107, 160 N. W. 852.

Oregon. Watson v. Salem, 84 Or. 666, 164 Pac. 567 [rehearing denied, *Watson v. Salem*, 84 Or. 666, 164 Pac. 1164].

irregularity in giving it does not make a contract thereunder void.³ Thus if the clerk, instead of the council, fixed the time for which the notice was to be given, and the council let the contract under such notice;⁴ or if the council, as required by law, designated the paper in which the advertisement should be given, but ordered a "readvertisement" without expressly stating that it was to be in the same paper;⁵ or if advertisement is made in the name of the wrong department;⁶ or if it does not state when bids would be opened and where there is a uniform and known custom to open bids at the end of the time fixed for receiving them,⁷ such notice is sufficient. If the statute requires a notice thirty days before the contract is let, a notice given twenty-nine days before the bids are opened, but more than thirty days before the contract is let, is sufficient.⁸ Contracts made pursuant to such advertisement are valid.

Notice must be given substantially as required by law. Advertisement in a paper not authorized by law is ineffectual.⁹ Under a statute which requires advertisement for not less than five successive days, advertisement must be published for five full days before the expiration of the time within which bids will be received.¹⁰ Under a statute which requires notice for not less than five successive days, a notice that bids would be opened on the tenth, which was published on the fifth, and thence each day until the ninth, was held to be insufficient.¹¹ A notice of letting contracts which is published the requisite number of times, is insufficient if the first publication does not give the correct date.¹²

§ 1940. Readvertisement. A readvertisement is equivalent to a rejection of bids and avoids a contract under the first advertisement.¹ After a contract is let a change in details may be made in

³ *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492.

⁴ *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492.

⁵ *Ellis v. Witmer*, 134 Cal. 249, 60 Pac. 301.

⁶ *Potts v. Philadelphia*, 195 Pa. St. 619, 46 Atl. 195.

⁷ *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108.

⁸ *Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483.

⁹ *California, etc., Co. v. Moran*, 128 Cal. 373, 60 Pac. 969.

¹⁰ *Watson v. Salem*, 84 Or. 666, 164 Pac. 567 [rehearing denied, *Watson v. Salem*, 84 Or. 666, 164 Pac. 1184].

¹¹ *Watson v. Salem*, 84 Or. 666, 164 Pac. 567 [rehearing denied, *Watson v. Salem*, 84 Or. 666, 164 Pac. 1184].

¹² *Sammons v. Sturgis*, 145 Ga. 663, 89 S. E. 774.

¹ *Johnson v. Rock Hill*, 57 S. Car. 371, 35 S. E. 568.

some jurisdictions without readvertising,² at least if the change does not increase the cost or diminish the utility to the public,³ if the modification is not a material one,⁴ and if the extra expenditure does not exceed the sum for the expenditure of which the statute requires advertising.⁵ If a sudden emergency requiring a modification in plans arises, readvertisement is not necessary.⁶

In other jurisdictions it is held that advertisement is necessary if a change is made, even if such change is advantageous to the public corporation.⁷ It has been held that a requirement for advertising for bids does not apply to a contract to complete a contract abandoned by the original contractor.⁸ If a public corporation has completed a contract for a street improvement, property owners who are to be assessed for the cost thereof can not object to an assessment which includes the cost of completing such contract, although competitive bidding was not sought,⁹ at least if the cost to the property owners is not increased materially.¹⁰

§ 1941. Specifications. Under many statutes it is necessary that plans and specifications of the work to be done should be prepared before bids are submitted and before contracts are let therefor.¹ The object of such provisions is usually to enable competing contractors to know exactly what they are to bid on.²

Specifications must therefore be reasonably clear and free from ambiguity.³ Under such statutes a mere statement of the location

² *Commissioners v. Heating Co.*, 128 Ind. 240, 12 L. R. A. 502, 27 N. E. 612; *Pung v. Derse*, 165 Wis. 342, 162 N. W. 177.

³ *Pung v. Derse*, 165 Wis. 342, 162 N. W. 177.

⁴ *Escambia County v. Blount Construction Co.*, 66 Fla. 129, 62 So. 650.

⁵ *Brady v. Mayor, etc., of New York*, 112 N. Y. 480, 2 L. R. A. 751, 20 N. E. 390.

⁶ *Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982.

⁷ *Manly Building Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406, 54 N. E. 372.

⁸ *Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483.

⁹ *Bayes v. Paintsville*, 166 Ky. 679, L. R. A. 1916B, 1027, 179 S. W. 623.

¹⁰ *Bayes v. Paintsville*, 166 Ky. 679, L. R. A. 1916B, 1027, 179 S. W. 623.

¹ *Fones Hardware Co. v. Erb*, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. 7; *Morse v. Montville*, 115 Me. 454, 99 Atl. 438.

² *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1; *Andrews v. Ada Co.*, 7 Ida. 453, 63 Pac. 592; *Edmundson v. Pittsburgh School District*, 248 Pa. St. 559 [sub nomine, *Edmundson v. Board of Public Education*, 94 Atl. 248]; *Wells v. Burnham*, 20 Wis. 112; *Kneeland v. Furlong*, 20 Wis. 437.

³ *Piedmont Paving Co. v. Allmar*, 136 Cal. 88, 68 Pac. 493; *Edmundson v. Board of Public Education*, 248 Pa. St. 559, 94 Atl. 248.

and capacity of a garbage crematory is insufficient, as without plans it is impossible to say who is the lowest bidder.⁴

If plans and specifications have not been prepared, a contract can not be let by requiring the different bidders to submit thereon plans and by letting the contract to the bidder whose bid is the best, considering both plans and cost.⁵ A notice for bids for collecting garbage, the bidders to submit their own plans as to the method of disposing of it, is insufficient.⁶ The time of performance can not be left open for each bidder to fix for himself, and the time as well as the price, must be considered in awarding the contract.⁷ It is insufficient where the plans but not the location of a courthouse are submitted to the judges.⁸

Any material variance between the plans, specifications, etc., on the one hand, and the proposal or bid on the other,⁹ such as a variance as to time,¹⁰ renders the contract invalid. A contract is clearly invalid where the proposals are less advantageous to the city than the specifications.¹¹ The fact that variations within certain limits as to the quantity of work to be done is provided for, does not render the specifications insufficient or the contract invalid.¹² Specifications for repair work upon streets need not state the exact quantity of work to be done, since such statement can not be made in advance.¹³ If the specifications state the existing conditions as exactly as possible, they will be sufficient.¹⁴ If the specifications do not indicate the time within which the contract was to be performed, they are insufficient and the contract is invalid.¹⁵ A clause in the specifications requiring the contract to be performed by a certain time, unless "for good cause shown" the public corporation should extend the time, does not render the specifications uncertain.¹⁶ Such a provision authorizes the public

⁴ *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L. R. A. 685, 81 N. W. 864.

⁵ *Fones Hardware Co. v. Erb*, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. 7.

⁶ *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32.

⁷ *Mackinnon v. Newark*, — N. J. —, 100 Atl. 694.

⁸ *Mahon v. Luzerne Co.*, 197 Pa. St. 1, 46 Atl. 894.

⁹ *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852.

¹⁰ *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852.

¹¹ *State, ex rel., Moreland v. Passaic*, 63 N. J. L. 208, 42 Atl. 1058.

¹² *Will v. Bismarck*, 36 N. D. 570, 163 N. W. 550.

¹³ *Devlin v. Jersey City*, 90 N. J. L. 318, 100 Atl. 208.

¹⁴ *Devlin v. Jersey City*, 90 N. J. L. 318, 100 Atl. 208.

¹⁵ *Edmundson v. Pittsburgh School District*, 248 Pa. St. 559 [sub nomine, *Edmundson v. Board of Public Education*, 94 Atl. 248].

¹⁶ *Mayes v. Adair County (Mo.)*, 194 S. W. 58.

corporation to insert such a clause in the contract, but it does not authorize it to extend the time for performance when the original contract is entered into.¹⁷

A contract is void if provisions favorable to the contractor are added after the bids are in, differing from the specifications on which such bids are made.¹⁸ After the bids are opened the public corporation can not modify its specifications by authorizing the use of different materials,¹⁹ or by extending the time for performance.²⁰ The act of a public corporation in purchasing a plant to enable a contractor to perform his contract after such contract has been let to him as the lowest bidder, is a violation of the statutory requirement for letting the contract to the lowest bidder.²¹

Under a statute which requires plans to be prepared and to be approved by certain designated officials, a contract can not be let unless such plans have been thus prepared and approved.²²

§ 1942. Estimates. Under some statutes an estimate of the public cost of a public improvement must be made by a specified public officer and such estimate is the maximum amount for which a bid can be accepted.¹ Under such a statute a contract can not be let for a greater amount than the amount of such estimate,² and a contract can not be let unless such estimate is made by the officer designated by statute.³ If the statute requires the estimate to be made by a designated public official, an estimate is invalid which is not made by him,⁴ even if it is made by an engineer who is employed by the board under whose charge such work has been

¹⁷ *Mayes v. Adair County* (Mo.), 194 S. W. 58.

¹⁸ *Atkinson v. Webster City*, 177 Ia. 659, 158 N. W. 473; *Diamond v. Man-kato*, 89 Minn. 48, 61 L. R. A. 448, 93 N. W. 91; *Mayes v. Adair County* (Mo.), 194 S. W. 58; *Riddle v. Atlantic City*, 89 N. J. L. 122, 97 Atl. 790. In some states the public corporation has power, however, to modify a contract where such modification may be advisable. *Manley-Stearns Construction Co. v. Miami*, — Fla. —, 75 So. 27.

¹⁹ *Atkinson v. Webster City*, 177 Ia. 659, 158 N. W. 473.

²⁰ *Mayes v. Adair County* (Mo.), 194 S. W. 58.

²¹ *Riddle v. Atlantic City*, 89 N. J. L. 122, 97 Atl. 790.

²² *Morse v. Montville*, 115 Me. 454, 99 Atl. 438.

¹ *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

² *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

³ *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

⁴ *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

placed and which is authorized to appoint an engineer to assist such public official.⁵

§ 1943. Bids. A bid which does not conform substantially to the plans, specifications and terms which are offered by the public corporation, is not a valid bid and can not be accepted so as to become the basis of a valid contract.¹ A material variance between the terms, plans and specifications as offered and those as contained in the bid,² such as a change in the time of performance,³ renders the contract invalid. If the advertisement calls for bids for a number of articles, a bid which is not for all of such articles may be rejected, although otherwise in accordance with law.⁴

Irregularities and immaterial variations do not render the bid invalid, since they may be corrected after the bid is opened and the contract may be let in accordance with the terms, plans and specifications which were offered originally.⁵ Since the purpose of such provisions is to secure to the public corporation the full benefit of free competition, a change can not be made in a bid after the time set for receiving bids,⁶ even if only one person has submitted bids.⁷ A bid for lighting which did not designate the service which would be given, but which was supplemented later by offering to the public corporation the election between either of two kinds of service, was held to be valid.⁸

If the statute provides that the bid must be signed by the bidder, the failure of the bidder to sign his bid renders it invalid.⁹ If a statute requires that the bidder's affidavit of good faith should accompany his bid, a bid without such affidavit is invalid,¹⁰ and it can not form the basis of a valid contract.¹¹

⁵ Board of Commissioners v. Davis, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

¹ Ness v. Marshall County, 178 Ind. 221, 98 N. E. 33, 1002; Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852; Konig v. Baltimore, 126 Md. 606, 95 Atl. 478; Shields v. Seattle, 79 Wash. 308, 140 Pac. 353.

² Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852; Konig v. City of Baltimore, 126 Md. 606, 95 Atl. 478.

³ Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852.

⁴ Shields v. Seattle, 79 Wash. 308, 140 Pac. 353.

⁵ Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852; State ex rel. v. Board of Education, 42 O. S. 374.

⁶ Fairbanks v. North Bend, 68 Neb. 560, 94 N. W. 537.

See § 1941.

⁷ Le Tourneau v. Hugo, 90 Minn. 420, 97 N. W. 115.

⁸ State v. Oconto Electric Co., 165 Wis. 467, 161 N. W. 789.

⁹ Prendergast v. St. Louis, 258 Mo. 648, 167 S. W. 970.

¹⁰ Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296.

¹¹ Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296.

A written provision in a bid controls an inconsistent printed provision.¹²

§ 1944. Bond. If the statute makes no provision with reference to furnishing a bond to the public corporation to insure performance of a public contract, a public corporation has implied power to require such bond.¹ The act of the public corporation in exacting a bond from the contractors by which they agree to pay for all labor and materials used by them in the performance of such contract, is proper.²

Under some statutes it is necessary that the contractor should accompany his bid with a bond or with the equivalent thereof.³ Under some statutes a bond must be taken when the contract is let.⁴ A cash deposit or certificate of deposit may be given by the contractor to secure performance.⁵

If the bid is invalid by reason of mistake, such bond or deposit can not be forfeited;⁶ if the proceedings are so irregular that the acceptance of the bid would not result in a valid contract,⁷ as where the public corporation has failed to make an appropriation for the payment of contractor as required by statute,⁸ the bond or deposit can not be forfeited.

A bond or a deposit which is submitted with the bid is forfeited by the bidder if his bid is accepted and he does not enter into a contract with the public corporation.⁹ The fact that the certified check of a bidder is not returned to him, does not of itself amount to an acceptance of his bid.¹⁰

§ 1945. Rejection of bid. Unless the statute requires the contract to be let to the lowest bidder in such a way as to give no

¹² *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852.

¹ *Columbia County v. Consolidated Contract Co.*, 83 Or. 251, 163 Pac. 438.

² *Columbia County v. Consolidated Contract Co.*, 83 Or. 251, 163 Pac. 438.

³ *Robling v. Pike County*, 141 Ind. 522, 40 N. E. 1079.

⁴ *Concrete Steel Co. v. Rowles Co.*, 101 Neb. 400, 163 N. W. 323; *Bushnell v. Haynes*, 56 Okla. 592, 156 Pac. 343.

⁵ *People v. Contracting Board*, 27 N. Y. 378.

⁶ *Dawson Springs v. Miller Coal & Contract Co.*, 155 Ky. 763, 160 S. W. 495; *Smith v. Independent School District*, 108 Minn. 322, 122 N. W. 173.

⁷ *N. P. Perine Contracting & Paving Co. v. Pasadena*, 116 Cal. 6, 47 Pac. 777.

⁸ *Hinkle v. Philadelphia*, 214 Pa. St. 126, 83 Atl. 590.

⁹ *Baltimore v. J. L. Robinson Construction Co.*, 123 Md. 660, 91 Atl. 682; *Wheaton Building & Lumber Co. v. Boston*, 204 Mass. 218, 90 N. E. 598.

¹⁰ *Ruby v. Hudson County*, 90 N. J. L. 335, 100 Atl. 157.

discretion to the public officers who let such contract,¹ the public authorities have wide discretion in rejecting bids.² The officer or board which rejects a bid may reconsider its action and may accept such bid, at least with the consent of the bidder,³ as long as such rejection has not become binding as by approval of other designated officers.⁴

§ 1946. Letting public contract to lowest bidder. A public contract need not be let to the "lowest" bidder unless the statute requires it.¹

The statutes often require the contract to be let, after advertising, to the "lowest," "the lowest and best," or "the lowest responsible" bidder.² A contract let without complying with this requirement is unenforceable.³ If the statute requires the letting

¹ See § 1946.

² *Connors v. Stone*, 177 Mass. 424, 59 N. E. 71; *State v. Hindson*, 44 Mont. 429, 120 Pac. 483; *Connolly v. Hudson County*, 57 N. J. L. 286, 30 Atl. 548.

³ *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

⁴ *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

¹ *United States v. Pacific Bridge Co. v. Clackamas County*, 45 Fed. 217.

California. *Riehl v. San Jose*, 101 Cal. 442, 35 Pac. 1013.

Connecticut. *Hartford v. Light Co.*, 65 Conn. 324, 32 Atl. 925.

Idaho. *Caldwell v. Mountain Home*, 29 Ida. 13, 156 Pac. 909.

Massachusetts. *Mayo v. Hampden*, 141 Mass. 74, 6 N. E. 757.

Michigan. *Kundinger v. Saginaw*, 132 Mich. 395, 93 N. W. 914.

New Jersey. *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651.

Nebraska. *State v. Dixon County*, 24 Neb. 106, 37 N. W. 936; *State v. Lincoln County*, 35 Neb. 346, 53 N. W. 147.

North Dakota. *Price v. Fargo*, 24 N. D. 440, 139 N. W. 1054.

Wisconsin. *State v. Oconto Electric Co.*, 165 Wis. 467, 161 N. W. 789. It was said to be the duty of the

public corporation to let the contract to the lowest bidder unless by statutory authority in *State v. Cornell*, 52 Neb. 25, 71 N. W. 961. It is not necessary that a contract for a joint city and county building should be let as a whole, where each is to own part in severalty. *Trimble v. Pittsburgh*, 248 Pa. St. 550, 94 Atl. 227.

Such building can not be divided by floors. *Trimble v. Pittsburgh*, 248 Pa. St. 550, 94 Atl. 227.

² *Philadelphia Co. v. Pittsburgh*, 253 Pa. St. 147, 97 Atl. 1083; *Mueller v. Eau Claire Co.*, 108 Wis. 304, 84 N. W. 430; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603.

Such a statute applies to a contract for constructing a bridge. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603. A statute requiring contracts for "work" to be let to the lowest bidder, does not require a contract for lighting the streets to be so let. *State v. Oconto Electric Co.*, 165 Wis. 467, 161 N. W. 789.

³ *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N.S.) 1028, 41 So. 684; *Fox v. New Orleans*, 12 La. Ann. 154, 68 Am. Dec. 766; *Philadelphia Co. v. Pittsburgh*, 253 Pa.

of the contract to the lowest bidder, the public officers have no discretion, but they are bound to let such contract in accordance with such statutory provision.⁴

Such provisions do not prevent a city from constructing public works under the direction of its own engineers and officers.⁵

These provisions are for the benefit of the public. The lowest bidder can not sue at law for profits which he would have made had his bid been accepted.⁶ The lowest bidder may enjoin the council from accepting a higher bid.⁷ Property owners who are obliged to pay more for an improvement than they otherwise would have been obliged to pay, may recover against a city which has voluntarily released the lowest bidder, whose bid has been accepted, and accepted the bid of a higher bidder, for the difference between the two bids.⁸

If bids have been advertised for on two different specifications, intended as alternative for the same work, a provision requiring the letting of the contract to the lowest bidder does not bind the city to select that specification on which the lowest bid is given.⁹

If the statute does not require advertisement for the letting of the contract to the lowest bidder, and the public officers have advertised for bids as a means of obtaining competition, they may reject all bids and enter into private negotiations with the lowest bidder for more favorable terms; and a contract thus made is valid.¹⁰

While a statute which requires the letting of a contract to the lowest bidder, contemplates competition, it requires only a fair

St. 147, 97 Atl. 1083; *Mueller v. Eau Claire County*, 108 Wis. 304, 84 N. W. 430; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603.

So where bonds are sold at private sale without giving a chance to bid. *Roberts v. Taft*, 116 Fed. 228; *Roberts v. Taft*, 109 Fed. 825, 48 C. C. A. 681.

⁴ *Mueller v. Eau Claire County*, 108 Wis. 304, 84 N. W. 430.

⁵ *Home, etc., Co. v. Roanoke*, 91 Va. 52, 27 L. R. A. 551, 20 S. E. 895.

It does not prevent the city from inserting in the contract provisions intended to secure full performance. *Will v. Bismarck*, 36 N. D. 570, 163 N. W. 550.

⁶ *Talbot Paving Co. v. Detroit*, 109 Mich. 657, 63 Am. St. Rep. 604, 67 N. W. 979.

⁷ *Times Printing Co. v. Seattle*, 25 Wash. 149, 64 Pac. 940.

⁸ *Barfield v. Louisville (Ky.)*, 64 S. W. 959 [modifying on rehearing, *Kimberger v. Bitzer*, 111 Ky. 429, 63 S. W. 964; s. c. also cited as *Barfield v. Gleason*].

⁹ *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 1109; *Trowbridge v. Hudson*, 24 Ohio C. C. 76.

¹⁰ *Dillingham v. Spartanburg*, 75 S. Car. 549, 117 Am. St. Rep. 917, 8 L. R. A. (N.S.) 412, 56 S. E. 381.

opportunity for competition. Accordingly, if only one bidder submits a bid and there is no actual competition, the contract may be awarded to such bidder.¹¹ Since the legislature can not compel bidders to submit bids, any other construction of such a statute would prevent a public corporation from making contracts for work which only one bidder wished to undertake. If only two bids have been submitted and one of them is not in conformity to the specifications, it is said that the public corporation has a discretion to reject both bids or to accept the only valid bid which was submitted.¹² It has power to reject both if it sees fit.¹³

§ 1947. Exercise of discretion by public officers. Where the statute requires the contract to be let to "the lowest responsible bidder," or to "the lowest and best" bidder, a discretion is vested in the officials who let the contract to determine who is the "best."¹ Such statutes are intended "for the benefit and protection of the public rather than that of the bidders, and * * * they confer no absolute right" upon a bidder,² which discretion can not be controlled by mandamus.³ If the contract is awarded

¹¹ *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852 (of the two bids in this case, one was defective, and the contract was let on the other); *Denton v. Carey-Reed Co.*, 169 Ky. 54, 183 S. W. 262; *Bauer v. West Hoboken*, 90 N. J. L. 1, 100 Atl. 223.

¹² *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852.

¹³ *Vincent v. Ellis*, 116 Ia. 609, 88 N. W. 836.

¹ *Illinois. Kelly v. Chicago*, 62 Ill. 279.

Indiana. Ness v. Marshall County, 178 Ind. 221, 98 N. E. 33, 1002.

Kansas. Board of Commissioners v. Davis, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

Kentucky. Taylor v. Riney, 156 Ky. 393, 161 S. W. 203.

Massachusetts. Mayo v. Hampden Co., 141 Mass. 74, 6 N. E. 757.

Missouri. State v. McGrath, 91 Mo. 386.

Montana. State v. Coad, 23 Mont. 131, 57 Pac. 1082.

Nebraska. Wurdeman v. Columbus, 100 Neb. 134, 158 N. W. 924.

New Jersey. Van Reipen v. Mayor. etc., of Jersey City, 58 N. J. L. 262, 33 Atl. 749.

New York. East River, etc., Co. v. Donnelly, 93 N. Y. 557.

Nevada. Hoole v. Kinkead, 16 Nev. 217.

Ohio. Copper v. Hermann, 6 Ohio N. P. 452; *State v. Commissioners of Marion County*, 39 O. S. 188.

Pennsylvania. Douglass v. Commonwealth, 108 Pa. St. 559; *Interstate, etc., Co. v. Philadelphia*, 164 Pa. St. 477, 30 Atl. 383; *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

Washington. Times Publishing Co. v. Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

² *State v. Rickards*, 16 Mont. 145, 156; 50 Am. St. Rep. 476, 28 L. R. A. 298, 40 Pac. 210.

³ *State v. Rickards*, 16 Mont. 145, 50 Am. St. Rep. 476, 28 L. R. A. 298, 40 Pac. 210; *State v. Hermann*, 63 O. S. 440, 59 N. E. 104.

to the lowest bidder, and he refuses to take it, the public corporation is not bound, under such a statute, to let the contract to the next lowest bidder, but it may readvertise for bids.⁴ If the right to reject all bids is reserved, the lowest reliable bidder can not force the board to let the contract to him though the statute requires the contract to be let to the lowest bidder, if reliable.⁵ When bids are offered for heating apparatus, each for a different patent, the board may select the most suitable and is not confined to the lowest.⁶ It is presumed that the board did its duty in awarding bids.⁷ The word "responsible" includes ability to perform the contract in a satisfactory manner, and such bidder is not necessarily the lowest.⁸ The skill and integrity of the bidder are to be considered as well as the amount of the bid.⁹ The fact that a bidder has performed a prior contract improperly and has thus caused great loss to the public corporation, may be considered in determining whether or not he is responsible.¹⁰ The finding of the board or public official on the question of responsibility is final if made in good faith.¹¹ It has been said, however, that the facts with reference to the responsibility of the different bidders must be decided and must appear upon the record.¹² Where the contract is to be let to the lowest responsible bidder who can do satisfactory work, this need not be the lowest bidder,¹³ but is the lowest responsible bidder offering the best terms,¹⁴ and the lowest bidder can not enforce the letting of the contract to himself.¹⁵ Under such a

Contra, a gross abuse of discretion will be controlled by mandamus. *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678.

⁴ *State v. Shelby County*, 36 O. S. 326.

⁵ *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630; *Peckham v. Watsonville*, 138 Cal. 242, 71 Pac. 169; *Kelly v. Chicago*, 62 Ill. 279.

⁶ *State v. Board, etc., of Toledo*, 14 Ohio C. C. 15, 7 Ohio C. D. 338.

⁷ *Neff v. Sand Co.*, 108 Ky. 457, 55 S. W. 697, 56 S. W. 723.

⁸ *People v. Kent*, 160 Ill. 655, 43 N. E. 760; *Seysler v. Mowery*, 29 Ida. 412, 160 Pac. 262; *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555; *Reuting v. Titusville*, 175 Pa. St. 512, 34 Atl. 916.

⁹ *Inge v. Mobile*, 135 Ala. 187, 33 So. 678; *Seysler v. Mowery*, 29 Ida. 412, 160 Pac. 262; *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

¹⁰ *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

¹¹ *Board of Commissioners v. Davis*, 92 Kan. 672, L. R. A. 1915A, 198, 141 Pac. 555.

¹² *Seysler v. Mowery*, 29 Ida. 412, 160 Pac. 262.

¹³ *Schefbauer v. Kearney*, 57 N. J. L. 588, 31 Atl. 454.

¹⁴ *Van Reipen v. Mayor, etc., of Jersey City*, 58 N. J. L. 262, 33 Atl. 740.

¹⁵ *State ex rel. McGovern v. Trenton*, 60 N. J. L. 402, 38 Atl. 636.

statute extra work on a contract may be let to the original contractor, though not the lowest bidder.¹⁶

§ 1948. Requirements restricting competition — Monopolies.

Where bids must be let to the lowest responsible bidder, the city may, if public interest requires it, specify articles covered by patents so that competition is practically impossible.¹ Some states hold such contracts invalid.² The view of the Wisconsin courts originally was that such contracts were in violation of the statute.³ Special statutes were passed thereupon to make such contracts valid and these statutes were upheld.⁴ A statute which authorizes a public corporation to specify a patented article in case the patentee has entered into an agreement with the public corporation for the use of such patent at a stipulated royalty, does not authorize a contract by which the patentee not only authorizes the use of

¹⁶ State ex rel. Moreland v. Passaic, 63 N. J. L. 208, 42 Atl. 1058.

¹ Iowa. Saunders v. Iowa City, 134 Ia. 132, 9 L. R. A. (N.S.) 392, 111 N. W. 529 (a patent paving material).

Michigan. Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185 (Nicholson block paving); Attorney General v. Detroit, 26 Mich. 283; Holmes v. Detroit, 120 Mich. 226, 77 Am. St. Rep. 687, 45 L. R. A. 121, 79 N. W. 200.

Missouri. Barber, etc., Co. v. Hunt, 100 Mo. 22, 18 Am. St. Rep. 530, 8 L. R. A. 110, 13 S. W. 98; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

Nebraska. Wurdeman v. Columbus, 100 Neb. 134, 158 N. W. 924 (patented street material for top coating).

New Jersey. Ryan v. Paterson, 66 N. J. L. 533, 49 Atl. 587.

New York. Harlem Gaslight Co. v. Mayor, etc., of New York, 33 N. Y. 309; Baird v. New York, 96 N. Y. 567 (a patent water meter); In re Dugro, 50 N. Y. 513 (Nicholson block paving).

Oregon. Temple v. Portland, 77 Or. 559, 151 Pac. 724 (obiter).

Pennsylvania. Silsby Mfg. Co. v. Allentown, 153 Pa. St. 319, 26 Atl. 646.

South Carolina. Dillingham v. City Council of Spartanburg, 75 S. Car. 549, 117 Am. St. Rep. 917, 8 L. R. A. (N.S.) 412, 56 S. E. 387 (a patent paving material).

Wisconsin. Kilvington v. Superior, 83 Wis. 222, 18 L. R. A. 45, 53 N. W. 487 (patent crematory).

² California. Nicolson Pavement Co. v. Painter, 35 Cal. 699.

Illinois. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280.

Kansas. Pollock v. Kansas City, 87 Kan. 205, 123 Pac. 985.

Kentucky. Fineran v. Paving Co., 116 Ky. 495, 3 Am. & Eng. Ann. Cas. 741, 176 S. W. 415 (bituminous macadam).

Louisiana. Burgess v. Jefferson, 21 La. Ann. 143 (Nicholson pavement).

³ Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205 (contracts for Nicholson block paving).

⁴ Dean v. Borchsenius, 30 Wis. 236; Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578; Allen v. City of Milwaukee, 128 Wis. 678, 116 Am. St. Rep. 54, 5 L. R. A. (N.S.) 680, 106 N. W. 1099.

the patent, but also agrees to do a considerable part of the work and furnish a considerable part of the materials for a large part of the entire contract price.⁵

If the owner of the patent is ready and willing to furnish such article on equal and reasonable terms to all, a patented article may be specified.⁶ If that part of the improvement in which the patented material is to be used or the patented process is to be employed, can readily be severed from the rest, the public corporation should do so; and it has no power to eliminate competition on the entire improvement by requiring an entire bid, and by specifying a patented article or a patented process.⁷

Some jurisdictions hold that specifications of natural material of which one vendor has a monopoly are valid;⁸ others that they are invalid.⁹ If the material of which one vendor has a monopoly is sold in the open market, and can readily be obtained by any of the bidders on substantially equal terms, such article may be specified.¹⁰

If the article is manufactured but not patented, specifications designating the manufacturer have been held invalid if other manufacturers produced as suitable an article.¹¹ The fact that the specifications describe a machine which is made by one of the prospective bidders, does not render the contract invalid if the other bidders had the legal right to make such machines, although it would be very expensive for them so to do.¹² In jurisdictions where the product of a designated factory can not be specified there is a conflict of authority as to whether specifications can call for articles equal to a specified article.¹³

⁵ *Allen v. Milwaukee*, 128 Wis. 678, 6 L. R. A. (N.S.) 680, 106 N. W. 1090.

⁶ *Farmer v. Dahl*, 19 Ariz. 395, 171 Pac. 130; *Sherrett v. Portland*, 75 Or. 449, 147 Pac. 382; *Temple v. Portland*, 77 Or. 559, 151 Pac. 724.

⁷ *Temple v. Portland*, 77 Or. 559, 151 Pac. 724. (Patented street material; contract for grading, excavating, laying street, constructing sidewalks, etc.)

⁸ *Field v. Paving Co.*, 117 Fed. 925; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Mueller v. Boulevard Commissioners*, 87 N. J. L. 702, 94 Atl. 84.

⁹ *Fishburn v. Chicago*, 171 Ill. 338, 68 Am. St. Rep. 336, 39 L. R. A. 482, 49 N. E. 532. (Asphaltum was re-

quired from Pitch Lake, Island of Trinidad.)

¹⁰ *Mueller v. Boulevard Commissioners*, 87 N. J. L. 702, 94 Atl. 84.

¹¹ *Smith v. Improvement Co.*, 161 N. Y. 484, 55 N. E. 1077. (Specifications for "vitrified paving brick manufactured by" a specified manufacturer.) *National Surety Co. v. Kansas City Hydraulic Press Brick Co.*, 73 Kan. 196, 84 Pac. 1034 (specifications for brick); *Atkin v. Wyandotte Coal Co.*, 73 Kan. 768, 84 Pac. 1040 (specifications for brick).

¹² *Bauer v. West Hoboken*, 90 N. J. L. 1, 100 Atl. 223.

¹³ That they can. *Mulrein v. Kalloch*, 61 Cal. 522. That they can not.

In jurisdictions where patented articles may be specified, there is a conflict of authority as to whether bids should be advertised for as in other cases.¹⁴ If a patented article may be required in the specifications, only in case an arrangement can be made in advance with the approval of the public corporation for making use of such patent, upon payment of a royalty, such contract can be let only upon competitive bidding and upon advertisement.¹⁵

§ 1949. Restricting competition in labor. Provisions which restrict free competition of labor violate the spirit of the statute requiring bids to be let to the lowest bidder. A resolution of a municipality to exclude from competition all persons except those of a specified class, is void.¹ A provision that no alien or convict labor is to be employed,² or that only citizen labor shall be used and that eight hours shall constitute a day's work,³ invalidates a contract if increasing or tending to increase the contract price. So a city can not require a union label upon all printing done for it where competitive bidding is necessary,⁴ or that only union labor shall be used on public works.⁵

If the contract is one which can not be let at competitive bidding,⁶ as in the case of the employment of school teachers,⁷ the public officials may require that the persons accepting such employment shall not be members of a labor union.

Tucker v. Newark, 19 Ohio C. C. 1, 10 Ohio C. D. 437.

¹⁴ That bids should be advertised for. Worthington v. Boston, 41 Fed. 23; Newark v. Bonnell, 57 N. J. L. 424, 51 Am. St. Rep. 609, 31 Atl. 408; Ricketson v. Milwaukee, 105 Wis. 591, 47 L. R. A. 685, 81 N. W. 864.

That advertising in such cases is "not only a farcical, but also a hazardous proceeding." See Baird v. Mayor, etc., of New York, 96 N. Y. 567, 587.

¹⁵ Allen v. Milwaukee, 128 Wis. 678, 116 Am. St. Rep. 54, 5 L. R. A. (N.S.) 680, 106 N. W. 1099.

¹ Paterson Chronicle Co. v. Paterson, 66 N. J. L. 129, 48 Atl. 589.

² Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678.

³ Glover v. People, 201 Ill. 545, 66 N.

E. 820 (attack on validity of assessment).

⁴ City of Atlanta v. Stein, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932; Adams v. Brennan, 177 Ill. 194, 69 Am. St. Rep. 222, 42 L. R. A. 718, 52 N. E. 314; Holden v. Alton, 179 Ill. 318, 53 N. E. 556; Miller v. Des Moines, 143 Ia. 409, 23 L. R. A. (N.S.) 815, 122 N. W. 226; Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815. See also § 821.

⁵ Fiske v. People, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985; Miller v. Des Moines, 143 Ia. 409, 23 L. R. A. (N.S.) 815, 122 N. W. 226.

⁶ People v. Chicago, 278 Ill. 318, L. R. A. 1917E, 1069, 116 N. E. 158.

⁷ People v. Chicago, 278 Ill. 318, L. R. A. 1917E, 1069, 116 N. E. 158.

A provision regulating the number of hours which shall constitute a day's labor in the performance of the contract, is held not to render a contract invalid under a statutory provision which requires that the contract be let to the lowest bidder,⁸ on the theory that such provision does not require the contract to be let at the lowest possible cost.⁹

The result has been reached in some cases, however, that as such provision is invalid, it is to be regarded as simply void, and as it is presumed that all bidders ignored it, the contract is valid.¹⁰

Under some statutes provisions not unfavorable to the public may be inserted in the contract, though not in the specifications. Thus a contract has been held valid which contains a provision that no Chinamen shall be employed on the work, and that eight hours shall constitute a day's labor;¹¹ or that no person who was not a citizen of the United States should be employed on the work in question;¹² or that only citizens of the United States should be employed and that eight hours should constitute a day's work,¹³ where it is not shown that such provisions were known in advance, or considered in making bids, and therefore they did not increase the amount of such bids.

Under statutes which require contracts to be let to the lowest bidder, the proposals for bids can not fix the price to be paid for labor,¹⁴ nor provide that all rock used must be dressed in the state,¹⁵ as such provisions restrict bidding. A provision agreeing to comply with an unconstitutional labor law has been held not to invalidate the contract if it does not increase the cost.¹⁶

§ 1950. Covenants requiring repair of streets. If the statutes which regulate the letting of contracts for the construction of streets require the letting of such contract to the lowest bidder, it is generally held that a covenant in such contract which requires

⁸ *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

⁹ *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

¹⁰ *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815.

¹¹ *Hellman v. Shoulters*, 114 Cal. 141, 44 Pac. 915 [affirmed in banc, 114 Cal. 136, 45 Pac. 1057].

¹² *Hamilton v. People*, 194 Ill. 133, 62 N. E. 533.

¹³ *De Wolf v. People*, 202 Ill. 73, 66 N. E. 868 (attack on assessment); *Wells v. Raymond*, 201 Ill. 435, 66 N. E. 210 (objection by property owner).

¹⁴ *Frame v. Felix*, 167 Pa. St. 47, 27 L. R. A. 802, 31 Atl. 375.

¹⁵ *St. Louis, etc., Co. v. Von Versen*, 81 Mo. App. 519.

¹⁶ *People v. Featherstonhaugh*, 172 N. Y. 112, 60 L. R. A. 768, 64 N. E. 802.

the contractor to keep the street in repair for a specified period of time, renders such contract invalid if it imposes upon the contractor anything more than the duty of guaranteeing the construction of such street with proper materials and in a proper manner in accordance with the plans and specifications.¹ Several reasons exist for this rule. It prevents letting the contract for constructing the street alone to the highest bidder; it involves a fixed liability for making future repairs which may never be made, and it throws the costs of repairs upon the fund or the persons who have to pay the cost of the street, usually the abutting property owners, whereas by statute such repairs usually are payable out of the fund raised by general taxation. These reasons may be reduced to one, namely, that the power to contract for constructing a street is not power to contract for constructing and repairing it.

While the question as to the validity of such contract generally arises where the abutting property owners are attempting to resist an assessment for the contract price on the ground that it includes more than the actual cost of the construction of the street, such provision also renders the contract unenforceable as against the public corporation, and no action can be brought upon it in case of its refusal to permit such contractor to repair such street under such contract.²

Specific statutory authority for inserting in a contract for public improvements a provision that the work and material must be guaranteed and kept in repair by the contractor, for a term of years, does not authorize the public corporation to insert in the contract a covenant to employ the contractor to make repairs for a number of years upon specified terms.³

The contract may require the contractor to repair all defective work, even if the street is paid for by assessments, as this merely provides a mode of performing the contract to construct the street.⁴

¹ California. *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 80 Am. St. Rep. 124, 52 L. R. A. 264, 62 Pac. 394.

Kentucky. *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

Missouri. *Eyer mann v. St. Louis*, 265 Mo. 529, L. R. A. 1915F, 854, 178 S. W. 98.

Oregon. *Portland v. Paving Co.*, 33

Or. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28.

Washington. *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658.

Wisconsin. *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

² *Eyer mann v. St. Louis*, 265 Mo. 529, L. R. A. 1915F, 854, 178 S. W. 98.

³ *Eyer mann v. St. Louis*, 265 Mo. 529, L. R. A. 1915F, 854, 178 S. W. 98.

⁴ *Allen v. Portland*, 35 Or. 420, 58 Pac. 509.

So it has been held that a contract to keep the street in repair for a fixed period is in the nature of a guaranty of the work done, and not a contract for repairs within the meaning of the statute that requires such contracts to be let to the lowest bidder.⁵ On this theory a provision for guaranteeing and keeping the public improvement in repair for one,⁶ or for five,⁷ or for eight,⁸ or for ten,⁹ years has been held valid. In New Jersey such contracts are held valid; the abutting property owners, however, having a right to have their assessments reduced to a reasonable price for the street itself.¹⁰ A collateral provision for making repairs which are not due to defective material or workmanship at a specified price, is valid if otherwise in accordance with statute and if no attempt is made to charge such expenses upon property owners upon whom the expense of maintenance can not be charged.¹¹

A provision that the contractor shall assume all risk of damage to others arising from the work has been held invalid.¹²

§ 1951. Other provisions which tend to increase cost. Statutes which require the letting of contracts to the lowest bidder or to the lowest responsible bidder are held in some jurisdictions to render invalid contracts which contain provisions for imposing liabilities upon the contractor over and above those which are inherent in the

⁵ *Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474; *La Veine v. Kansas City*, 67 Kan. 239, 72 Pac. 774; *St. Louis, etc., Co. v. Frost*, 90 Mo. App. 677. Such provision is, of course, valid if under express statutory authority. *Barber, etc., Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; and see *Seaboard National Bank v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939; *Barber, etc., Co. v. Hezel*, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449 (giving a history of the litigation in Missouri on this point); *Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659, 152 C. C. A. 493; *Steele v. Duluth*, 136 Minn. 288, 161 N. W. 593; *Mueller v. Boulevard Commissioners*, 87 N. J. L. 702, 94 Atl. 84; *Dillingham v. Spartanburg*, 75 S. Car. 549, 117 Am. St. Rep. 917, 8 L. R. A. (N.S.) 412, 56 S. E. 381.

⁶ *Dillingham v. City Council of Spartanburg*, 75 S. Car. 549, 117 Am. St. Rep. 917, 8 L. R. A. (N.S.) 412, 56 S. E. 381.

⁷ *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 334 [sub nomine, *Barber Asphalt Paving Co. v. Gaar*, 73 S. W. 1106]; *Steele v. Duluth*, 136 Minn. 288, 161 N. W. 593; *McGlynn v. Toledo*, 12 Ohio C. D. 15, 22 Ohio C. C. 34.

⁸ *People v. Featherstonhaugh*, 172 N. Y. 112, 60 L. R. A. 768, 64 N. E. 802.

⁹ *Mueller v. Boulevard Commissioners*, 87 N. J. L. 702, 94 Atl. 84.

¹⁰ *Wilson v. Trenton*, 61 N. J. L. 599, 68 Am. St. Rep. 714, 44 L. R. A. 540, 40 Atl. 575.

¹¹ *Steele v. Duluth*, 136 Minn. 288, 161 N. W. 593.

¹² *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678.

performance of the contract itself.¹ Contracts which contain such provisions are exceptionally objectionable when the cost of such improvement is ultimately to be assessed upon abutting property owners.² A contract which contains a provision that "all loss or damage arising from the nature of the work to be done under the specifications shall be sustained by the contractor," is void.³ A covenant which requires a contractor to be responsible for all injuries to gas or water pipes and to pay the expenses of removing all gas and water pipes in the streets, renders the contract invalid.⁴ A contract which requires the contractor to pay any loss which arises from defects or from the action of the elements is not invalid.⁵ A covenant which provides that the contractor shall not remove stakes or monuments without the consent of the engineer, does not render the contract invalid.⁶ If a public corporation is authorized to call for bids for the completion of a contract on a percentage basis, a provision which requires the contractors to fix the guaranteed minimum cost has been held not to prevent competitive bidding and to be valid;⁷ and a surety on the bond of the original contractor is liable for the difference between the price for the completion of the contract thus fixed and the original contract price.⁸ A provision in a contract for continuous service, authorizing the public corporation to terminate it if it is dissatisfied with the performance, is not an evasion of the statute requiring competitive bidding,⁹ at least in the absence of fraud.¹⁰ A provision in a contract for a public improvement requiring the contractor to produce receipts for all laborers and materialmen as a condition precedent to his right to demand payment of the contract price, is not invalid.¹¹

¹ *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N.S.) 1026, 41 So. 684.

² *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678; *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N.S.) 1026, 41 So. 684.

³ *Blochman v. Spreckels*, 135 Cal. 662, 57 L. R. A. 213, 67 Pac. 1061.

⁴ *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N.S.) 1026, 41 So. 684.

⁵ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

⁶ *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

⁷ *Board of Education v. Wright-Osborn Co.*, 49 Utah 453, 164 Pac. 1033.

⁸ *Board of Education v. Wright-Osborn Co.*, 49 Utah 453, 164 Pac. 1033.

⁹ *Moriarty v. Board of Commissioners*, 90 N. J. L. 328, 100 Atl. 1070.

¹⁰ *Moriarty v. Board of Commissioners*, 90 N. J. L. 328, 100 Atl. 1070.

¹¹ *Denver v. Hindry*, 40 Colo. 42, 11 L. R. A. (N.S.) 1028, 90 Pac. 1028.

V

ULTRA VIRES CONTRACTS

§ 1952. Nature of ultra vires. The term *ultra vires*, which is used with reference to public corporations, as well as with reference to private corporations,¹ means "beyond the powers." The term is used with a variety of meanings, which in some respects are different and in other respects overlap. Since a public corporation rarely has powers greater than those of a natural person, and frequently much more limited, a contract or other transaction in which a natural person can not engage because of the policy of the law, is usually one in which a public corporation can not engage. Transactions of this sort are occasionally referred to as *ultra vires*; but since such contracts are invalid by reason of considerations which apply to natural persons as well as to public corporations, they are no more beyond the powers of the corporation in one sense than they are beyond the powers of the individual in another sense. Contracts of this sort are invalid because the law does not allow any one to deal in subject-matter of certain kinds;² but the invalidity of such contracts is due to the subject-matter primarily and not to the lack of capacity of the parties to the contract. Of the contracts which a natural person might make, there are at least three classes which are spoken of as beyond the powers of a public corporation. Certain contracts are beyond the powers of a public corporation because such power has not been conferred upon the public corporation by the constitution or by the legislature either expressly or by implication. In some cases there is not only a failure to confer such power, but a specific prohibition upon the exercise of such power upon the public corporation. In other cases the power is conferred upon a public corporation in case it exercises it in a certain specified manner, and the public corporation has attempted to exercise such power but has not complied with the statutory requirements concerning the manner in which it is to be exercised. In this case, too, we find that under some statutes there is similarly a want of power to act other than in the manner specified, while under other statutes there is an express prohibition against exercising such power in any other manner than in that specified. In other cases the expression *ultra vires* is used of contracts which are within the power of the public corporation but beyond the power of the agent who attempts to

¹ See § 1904.² See §§ 657 et seq.

enter into the contract on behalf of the public corporation. Questions of this sort involve questions of the power of the officers or agents of the public corporation and not questions of the power of the public corporation itself.³

There are a number of reasons which may explain the use of the term *ultra vires* in these different senses, although they may not justify the use of a technical legal explanation with so many different meanings. In all cases, except those in which the lack of power is merely the lack of power of the officer or agent who entered into the contract, the corporation has no power to enter into the contract in the way in which it attempted to enter into the contract, the validity and effect of which is presented for adjudication. If the public corporation has not attempted to comply with the statutes which regulate the exercise of its power, it makes but little practical difference as to the effect of the contract itself, whether it could have exercised such power in a different way or whether it could not have exercised such power under any circumstances; and in many cases it makes little practical difference as far as the validity of the contract is concerned, whether such contract is beyond the power of the public corporation in question but within the power of a natural person, or whether it is a contract which even a natural person could not enter into. Whatever practical distinction can be made between contracts of these various classes, arises after performance of the contract by one or both parties,⁴ and after the *ultra vires* act has either been performed or the adversary party is seeking to recover reasonable compensation for what he has furnished under such contract.

A justification for the confusion between contracts which are *ultra vires* as being beyond the power of the public corporations and those which are unenforceable as being beyond the power of the agent who assumed to make such contract on behalf of the corporation, can be found in the fact that a public corporation can act only through its agents, and that if a contract was entered into on behalf of the public corporation by an agent who had no authority to bind it by such contracts, it makes but little practical difference outside of questions of estoppel,⁵ and ratification,⁶ whether such contract could have been made on behalf of the public corporation by some other officer or agent.

³ See §§ 1782 et seq.

⁴ See §§ 1956 et seq.

⁵ See §§ 1965 et seq.

⁶ See § 1967.

§ 1953. Right to take advantage of ultra vires. The attitude of courts toward ultra vires contracts depends in many jurisdictions upon the party who seeks to raise the question of ultra vires and the stage of the performance of the contract at which it is sought to raise such question.

At the one extreme we find cases in which a public official whose duty it is to restrain the improper use of public funds or a taxpayer who is authorized to bring such an action in case the public official fails to do so, seeks to restrain the public corporation from entering into the contract before any steps have been taken in performance thereof. Cases of this sort fall without the subject of the validity of such contracts, but they present a class of cases in which the courts are most ready to declare contract to be ultra vires and to prevent public officials from entering into such contracts in violation of their duty.¹

At the other extreme we find cases in which the contract has been performed on both sides or on the part of the public corporation and in which a party who is in no way injured by the fact that the transaction is ultra vires, seeks to avail himself of the ultra vires character of the transaction in order to avoid liability under his contract. In cases of this sort the courts are very unwilling to permit the defense of ultra vires to be interposed.² After a contract for the construction of a public improvement has been performed by the public corporation, and after it has been performed by the contractor except as to his covenant to pay for all labor and materials used in the performance of such contract, a surety upon the bond of the contractor can not set up as against a laborer or materialman the fact that the contract between the contractor and the public corporation was ultra vires in that a part of the realty upon which such public improvement was to be constructed, did not belong to such public corporation.³

It is said occasionally that the defense of ultra vires can not be used when it would work an injustice to permit it.⁴ The principle

¹ *State ex rel. v. Dickinson County*, 77 Kan. 540 [sub nomine, *State ex rel. v. Fry*, 16 L. R. A. (N.S.) 476, 95 Pac. 392]; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480, 95 N. W. 1097.

² *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738; *Bell v. Kirkland*, 102 Minn. 213, 120 Am. St. Rep. 621, 13 L. R. A. (N.

S.) 793, 113 N. W. 271; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480, 95 N. W. 1097.

³ *Bell v. Kirkland*, 102 Minn. 213, 120 Am. St. Rep. 621, 13 L. R. A. (N.S.) 793, 113 N. W. 271.

⁴ *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122; *Bell v. Kirkland*, 102 Minn. 213, 120 Am. St. Rep. 621, 13 L. R. A. (N.S.) 793, 113 N. W. 271.

which is thus invoked is the same principle that is invoked in ultra vires contracts of private corporations,⁵ and the practical results which follow from the attempt to apply such principle consistently are even less satisfactory in the case of public corporations than in the case of private corporations. In its practical application the principle sometimes means only that the public corporation must make compensation for the value of the property which it has received under an invalid contract or that it must restore the property in specie.⁶ If the courts attempt to extend this principle so as to enforce the contract itself against the public corporation whenever a practical injustice would result, the result will be to enable corporations to add, by their unauthorized acts, to the powers which have been conferred upon them by the state through its constitution or its statutes. Furthermore, there are comparatively few cases in which the application of the doctrine of ultra vires does not result in some injustice, since the contractor, unless he is allowed to enforce the contract against the corporation, does not receive the thing for which he bargained and without which he would not have entered into the transaction.

§ 1954. Who may take advantage of ultra vires. Upon some phases of the question of the right of the party who seeks to take advantage of the ultra vires character of a contract in order to avoid it, there is a conflict of authority. In a direct proceeding to prevent the public corporation from entering into the contract, the right of the public officers or the taxpayer to maintain such action is usually regulated by statute.¹ If the public corporation has entered into the contract and one of the parties thereto seeks to evade liability on the ground that it is ultra vires, there is a conflict of authority as to the relation which a party must bear to the transaction in order to be permitted to set up ultra vires as a defense. If the litigation does not arise between the public corporation and the adversary party, a third person can not take advantage of the ultra vires character of the contract, at least after performance.² In some jurisdictions it is said that the adversary party to the transaction can not take advantage of the ultra vires character of the contract, since he is not injured thereby and that

⁵ See §§ 1996 et seq.

⁶ Walker v. Richmond, 173 Ky. 26, 189 S. W. 1122.

See §§ 1958 et seq.

¹ See § 1953.

² Bell v. Kirkland, 102 Minn. 213, 120 Am. St. Rep. 621, 13 L. R. A. (N.S.) 793, 113 N. W. 271.

such defense can be set up only by the public corporation.³ In other cases it is said that the adversary party may, under some circumstances, set up the ultra vires character of the contract, even if he has received the benefit thereof.⁴

§ 1955. Effect of ultra vires contracts—Executory contracts.

The effect and consequences of an ultra vires contract must next be considered. We must first consider the contract which is invalid only because it is ultra vires—that is, while beyond the power of the corporation it is not forbidden by statute, and does not violate any rules of public policy applicable to natural persons. The effect of such contract depends upon the extent of the performance thereof. The contract presented for consideration in any given case may be: (1) executory on both sides; (2) performed on one side either by (a) the corporation or (b) the adversary party; or (3) performed completely on each side. As far as the contract is executory and the public corporation has received nothing of value thereunder, an ultra vires contract is of no effect. Either party may repudiate it without liability for its breach.¹ Thus an executory contract to keep a certain watercourse open,² or to keep a road fenced, in return for a right of way,³ or to exempt certain realty from taxation,⁴ is void. Payment of a debt barred by the Statute of Limitations is held to be ultra vires. Mandamus will therefore be refused where the treasurer declines to pay a warrant drawn for such debt.⁵ The public corporation can not be held liable upon an ultra vires contract on the theory of tort.⁶ An

³ *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480, 95 N. W. 1097.

⁴ *City Council v. M. & W. Co.*, 31 Ala. 76; *Westinghouse Machine Co. v. Wilkinson*, 79 Ala. 312; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; *Pearson v. Duncan*, — Ala. —, 73 So. 406.

¹ *Indiana*. *McKee v. Greensburg*, 160 Ind. 378, 66 N. E. 1009.

Kansas. *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176.

Massachusetts. *Greenough v. Wakefield*, 127 Mass. 275; *Mead v. Acton*, 169 Mass. 341, 1 N. E. 413; *Spaulding*

v. Peabody, 153 Mass. 129, 26 N. E. 421; *Swift v. Falmouth*, 167 Mass. 115, 45 N. E. 184.

New York. *Halstead v. Mayor, etc.*, of New York, 3 N. Y. 430.

Pennsylvania. *Philadelphia v. Flanigen*, 47 Pa. St. 21.

Virginia. *Alleghany Co. v. Parrish*, 93 Va. 615, 25 S. E. 882.

² *Swift v. Falmouth*, 167 Mass. 115, 45 N. E. 184.

³ *Meek v. Meade Co.*, 12 S. D. 162, 80 N. W. 182.

⁴ *McTwiggan v. Hunter*, 19 R. I. 265, 29 L. R. A. 526, 33 Atl. 5.

⁵ *Trowbridge v. Schmidt*, 82 Miss. 475, 34 So. 84.

⁶ *Masters v. Rainier*, 238 Fed. 827.

assignee of an executory ultra vires contract, can not enforce it against the public corporation.¹

§ 1956. Performance by public corporation. If the public corporation has performed the contract on its side, the adversary party can not retain the benefits and plead ultra vires. The objection that the contract was originally ultra vires has been eliminated by performance.¹ Thus a city may collect a loan of its funds and enforce a mortgage given therefor, though the loan is ultra vires.² So a city may enforce payment under an ultra vires contract for hiring out prisoners in its workhouse.³

This view is not, however, entertained in all jurisdictions; and it is held by some courts that performance by the public corporation does not make the contract itself enforceable,⁴ and that if the public corporation acquires any rights by reason of such performance, it is a quasi-contractual right to recover what it has parted with under the contract. It has been held that if a city loans its funds to a private corporation, it can not enforce a bond given therefor.⁵ Where as part of an ultra vires contract the corporation takes a bond to secure performance, it has been held that it can not maintain an action on such bond.⁶ A public corporation has no power to become a member of a mutual fire insurance company, and it has been held that in case of loss the public corporation can

¹ *Pearson v. Duncan*, — Ala. —, 73 So. 406.

² *Indiana*. *Middleton v. State*, 120 Ind. 166, 22 N. E. 123.

Maine. *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738.

Minnesota. *Deering v. Peterson*, 75 Minn. 118, 77 N. W. 568.

Missouri. *St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. Rep. 764, 14 S. W. 825.

North Carolina. *Hendersonville v. Price*, 96 N. Car. 423, 2 S. E. 155.

New Jersey. *Mayor, etc., of Hoboken v. Harrison*, 30 N. J. L. 73; *Jersey City v. North Jersey Street Ry.*, 72 N. J. L. 383, 61 Atl. 95; *Board of Education v. Surety Co.*, 83 N. J. L. 293, 85 Atl. 223.

New York. *Mayor, etc., of New York*

v. Sonneborn, 113 N. Y. 423, 21 N. E. 121; *Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7.

Washington. *Washington Water Power Co. v. Spokane*, 89 Wash. 149, 154 Pac. 329.

² *City of Fergus Falls v. Hotel Co.*, 80 Minn. 165, 81 Am. St. Rep. 249, 50 L. R. A. 170, 83 N. W. 54.

³ *St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. Rep. 764, 14 S. W. 825.

⁴ *Pearson v. Duncan*, — Ala. —, 73 So. 406; *School District v. Twin Falls County Mutual Fire Insurance Co.*, 30 Ida. 400, 164 Pac. 1174.

⁵ *City Council v. Plank Road Co.*, 31 Ala. 76.

⁶ *Kansas City v. O'Connor*, 82 Mo. App. 655; *Portland v. Paving Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28.

not recover from the insurance company.⁷ Under this theory the remedy of the corporation is to avoid the contract and recover whatever it has parted with thereunder.⁸

Whether the adversary party can avoid a contract under which he has obtained and enjoyed a franchise which it is beyond the power of the public corporation to grant, is a question upon which there is a conflict of authority. It is held in some jurisdictions that since he has in fact enjoyed such franchises, he has not been injured by the fact that it is ultra vires and that accordingly he can not avoid executory covenants on his part.⁹ One who has made use of a franchise for many years can not avoid his contract to furnish water to the city in consideration of which such franchise was granted.¹⁰ In other jurisdictions it has been held that if such franchise is ultra vires the adversary party has received nothing thereby, and that whatever use he may have had under such franchise has been purely permissive; and for these reasons it is held that the adversary party can not be compelled to perform the executory covenants of the contract on his part.¹¹ A public corporation which has no authority to grant a franchise to lay gas pipes in the public streets, but which has assumed to grant such franchise, can not maintain an action against the adversary party for his failure to perform his covenants to lay such pipes.¹² While it is not generally insisted upon by the courts, it may be noted that a distinction can be made between most of the cases in which the adversary party who has accepted a franchise is not allowed to repudiate his executory covenants and those in which he is allowed to repudiate them, and that distinction rests upon the extent to which he has in fact received the benefit of such franchise and the length of time for which he has made use thereof.

It is said that while the public corporation can not be compelled to pay for benefits received under a contract which was invalid because it was not let upon competitive bidding, whether it is sought to enforce the contract or to enforce a liability in quasi-

⁷ *School District v. Twin Falls County Mutual Fire Insurance Co.*, 30 Ida. 400, 164 Pac. 1174.

⁸ *Kansas City v. O'Connor*, 82 Mo. App. 655.

⁹ *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738; *Jersey City v. North Jersey Street Ry.*, 72 N. J. L. 383, 61 Atl. 95.

¹⁰ *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738.

¹¹ *Elizabeth City v. Banks*, 150 N. Car. 407, 22 L. R. A. (N.S.) 925, 64 S. E. 189.

¹² *Elizabeth City v. Banks*, 150 N. Car. 407, 22 L. R. A. (N.S.) 925, 64 S. E. 189.

contract, the public corporation can not recover money which has been paid upon such contract.¹³

§ 1957. Performance by adversary party—Liability on contract.

Performance by the adversary party usually gives something of value to the corporation as the result of such performance, but it leaves the ultra vires part of the contract executory. Accordingly, even if the corporation has received something of value under the contract, it is not thereby estopped from alleging its lack of capacity in order to avoid liability.¹ Thus if a contract is made in excess of the statutory limitation without the assent of three-fifths of the voters,² performance by the adversary party does not estop the municipality from alleging ultra vires. A covenant by a city in consideration of a conveyance to it of a strip of land, whereby it agrees to leave a street open for its whole width, is ultra vires and void.³ If a public corporation has no authority to enter into a contract with a railway, by which the public corporation agrees to pay a part of the expense of strengthening a bridge so that it shall be suitable for use by such railway, the railway company can not recover from the public corporation the amount thus agreed upon after the railway company has performed.⁴ If a public corporation has made a contract in excess of its powers by which it has agreed to furnish water for a term of years at a nominal rate, to a public institution, in consideration of its locating in such public corporation, the fact that such public institution has paid such nominal consideration and has located in such town, does not render the contract enforceable.⁵

¹³ *Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S. W. 1074.

¹ *United States. Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138.

Alabama. Pearson v. Duncan, — Ala. —, 73 So. 406.

Illinois. Normal School v. Charleston, 271 Ill. 602, L. R. A. 1916D, 991, 111 N. E. 573.

Maryland. Mealey v. Mayor, etc., Hagerstown, 92 Md. 741, 48 Atl. 746.

Michigan. Thomas v. Port Huron, 27 Mich. 320.

New Mexico. Hagerman v. Hagerman, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

Washington. State v. Pullman, 23

Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265.

Wisconsin. Balch v. Beach, 119 Wis. 77, 95 N. W. 132; *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526.

² *State v. Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265. (Contract to buy a waterworks.)

³ *Penley v. Auburn*, 85 Me. 278, 21 L. R. A. 657, 27 Atl. 158.

⁴ *Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Minneapolis*, 124 Minn. 351, 50 L. R. A. (N.S.) 143, 145 N. W. 609.

⁵ *Normal School v. City of Charleston*, 271 Ill. 602, L. R. A. 1916D, 991, 111 N. E. 573.

In some cases, however, it has been said that the ultra vires character of the contract can not be set up by the public corporation if the adversary party has performed or is ready and willing to perform.⁵ A contract by which a public corporation agreed to sell a lighting plant and to give a franchise for twenty-five years, was held to be enforceable specifically against the public corporation, although the provision for a twenty-five-year franchise was ultra vires.⁷

If the adversary party has performed in full, courts of equity have refused to enjoin the public corporation from making payment in accordance with the terms of the contract, even if it is ultra vires.⁸

§ 1958. Performance by adversary party—Liability in quasi-contract. If performance by the adversary party gives something of value to the public corporation, suitable for the purposes for which it was formed, it is, according to the weight of authority, bound to pay a reasonable compensation therefor.¹ Thus where the

⁵ *California-Oregon Power Co. v. Medford*, 226 Fed. 957; *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316.

⁷ *California-Oregon Power Co. v. Medford*, 226 Fed. 957.

⁸ *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837.

¹ *United States. Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Parkerson v. Brown*, 106 U. S. 487, 27 L. ed. 238; *Chapman v. Douglas Co.*, 107 U. S. 348, 27 L. ed. 378.

California. Argenti v. San Francisco, 16 Cal. 256; *Pimental v. San Francisco*, 21 Cal. 351.

Dakota. National Tube Works Co. v. Chamberlain, 5 Dak. 54, 37 N. W. 761.

Illinois. Chicago v. McKechney, 205 Ill. 372, 68 N. E. 954 [affirming, 91 Ill. App. 442].

Indiana. Schipper v. Aurora, 121 Ind. 154, 6 L. R. A. 318, 22 N. E. 678.

Iowa. Turner v. Cruzen, 70 Ia. 202, 30 N. W. 483.

Kansas. Brown v. Atchison, 39 Kan.

37, 7 Am. St. Rep. 515, 17 Pac. 465; *Topeka v. Ritchie*, — Kan. —, 184 Pac. 728.

Minnesota. Moore v. Ramsey County, 104 Minn. 30, 115 N. W. 750.

Nebraska. Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 342; *Miles v. Holt County*, 86 Neb. 238, 27 L. R. A. (N.S.) 1130, 125 N. W. 527.

Oregon. Ward v. Forest Grove, 20 Or. 355, 25 Pac. 1020.

Pennsylvania. Long v. Lemoyne, 222 Pa. St. 311, 21 L. R. A. (N.S.) 474, 71 Atl. 211.

South Carolina. Luther v. Wheeler, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

South Dakota. Livingston v. School District, 11 S. D. 150, 76 N. W. 301.

Wisconsin. Paul v. Kenosha, 22 Wis. 266, 94 Am. Dec. 598; *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94. See *Quasi-Contractual Obligations of Municipal Corporations*, by Jerome C. Knowlton, 9 Michigan Law Review, 671.

Contra, where the benefit consisted in unauthorized repairs on roads. *Floyd*

corporation receives money,¹ as by the sale of void bonds,² or upon an invalid note,⁴ and it is used for a lawful purpose;⁵ or it borrows money without authority and uses it for a lawful purpose,⁸ as for improving streets,⁷ or in buying a schoolhouse;⁹ or where a corporation receives a water supply,⁹ or public lights,¹⁰ it must make compensation therefor. So where a bond is invalid, because for a time shorter than the statutes provide, the lender may recover on debt.¹¹ So if property is transferred to a public corporation under an ultra vires contract,¹² and the corporation voluntarily retains the property, it must make compensation therefor. So if a city receives certain of its own bonds canceled and given up under an ultra vires contract for refunding, it must either return such bonds and recognize them as valid, or else account for whatever it has received under such contract.¹³ So if ultra vires bonds are issued for work done in laying a sidewalk,¹⁴ or if ultra vires warrants are issued in payment for street curbing and paving,¹⁵ reasonable compensation must be made for such labor. A purchaser of invalid bonds from the original holder is allowed in some jurisdictions to

County v. Allen, 137 Ky. 575, 27 L. R. A. (N.S.) 1125, 126 S. W. 124.

² Bangor Savings Bank v. Stillwater, 49 Fed. 721; Allen v. La Fayette, 89 Ala. 641, 9 L. R. A. 497, 8 So. 30; Long v. Lemoyne, 222 Pa. St. 311, 21 L. R. A. (N.S.) 474, 71 Atl. 211.

³ Geer v. School District, 111 Fed. 682, 49 C. C. A. 539; Paul v. Kenosha, 22 Wis. 266, 94 Am. Dec. 598.

⁴ Long v. Lemoyne, 222 Pa. St. 311, 21 L. R. A. (N.S.) 474, 71 Atl. 211; Luther v. Wheeler, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

⁵ Thomson v. Elton, 109 Wis. 589, 85 N. W. 425.

⁶ Bluthenthal v. Headland, 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87; Butts County v. Jackson Bkg. Co., 129 Ga. 801, 15 L. R. A. (N.S.) 567, 60 S. E. 149; Luther v. Wheeler, 73 S. Car. 83, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

⁷ Bangor Savings Bank v. Stillwater, 49 Fed. 721.

⁸ Allen v. La Fayette, 89 Ala. 641, 9 L. R. A. 497, 8 So. 30.

⁹ Higgins v. San Diego, 131 Cal. 294, 63 Pac. 470; Higgins v. San Diego, 118 Cal. 524, 537, 45 Pac. 824 [modified on rehearing, 50 Pac. 670]; Nicholasville Water Co. v. Nicholasville (Ky.), 38 S. W. 430 [denying rehearing, 36 S. W. 549].

¹⁰ City of Kansas City v. Gas Co., 9 Kan. App. 325, 61 Pac. 317; Wellston v. Morgan, 59 O. S. 147, 52 N. E. 127. So a city must pay for private water pipe taken for the city's system and kept if it can not restore it. Cleveland v. Denison, 16 Ohio C. C. 541.

¹¹ People's Bank v. School District, 3 N. D. 496, 28 L. R. A. 642, 57 N. W. 787.

¹² Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378.

¹³ Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659.

¹⁴ Brown v. Atchison, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465.

¹⁵ Johnson v. Alderson, 33 W. Va. 473, 10 S. E. 815.

recover on quantum meruit as assignee of such claim;¹⁶ in others not.¹⁷ No recovery can be had upon a loan to a corporation in excess of its authority if such loan is applied directly to a purpose to which the public corporation did not have authority to apply it.¹⁸ If money which is borrowed by a public corporation under an ultra vires contract has been paid into the public treasury, the fact that such money is subsequently expended in a manner not authorized by law does not prevent the lender from recovering such loan.¹⁹ One who buys void warrants can recover the amount originally paid to the city only on showing that such funds were devoted to proper purposes.²⁰ A public corporation may be liable in quantum meruit for work and labor furnished under a void contract, the benefits of which were received by the city.²¹ Thus if a city makes an ultra vires lease of land by the terms of which the lessee is to fill in on each side of a stone gutter which the city is to construct, which will prevent the soil from washing away, and the city does not construct such gutter, and therefore the lessee can not use the realty for the purpose intended, the city is, at least, liable for the work done by him in making such fill.²²

If the benefits which have been received under the contract have not been received by the public corporation, but by individuals or by some local body other than the corporation, the corporation can not be compelled to pay reasonable compensation for what the adversary party has furnished.²³ A public corporation is not liable for local improvements made pursuant to unauthorized contracts.²⁴ So a city is not liable in assumpsit for money received by it from the sale of bonds issued to aid a railroad, which money was expended in constructing a railroad depot and tracks within the city limits.²⁵ The incidental benefit to the corporation arising from the

¹⁶ *Geer v. School District*, 111 Fed. 682, 49 C. C. A. 539.

¹⁷ *Coquard v. Oquawka*, 192 Ill. 355, 61 N. E. 660.

¹⁸ *Davis v. Commissioners of Stokes County*, 74 N. Car. 374.

¹⁹ *Long v. Lemoyne*, 222 Pa. St. 311, 21 L. R. A. (N.S.) 474, 71 Atl. 211.

²⁰ *Watson v. Huron*, 97 Fed. 449, 38 C. C. A. 264.

²¹ *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954 [affirming, 91 Ill. App. 442].

²² *Schipper v. Aurora*, 121 Ind. 154, 6 L. R. A. 318, 22 N. E. 878.

²³ *Nolan v. Cobb County*, 141 Ga. 385, 50 L. R. A. (N.S.) 1223, 81 S. E. 124; *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

²⁴ *Willis v. Wyandotte Co.*, 86 Fed. 872, 30 C. C. A. 445; *Wrought Iron Bridge Co. v. Hendricks Co.*, 19 Ind. App. 672, 48 N. E. 1050.

²⁵ *Travelers' Ins. Co. v. Johnson City*, 99 Fed. 663, 49 L. R. A. 123, 40 C. C. A. 58; *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

location of the railway depot is not sufficient to make it liable for the proceeds of such bonds.²⁶ A public corporation is not liable for reasonable compensation for work and material furnished in constructing a road which was not located upon public property and which did not enure to the benefit of the public corporation.²⁷

Some courts have suggested a theory which is in some respects, at least, inconsistent with the views heretofore expressed. It is suggested as a proper test that if the contract is within the scope of corporate power and the power is merely exercised irregularly, so as to make the contract itself unenforceable, recovery should be allowed on quantum meruit.²⁸ On the other hand, if the contract is entirely without the powers of the corporation, there is no liability for work done thereunder even in quantum meruit.²⁹

§ 1959. Recovery of property in specie. In most jurisdictions one who has furnished property to a public corporation under a contract which is ultra vires and who has not been paid therefor, may recover the property, at least if it can be removed without serious inconvenience to the public.¹ While a contract by which a public corporation agrees not to require a property owner to maintain a sidewalk, in consideration of his setting his fence

²⁶ Swanson v. Ottumwa, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

²⁷ Menasha Wooden Ware Co. v. Winter, 159 Wis. 437, 150 N. W. 526.

²⁸ Sullivan v. School District, 39 Kan. 347, 18 Pac. 287. Recovery for constructing street. Ryan v. Coldwater, 46 Kan. 242, 26 Pac. 675; Sleeper v. Bullen, 6 Kan. 300; School District v. Sullivan, 48 Kan. 624, 29 Pac. 1141. Recovery for constructing and furnishing a schoolhouse. Union, etc., Furniture Co. v. School District, 50 Kan. 727, 20 L. R. A. 136, 32 Pac. 368.

Recovery for services as attorney. Topeka v. Ritchie, — Kan. —, 184 Pac. 728.

²⁹ Arkansas. Newport v. Ry., 58 Ark. 270, 24 S. W. 427.

Indiana. Harrison Township v. McGregor, 67 Ind. 380.

Kansas. Pleasant View Township v. Shawgo, 54 Kan. 742, 39 Pac. 704.

Pennsylvania. Bloomsburg Land Improvement Co. v. Bloomsburg, 215 Pa. St. 452, 64 Atl. 602.

Wisconsin. Perry v. Superior City,

26 Wis. 64; Menasha Wooden Ware Co. v. Winter, 159 Wis. 437, 150 N. W. 526.

Employment as attorney. Hampton v. Logan County, 4 Ida. 646, 43 Pac. 324. Construction of bridge. Salt Creek Township v. King, etc., Mfg. Co., 51 Kan. 520, 33 Pac. 303; Pleasant View Township v. Shawgo, 54 Kan. 742, 39 Pac. 704. Construction of road. Hovey v. Wyandotte County, 56 Kan. 577, 44 Pac. 17. Guaranty that sewer will not flood property. Nashville v. Sutherland, 92 Tenn. 335, 36 Am. St. Rep. 88, 19 L. R. A. 619; 21 S. W. 674.

Lease of realty to municipal corporation for use as a park to which admission fee is to be charged. Bloomsburg Land Improvement Co. v. Bloomsburg, 215 Pa. St. 452, 64 Atl. 602.

¹ General Electric Co. v. Ft. Deposit, 174 Ala. 179, 56 So. 802; Snouffer v. Tipton, 161 Ia. 223, L. R. A. 1915B, 173, 142 N. W. 97; Walker v. Richmond, 173 Ky. 26, 189 S. W. 1122.

Contra, Buchanan Bridge Co. v. Campbell, 60 O. S. 406, 54 N. E. 372.

back for a specified distance, is ultra vires, equity will compel the public corporation to restore such realty to the abutting property owner if it repudiates such contract and seeks to enforce an assessment against him for the cost of such sidewalk.² A contractor who has performed an ultra vires contract for paving a street and who has not been paid therefor, may remove the paving material if no serious inconvenience to the public will result.³ A statute which permits one who has furnished property to a corporation under an ultra vires contract, to remove such property, is therefore valid.⁴

§ 1960. Performance by both parties. If an ultra vires contract has been performed completely by both parties, it is frequently held that no objection can be made to such transaction thereafter on the ground of its original invalidity.¹ If a contract between a public corporation and a contractor for the construction of a public improvement has been performed, except for the fact that the contractor has not paid all the laborers and materialmen, a surety upon the contractor's bond can not set up the ultra vires character of the original contract in an action by a laborer or materialman.²

A statute which authorizes a public corporation to recover money which is paid without authority of law, has been held not to apply where the contract has been performed in full, the public corporation has received the benefit, and the adversary party has acted in good faith.³ If the contract and the payment thereunder are in violation of a mandatory constitutional provision, it has been held that the public corporation may recover the payment thus made.⁴ A public corporation which has paid money to a railway in consideration of its constructing a railroad through such corporation, and constructing a depot therein, may recover such payment if it is in violation of a specific constitutional provision which forbids

² Walker v. Richmond, 173 Ky. 26, 189 S. W. 1122.

³ Snouffer v. Tipton, 161 Ia. 223, L. R. A. 1915B, 173, 142 N. W. 97.

⁴ Jordan v. Logansport, 178 Ind. 629, 99 N. E. 1060.

¹ Board of Water Commissioners v. Highland Park, 192 Mich. 607, 159 N. W. 160; Bell v. Kirkland, 102 Minn. 213, 120 Am. St. Rep. 621, 13 L. R. A. (N.S.) 793, 113 N. W. 271; Sacramento

County v. Southern Pacific Co., 127 Cal. 217, 59 Pac. 568.

² Bell v. Kirkland, 102 Minn. 213, 120 Am. St. Rep. 621, 13 L. R. A. (N.S.) 793, 113 N. W. 271.

³ Sacramento Co. v. Pacific Co., 127 Cal. 217, 59 Pac. 568, 825. (The railroad rebuilt roadway on its bridge and turned it over to the county.)

⁴ Luxora v. Jonesboro, Lake City & Eastern Ry. Co., 83 Ark. 275, 13 L. R. A. (N.S.) 157, 103 S. W. 605.

a public corporation to appropriate money for any corporation or individual.⁵ If a contractor has performed in part under a contract which is invalid because it exceeds the debt limit of the public corporation, and the public corporation pays for such performance in part, the public corporation can not recover from the contractor the amount thus paid.⁶

§ 1961. Effect of divisible or indivisible contract. If the contract is divisible in its nature and part only is ultra vires, the valid part of the contract is enforceable.¹ Thus a contract with a water company is enforceable as to payment for water and hydrant rentals, though ultra vires as granting an exclusive privilege.² So where a city has reached its limit of indebtedness, a contract for the construction of a street, the city to pay the cost of paving intersections and to assess the cost of the rest of the street on the abutting property, is invalid as to the former clause, but valid as to the latter.³ If the contract is indivisible and part of it is ultra vires, no part of it can be enforced.⁴ Thus an indivisible contract for settling a valid judgment and purchasing a water and light plant is unenforceable as to the first provision if the latter is ultra vires.⁵ The contract can not be so modified by the courts as to make it valid if it is indivisible. A contract for a fire-alarm telegraph system, which was void as in excess of the limit of indebtedness, can not be changed so as to give the contractor a franchise to maintain it, where part of the apparatus was furnished by the city.⁶

§ 1962. Contracts in violation of statutory provisions. If a contract is entered into by a public corporation in violation of some specific statute, the effect of such contract and the rights of the party arising upon performance thereof depend upon the intention of the legislature in enacting such statute. If the contract is

⁵ *Luxora v. Jonesboro, Lake City & Eastern Ry. Co.*, 83 Ark. 275, 13 L. R. A. (N.S.) 157, 103 S. W. 606.

⁶ *Kreusler v. School District*, 256 Pa. St. 281, 100 Atl. 821.

¹ *Kimball v. Cedar Rapids*, 100 Fed. 802; *City of Greenville v. Waterworks Co.*, 125 Ala. 625, 27 So. 764; *Valparaiso v. Water Co.*, 30 Ind. App. 316, 65 N. E. 1063; *Coit v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

² *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685.

³ *Ft. Dodge, etc., Co. v. Ft. Dodge*, 115 Ia. 568, 89 N. W. 7.

⁴ *Kansas City v. O'Connor*, 82 Mo. App. 655.

⁵ *Austin v. McCall*, 95 Tex. 565, 67 S. W. 192, 68 S. W. 791.

⁶ *Gamewell, etc., Co. v. Laporte*, 102 Fed. 417, 42 C. C. A. 405.

executory, no recovery can be had thereon.¹ If the contractor knows of the invalidity of the contract before performance and knows that payment will be resisted, he can not recover.² If the proceedings are irregular and are not in compliance with statutory provision, but they are in violation of a mandatory statute, recovery may be had upon the contract after performance thereof in some jurisdictions,³ and recovery can generally be had on the theory of reasonable compensation for benefits furnished under such contract.⁴ The fact that payment has been enjoined under the contract is not conclusive as to the right of the contractor to recover in quasi-contract.⁵ Where a contract was held void because the title of the ordinance whereby it was formed did not show its true purpose, the city was liable for rental for fifteen hydrants used by it.⁶

¹ *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176; *Power v. Gray*, 186 Mich. 646, 153 N. W. 37; *Power v. Balitz*, 186 Mich. 652, 153 N. W. 39.

² *Ritchie v. City of Wichita*, 99 Kan. 663, 163 Pac. 176.

³ *United States. Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238; *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378; *Gause v. Clarksville*, 1 Fed. 353.

California. Argenti v. San Francisco, 16 Cal. 265; *Pimental v. San Francisco*, 21 Cal. 352.

Dakota. National Tube Works v. Chamberlain, 5 Dak. 54, 37 N. W. 761.

Iowa. First National Bank v. Emmetsburg, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

Kansas. Mound City v. Snoddy, 53 Kan. 126, 35 Pac. 1112; *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176.

Illinois. Sanitary District v. Mfg. Co., 179 Ill. 167, 53 N. E. 627.

Maryland. Konig v. Baltimore, 128 Md. 465, 97 Atl. 837.

Minnesota. First Nat. Bank v. Goodhue, 120 Minn. 362, 43 L. R. A. (N.S.) 84, 139 N. W. 599.

Nebraska. State v. Moore, 46 Neb. 590, 50 Am. St. Rep. 626, 65 N. W. 193.

New Jersey. State v. Long Branch, 59 N. J. L. 371, 35 Atl. 1070.

Oregon. Portland, etc., Co. v. Portland, 18 Or. 21, 6 L. R. A. 290, 22 Pac. 536. (Notice defective.)

Pennsylvania. Long v. Lemoyne, 222 Pa. St. 311, 21 L. R. A. (N.S.) 474, 71 Atl. 211.

South Carolina. Luther v. Wheeler, 73 S. Car. 83, 6 Ann. Cas. 754, 4 L. R. A. (N.S.) 746, 52 S. E. 874.

Wisconsin. Thomson v. Elton, 109 Wis. 589, 85 N. W. 425.

⁴ *Kansas. City of Ellsworth v. Roa-iter*, 46 Kan. 237, 26 Pac. 674.

Michigan. Carey v. East Saginaw, 79 Mich. 73, 44 N. W. 168.

Minnesota. Laird Norton Yards v. Rochester, 117 Minn. 114, 41 L. R. A. (N.S.) 473, 134 N. W. 644.

Nebraska. Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349.

New York. Kramrath v. Albany, 127 N. Y. 575, 28 N. E. 400.

⁵ *First National Bank v. Emmetsburg*, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

⁶ *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349 [distinguishing, *Tullock v. Webster Co.*, 46 Neb. 211, 64 N. W. 705].

On the other hand, if the contract is in violation of a mandatory statute, and is contrary to public policy, no recovery can be had either on the contract or on quantum meruit.⁷ Under a statute which provides that a public corporation can not make public improvements or issue bonds to pay the expense thereof, in any other manner than in that provided by law, a contractor who has entered into a contract with such public corporation without complying with statutory requirements can not recover reasonable compensation from such corporation.⁸

Unless the statute shows a contrary intention on the part of the legislature, failure to give a bond does not defeat the right of the contractor who has performed such contract in full, but who has not given a bond,⁹ and such contractor is entitled at least to recover reasonable compensation for what he has done under such contract.¹⁰ Whether title passes under irregular contracts is a question upon which there seems to be a conflict of authority.¹¹ It has been held that the title to property delivered under an irregular

⁷United States. *Marsh v. Fulton County*, 77 U. S. (10 Wall.) 676, 19 L. ed. 1040; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132; *Morton v. Nevada City*, 41 Fed. 582; *Gamewell Fire Alarm Telegraph Co. v. Laporte*, 102 Fed. 417; *State Trust Co. v. Duluth*, 104 Fed. 632.

California. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *City Improvement Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776.

Colorado. *Denver v. Hindry*, 40 Colo. 42, 11 L. R. A. (N.S.) 1028, 90 Pac. 1028.

Indiana. *Moss v. Sugar Ridge Township*, 161 Ind. 417, 67 N. E. 460.

Iowa. *Ryce v. Osage*, 88 Ia. 556, 55 N. W. 532.

Michigan. *McBrien v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *Niles Waterworks v. Niles*, 59 Mich. 311, 26 N. W. 525.

Missouri. *Maupin v. Franklin County*, 67 Mo. 327.

New Jersey. *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665, 15 Atl. 10.

New Mexico. *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

New York. *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144.

North Dakota. *Goose River Bank v. School Township*, 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; *Capital Bank v. School District*, 1 N. D. 479, 48 N. W. 363.

Oklahoma. *Fairbanks-Morse Co. v. Geary*, — Okla. —, 157 Pac. 720.

Oregon. *Springfield Milling Co. v. Lane County*, 5 Or. 265.

Texas. *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637.

Wisconsin. *McGillivray v. Joint School District*, 112 Wis. 354, 88 Am. St. Rep. 969, 58 L. R. A. 100, 88 N. W. 310.

⁸*Denver v. Hindry*, 40 Colo. 42, 11 L. R. A. (N.S.) 1028, 90 Pac. 1028.

⁹*State v. Clark*, 116 Minn. 500, 39 L. R. A. (N.S.) 43, 134 N. W. 129.

¹⁰*State v. Clark*, 116 Minn. 500, 39 L. R. A. (N.S.) 43, 134 N. W. 129.

¹¹See § 1959.

bid passes to the public corporation, and such corporation can not rescind and agree to treat the property as delivered under a second and valid bid.¹² A public corporation which has obtained goods under a contract which is invalid because not in compliance with statute, has been held liable on the theory of conversion for property which it has converted to its own use after it has been received under such contract.¹³ Whatever may be the liability of the public corporation, the adversary party should undoubtedly be permitted to recover in specie the property which he has furnished under the contract and which has not been consumed by the public corporation, if such property can be restored to him without serious injury to the public corporation.

§ 1963. Illustrations of particular statutes. Different statutes of the same general class differ in their phraseology. Courts differ, further, in their views of the intent of the legislature in enacting such statutes. There is, accordingly, a hopeless diversity of opinion as to the effect of similar statutes upon contracts entered into in violation thereof. Statutes which forbid public corporations to incur indebtedness in excess of certain limits apply in their spirit and terms to liabilities for reasonable compensation as well as to express contracts. Since they are intended to compel municipalities to do business on a cash basis, no recovery can be had for reasonable compensation for property or services furnished to the corporation.¹ The fact that the articles furnished under such contract have been accepted and retained by the public corporation

¹ *Office, etc., Co. v. Washoe County*, 24 Nev. 359, 55 Pac. 222.

¹² *Hill County v. Shaw & Borden Co.*, 225 Fed. 475, 140 C. C. A. 523.

¹³ *Illinois. Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982.

Iowa. Windsor v. Des Moines, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476.

Montana. State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 453, 51 L. R. A. 336, 63 Pac. 99.

Oklahoma. Superior Manufacturing Co. v. School District, 28 Okla. 293, 37 L. R. A. (N.S.) 1054, 114 Pac. 328;

Fairbanks-Morse Co. v. City of Geary, — Okla. —, 157 Pac. 720.

Pennsylvania. Keller v. Scranton, 200 Pa. St. 130, 86 Am. St. Rep. 708, 49 Atl. 781; *Kreusler v. School District*, 256 Pa. St. 281, 100 Atl. 821.

Washington. State v. Pullman, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265.

West Virginia. Merchants' National Bank v. Spates, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681.

Wisconsin. Balch v. Beach, 119 Wis. 77, 95 N. W. 132.

The question of liability in quasi-contract was avoided in *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138.

does not create a public liability against it.² It has been held that one who furnishes property under such a contract can not recover such property, although no payment is made therefor.³ If a contract is invalid because it imposes an annual liability in excess of the amount which can be raised by the statutory rate of taxation, no recovery can be had against the public corporation for reasonable compensation.⁴ If the statute absolutely forbids incurring any indebtedness, no liability exists if property is bought on credit, even for a reasonable compensation therefor.⁵ No recovery can be had upon a loan of money which is invalid as creating a liability beyond the revenues of the year in which liability is incurred, although the public corporation could have incurred a direct liability upon its necessary expenditures,⁶ but the lender will be subrogated to the rights of the holders of the warrants which had been paid out of the proceeds of such loan.⁷ If by statute the dispenser is authorized to buy and sell liquors for cash only, the city is not liable for the value of liquor sold to it on credit.⁸ This rule has been applied even where the liquor has been sold and the city retains the proceeds thereof.⁹ So where the city can not contract obligations in excess of its annual income except by popular vote, it is not liable for a reasonable compensation for hydrant rentals, if in excess of such income.¹⁰ This does not prevent recovery for property retained by the corporation in cases where it can be surrendered to the party furnishing it. Where an installment contract is held to be invalid if all the payments to be made added together will, when added to the other debts of the public corporation, exceed the limit of indebtedness, but no one installment will

² *Superior Manufacturing Co. v. School District*, 28 Okla. 293, 37 L. R. A. (N.S.) 1054, 114 Pac. 328.

³ *Fairbanks-Morse Co. v. Geary*, — Okla. —, 157 Pac. 720.

⁴ *Hagerman v. Hagerman*, 19 N. M. 118, L. R. A. 1915A, 904, 141 Pac. 613.

⁵ *Alabama. Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87.

Iowa. Mosher v. School District, 44 Ia. 122.

Louisiana. Fox v. New Orleans, 12 La. Ann. 154, 68 Am. Dec. 766.

Michigan. Detroit v. Paving Co., 36 Mich. 335; *Detroit v. Robinson*, 38

Mich. 108; *Niles Water Works v. Niles*, 59 Mich. 311, 26 N. W. 525.

Wisconsin. Earles v. Wells, 94 Wis. 285, 59 Am. St. Rep. 885, 63 N. W. 964.

⁶ See § 1921.

⁷ *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 121 Am. St. Rep. 244, 15 L. R. A. (N.S.) 567, 60 S. E. 149.

⁸ *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87.

⁹ *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87.

¹⁰ *Niles Waterworks v. Niles*, 59 Mich. 311, 26 N. W. 525.

cause such excess, such a contract has been held good from year to year until renounced by either party.¹¹ If the statute or constitution requires that a provision for a tax must be made to meet the liability imposed by the contract, a contract entered into in disregard of such provision is a nullity. No recovery can be had for a reasonable compensation for property furnished under such a contract.¹² If the statute requires a contract of a certain class to be in writing, an oral executory contract is unenforceable.¹³ On the question of the effect of performance of such a contract there is a conflict of authority. In some jurisdictions it is held that performance by the adversary party creates no liability against the public corporation in quantum valebat.¹⁴ Thus if by statute extras can be ordered only by written agreement signed by both contractor and public officers, the contractor can not recover in any form of action for extras furnished on oral order.¹⁵ In other jurisdictions performance by the adversary party is held to create a liability in quantum valebat.¹⁶ So where the statute requires a contract to be in writing, a city is liable in quantum valebat for gas furnished after the written contract expired, a tax having been levied which was available only for paying for gas.¹⁷ So extras furnished on oral order of the proper public officer must be paid for even if the statute requires a written order therefor.¹⁸ So if no written acceptance of an ordinance for lights is made as provided for by statute, the city must pay for benefits received.¹⁹ If the statute requires advertisement for bids, contracts made in violation of

¹¹ *Dawson v. Waterworks Co.*, 106 Ga. 696, 32 S. E. 907.

¹² No recovery for a bridge. *Berlin Iron Bridge Co. v. San Antonio*, 62 Fed. 862.

¹³ See §§ 1428 and 1935 et seq.

¹⁴ *Kentucky*. *Murphy v. Louisville*, 72 Ky. (9 Bush) 189.

Massachusetts. *Boston Electric Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787.

Michigan. *McBrien v. Grand Rapids*, 56 Mich. 95 [sub nomine, *McBrien v. Grand Rapids*, 22 N. W. 206].

New Jersey. *Schumm v. Seymour*, 24 N. J. Eq. 143.

New York. *Dickinson v. Poughkeepsie*, 75 N. Y. 65.

Pennsylvania. *Addis v. Pittsburg*, 85 Pa. St. 379; *McManus v. Philadelphia*, 201 Pa. St. 619, 51 Atl. 320.

Tennessee. *Watterson v. Nashville*, 106 Tenn. 410, 61 S. W. 782.

¹⁵ *Watterson v. Nashville*, 106 Tenn. 410, 61 S. W. 782.

¹⁶ *Cincinnati v. Cameron*, 33 O. S. 336.

¹⁷ *Memphis Gaslight Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25. To the same effect, see *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

¹⁸ *Cincinnati v. Cameron*, 33 O. S. 336.

¹⁹ *Baxter Springs v. Light & Power Co.*, 64 Kan. 501, 68 Pac. 63.

such provisions are nullities.²⁰ If advertisement is omitted when the law requires it, the contractor can not enforce payment of his warrant by mandamus, if a warrant is given him after performance.²¹ Statutes which require advertisement for bids are intended to protect the public from collusion between contractors and public officials, and to secure to the public the best terms possible. The policy of such statutes would be violated as well by permitting recovery for a reasonable compensation as by allowing recovery on an express contract. Accordingly, if bids are not advertised for no recovery can be had on quantum meruit.²² No liability attaches to a municipal corporation by reason of a contract entered into by it for the construction of a sewer, when the cost exceeds five hundred dollars, and there is neither advertisement for bids nor certificate that there is sufficient money in the treasury to the credit of such fund.²³ So no liability exists for supplies bought by the secretary of state for the legislature and used by the state if bids are not advertised for.²⁴ So if the contract is not let to the lowest and best bidder,²⁵ or if the contract is in excess of the amount authorized by law,²⁶ or is made before an appropriation is made for the contract,²⁷ where such acts respectively are mandatory, no recovery can be had either on the contract or on quantum meruit.

One who has furnished goods under a contract which is invalid because no estimate or specifications were prepared in advance and because the certified check which was submitted with the bid was less than that required by statute, may recover the reasonable value thereof,²⁸ although the statute provides that a contract in violation

²⁰ *State v. Butler*, 178 Mo. 272, 77 S. W. 560; *McCloud v. Columbus*, 54 O. S. 439, 44 N. E. 95; *Lancaster v. Miller*, 58 O. S. 558, 51 N. E. 62.

²¹ *State v. Yeatman*, 22 O. S. 546.

²² *California*. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *City Improvement Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776.

Colorado. *Mulnix v. Ins. Co.*, 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123.

Michigan. *McBrien v. Grand Rapids*, 56 Mich. 95 [sub nomine, *McBrien v. Grand Rapids*, 22 N. W. 206].

New York. *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144.

Ohio. *Buchanan Bridge Co. v. Camp-*

bell, 60 O. S. 406, 54 N. E. 372 (nor was the contracting company allowed in this case to recover the material furnished).

²³ *Lancaster v. Miller*, 58 O. S. 558, 51 N. E. 52.

²⁴ *Mulnix v. Ins. Co.*, 23 Colo. 71, 33 L. R. A. 827, 46 Pac. 123.

²⁵ *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4.

²⁶ *Black v. Detroit*, 119 Mich. 571, 78 N. W. 660.

²⁷ *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726.

²⁸ *Laird-Norton Yards v. Rochester*, 117 Minn. 114, 41 L. R. A. (N.S.) 473, 134 N. W. 644.

of such statute shall be void and that money paid under such may be recovered without restitution of the benefit or property.²⁹

If the statute requires an election as a condition precedent, a contract made without such election is a nullity.³⁰ It can not be ratified,³¹ nor is there any liability on quantum meruit.³² If a contract for the purchase of property in excess of a certain amount must by statute be submitted to the voters, no recovery can be had in quasi-contract for the value of property furnished under such a contract which was not submitted to the voters.³³ It has, however, been held in other jurisdictions that a loan which is made to a public corporation and which has been received by such corporation, must be repaid, although the question of making such loan was not submitted to the voters in the first instance as was required by statute.³⁴ But a contract is valid if a proposition made by proper authority is accepted by the water company to which it is made and a favorable vote is then taken upon it.³⁵ Amendments in a contract made by the council after acceptance do not avoid the contract, but are themselves invalid.³⁶

If the provisions of the statute prevent a public corporation from incurring any liability except upon an express contract, it has been held that in case of a breach of a valid contract by the public corporation the contractor can not ignore the contract and sue to recover reasonable compensation for what he has furnished under the contract.³⁷

One who has furnished supplies in violation of a statute which confines such contracts to newspapers published in the county, may recover in quasi-contract.³⁸

²⁹ *Laird-Norton Yards v. Rochester*, 117 Minn. 114, 41 L. R. A. (N.S.) 473, 134 N. W. 644.

³⁰ *Smith v. Dublin*, 113 Ga. 833, 39 S. E. 327; *Grady v. Pruitt*, 111 Ky. 100, 63 S. W. 283; *Harrodsburg v. Water Co. (Ky.)*, 64 S. W. 658; *Painter v. Norfolk*, 62 Neb. 330, 87 N. W. 31; *Duncan v. Charleston*, 60 S. Car. 532, 39 S. E. 265.

³¹ *State v. Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265.

³² *Perry Water, L. & I. Co. v. Perry*, 29 Okla. 593, 39 L. R. A. (N.S.) 72, 120 Pac. 582; *State v. Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265;

Davis v. Wayne Co., 38 W. Va. 104, 18 S. E. 373 (as binding future levies).

³³ *Perry Water, L. & I. Co. v. Perry*, 29 Okla. 593, 39 L. R. A. (N.S.) 72, 120 Pac. 582.

³⁴ *First Nat. Bank v. Goodhue*, 120 Minn. 362, 43 L. R. A. (N.S.) 84, 139 N. W. 599.

³⁵ *Lexington v. Bank*, 165 Mo. 671, 65 S. W. 943.

³⁶ *Lexington v. Bank*, 165 Mo. 671, 65 S. W. 943.

³⁷ *Denver v. Hindry*, 40 Colo. 42, 11 L. R. A. (N.S.) 1028, 90 Pac. 1028.

³⁸ *Hill County v. Shaw & Borden Co.*, 225 Fed. 475, 140 C. C. A. 523.

§ 1964. Presumption as to validity of contracts of public corporations. In some cases it is held that it will be presumed in the absence of evidence to the contrary that a contract which is within the power of a municipal corporation was entered into in conformity to law,¹ and that the powers of public officers were properly exercised.² Where this presumption obtains, evidence that a contract was entered into and performed by the adversary party is sufficient to establish plaintiff's case in the absence of evidence of the validity of such contract.³ On the other hand, it has been said that one who seeks to establish a contract against a public corporation must establish the validity of such contract,⁴ including compliance with all mandatory and statutory requirements.⁵

§ 1965. Estoppel. Since all are bound to know the powers of a public corporation and the formalities necessary to valid contracts,¹ there can ordinarily be no question of estoppel to deny the validity of an ultra vires contract.² Payment of interest on invalid

¹ *Fabric Fire Hose Co. v. Caddo*, — Okla. —, 158 Pac. 350; *Harrold v. Huntington*, 74 W. Va. 538, 82 S. E. 476.

² *Colorado Springs v. Hydro-Electric Co.*, 57 Colo. 169, 140 Pac. 921.

³ *Fabric Fire Hose Co. v. Town of Caddo*, — Okla. —, 158 Pac. 350.

⁴ *Buckeye Engine Co. v. Cherokee*, 54 Okla. 509, 153 Pac. 1166.

⁵ *Buckeye Engine Co. v. Cherokee*, 54 Okla. 509, 153 Pac. 1166.

¹ *State v. City of Sapulpa*, 58 Okla. 550, 160 Pac. 489; *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253; *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526. See § 1885.

² *United States. Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065.

Illinois. Seeger v. Mueller, 133 Ill. 86, 24 N. E. 513; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 36 Am. St. Rep. 438, 18 L. R. A. 832, 32 N. E. 902; *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, L. R. A. 1916D, 991, 111 N. E. 573.

Indiana. Pettis v. Johnson, 56 Ind. 139.

Iowa. Cedar Rapids Water Co. v. Cedar Rapids, 117 Ia. 250, 90 N. W. 746; *Harrison County v. Ogden*, 133 Ia. 9, 110 N. W. 32.

Massachusetts. Day v. Green, 58 Mass. (4 Cush.) 433.

Michigan. Black v. Detroit, 119 Mich. 571, 78 N. W. 660.

Minnesota. State v. Ry. Co., 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32.

Missouri. State v. Murphy, 134 Mo. 548, 56 Am. St. Rep. 515, 34 L. R. A. 369, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132.

Nebraska. Washington County v. David (Neb.), 89 N. W. 737.

New York. Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381.

North Carolina. Burgin v. Smith, 151 N. Car. 561, 66 S. E. 607.

Ohio. Cleveland v. Bank, 16 O. S. 236, 88 Am. Dec. 445.

Rhode Island. McAleer v. Angell, 19 R. I. 688, 36 Atl. 588; *Dube v. Peck*, 22 R. I. 443, 467, 48 Atl. 477.

Washington. Osborne v. King County, 76 Wash. 277, 136 Pac. 138.

obligations does not estop the corporation from alleging their invalidity,³ even if the payments are continued for twenty years.⁴ The fact that a tax is levied for the payment of interest upon municipal bonds does not estop the public corporation from denying liability thereon to a holder with notice.⁵ A town can not consent to a compromise judgment by which it issues a smaller amount of bonds than it voted the judgment not involving the power of the town to issue such bonds.⁶ So as a warrant is non-negotiable, recitals of validity of its purpose are not conclusive even in the hands of a bona fide holder.⁷ So performance for several years of an ultra vires contract with a railroad company, whereby the city agrees to erect and maintain a bridge over the railroad track, which it was the duty of the railroad to erect and maintain, does not estop the city to avoid such contract.⁸ While acquiescence in issuing ultra vires bonds does not work an estoppel, it may lead the court to a more liberal construction of the statute in favor of the bondholders than would otherwise be made.⁹ Payment of interest for a long period is a fact to be considered, if in the meantime the bonds have been transferred to bona fide holders, in determining whether the bond was originally valid. Thus where bonds are issued irregularly, but within the powers of the corporation, payment of interest for nine years is a circumstance tending to show the original validity of such bond.¹⁰ If, however, the contract is one which on its face is within the powers of the corporation, a question of estoppel may arise if by reason of facts not known to the adversary party such contract is in fact entered into for an

³ *Marsh v. Fulton Co.*, 77 U. S. (10 Wall.) 676, 19 L. ed. 1040; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Lewis v. Shreveport*, 108 U. S. 292, 27 L. ed. 728; *Davies Co. v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026; *Doon Township v. Cummins*, 142 U. S. 366, 35 L. ed. 1044; *Board, etc., of Oxford v. Bank*, 96 Fed. 293, 37 C. A. 493; *Buncombe Co. v. Payne*, 123 N. Car. 432, 31 S. E. 711; *Glenn v. Wray*, 126 N. Car. 730, 36 S. E. 167; *Debnam v. Chitty*, 131 N. Car. 657, 43 S. E. 3; *Noel, etc., Co. v. Mitchell Co.*, 21 Tex. Civ. App. 638, 54 S. W. 284.

⁴ *Clark v. Northampton*, 105 Fed. 312.

⁵ *State v. Sapulpa*, 58 Okla. 550, 160 Pac. 489.

⁶ *Board, etc., of Oxford v. Bank*, 96 Fed. 293, 37 C. C. A. 493 [citing, *Norton v. Shelby Co.*, 118 U. S. 425, 30 L. ed. 178; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77; *Doon Township v. Cummins*, 142 U. S. 366, 35 L. ed. 1044].

⁷ *Watson v. Huron*, 97 Fed. 449, 38 C. C. A. 264.

⁸ *St. Paul v. Ry.*, 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32.

⁹ *Washington County v. Williams*, 111 Fed. 801, 49 C. C. A. 621.

¹⁰ *Wetzel v. Paducah*, 117 Fed. 647.

ultra vires purpose.¹¹ If bonds show on their face that they are issued for a lawful purpose, they are not invalidated by the fact that they were in fact issued for other purposes,¹² or that their proceeds were misapplied.¹³ So if a building is contracted for, for a lawful purpose, the fact that it is used for other purposes does not defeat the right of the contractor to recover.¹⁴

The acceptance of a public improvement is said in some jurisdictions to estop a public corporation from denying liability thereon, although the contract was in compliance with the requirements of statute.¹⁵

§ 1966. Estoppel by recitals. The common form of estoppel in contracts of public corporations is found in cases of negotiable instruments in the hands of bona fide holders, where such instruments contain recitals of fact which, if true, make the instrument valid, and which are made by officers authorized to pass upon such facts. The public corporation in such case is estopped to deny the truth of such recitals as against a bona fide holder.¹ Where the recital was that the instrument was issued pursuant to an election, the instrument is valid, though the vote was on a proposition making the bonds redeemable after ten years, which provision was not

¹¹ *Ft. Scott v. Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437; *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176.

A city is estopped to deny a finding that a petition for an improvement is signed by a sufficient number of abutting property owners. *Ritchie v. Wichita*, 99 Kan. 663, 163 Pac. 176.

¹² *Board of Education v. McLean*, 106 Fed. 817, 45 C. C. A. 656; *Thompson v. Mecosta*, 127 Mich. 522, 86 N. W. 1044.

¹³ *Jones v. City of Camden*, 44 S. Car. 319, 51 Am. St. Rep. 819, 23 S. E. 141.

¹⁴ *Hubbell v. Custer City*, 15 S. D. 55, 87 N. W. 520.

¹⁵ *First National Bank v. Emmetsburg*, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

¹ *Brown v. Ingalls Township*, 81 Fed. 485; *Clapp v. Otoe Co.*, 104 Fed. 473, 45 C. C. A. 579; *Hardy Township v. Bank*, 106 Fed. 986, 46 C. C. A. 66 [af-

firming without opinion, *Brattleboro Savings Bank v. Hardy Tp.*, 98 Fed. 524]; *Independent School District v. Rew*, 111 Fed. 1, 55 L. R. A. 364, 49 C. C. A. 198; *Clapp v. Marice City*, 111 Fed. 103, 49 C. C. A. 251; *Fairfield v. School District*, 116 Fed. 838 [reversing, 111 Fed. 453]; *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915A, 910; *Mercer Co. v. Hackett*, 68 U. S. (1 Wall.) 83, 17 L. ed. 548; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Commissioners, etc., of Douglas Co. v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Commissioners v. January*, 94 U. S. 202, 24 L. ed. 110; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. ed. 816; *Warren Co. v. Marcy*, 97 U. S. 96, 24 L. ed. 977; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Wilson v. Salamanca Tp.*, 99 U. S. 499, 25 L. ed. 330; *Sherman Co. v. Simons*, 109 U. S. 735, 27 L. ed. 1093; *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996; *Commissioners, etc.,*

inserted in the bond.² A recital that the bonds were issued in full compliance with the statute under which they purported to be issued and that everything in the issuing of the bonds was done in regular form as required by law, estops the public corporation from attacking the validity of the bonds on the ground that the enabling ordinance was not published.³ A recital in the ordinance of the fact that the election was conducted in accordance with law estops the public corporation from alleging that it was conducted by an officer who was not authorized to conduct elections of that sort.⁴ Where the recital is as to the amount of pre-existing indebtedness;⁵ or that the constitutional limit has not been exceeded where no record is to be inspected, by statute or constitution, at the peril of the purchaser;⁶ or where it shows the finding of a board authorized by law to take final action on the question whether the limit is exceeded;⁷ or where the recitals show that the bonds are issued to refund debts,⁸ or are issued in satisfaction of judgments;⁹ or where the recitals are as to the completion of a railroad by a certain date, which completion is a condition precedent to the validity

of *Gunnison Co. v. Rollins*, 173 U. S. 255, 43 L. ed. 689; *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. ed. 552;; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 46 L. ed. 773; *Stanly County v. Coler*, 190 U. S. 437, 47 L. ed. 1126; *Quinlan v. Green County*, 205 U. S. 410, 51 L. ed. 860; *Presidio County v. Noel-Young Bond & Stock Co.*, 212 U. S. 58, 52 L. ed. 402; *Board, etc., of Barber Co. v. Society*, 101 Fed. 767, 41 C. C. A. 667; *Hughes Co. v. Livingston*, 104 Fed. 306, 43 C. C. A. 541; *South Hutchinson v. Barnum*, 63 Kan. 872, 66 Pac. 1035.

² *Board, etc., of Cowley Co. v. Heed*, 101 Fed. 768, 41 C. C. A. 668 [affirming, *Heed v. Cowley Co.*, 82 Fed. 716, which disapproved, *Lewis v. Bourbon Co.*, 12 Kan. 186].

³ *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915A, 910.

⁴ *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111.

⁵ *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Dallas Co. v. McKenzie*, 110 U. S. 686, 28 L. ed. 285;

Chaffee Co. v. Potter, 142 U. S. 355, 35 L. ed. 1040; *Board, etc., of Gunnison Co. v. Rollins*, 173 U. S. 255, 43 L. ed. 689; *E. H. Rollins & Sons v. Gunnison Co.*, 80 Fed. 692.

⁶ *Bgard, etc., of Lake Co. v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167.

In the absence of statutory provision making a recital in a bond conclusive, a recital that the indebtedness was authorized by law does not estop the public corporation from setting up the fact that the indebtedness exceeded the constitutional limit. *Sidey v. Marcelline*, 237 Fed. 168, 150 C. C. A. 314.

⁷ *Chilton v. Gratton*, 82 Fed. 873.

⁸ *Kiowa Co. v. Howard*, 83 Fed. 296, 27 C. C. A. 531; *Huron v. Bank*, 86 Fed. 272, 49 L. R. A. 534, 30 C. C. A. 78; *Waite v. Santa Cruz*, 89 Fed. 619; *Weason v. Mt. Vernon*, 98 Fed. 804, 39 C. C. A. 301; *Pierre v. Duscomb*, 106 Fed. 611, 45 C. C. A. 499; *State v. Wichita County*, 62 Kan. 494, 64 Pac. 45.

⁹ *Geer v. Ouray*, 97 Fed. 435, 38 C. C. A. 250.

of the bonds;¹⁰ or where the recitals are of specific facts showing compliance with formalities;¹¹ or recite in general terms that the provisions of the statute,¹² or all requirements of the constitution and statutes,¹³ have been complied with, the corporation is estopped to deny the truthfulness of such recitals. So a recital in a bond that the seal of the city is attached estops the city to deny that the clerk's seal attached to the bond is the seal of the city.¹⁴ Under a statute which provides that bonds must be signed by the mayor and aldermen, recitals in a bond which is signed by the mayor and countersigned by the clerk in accordance with the instructions of the aldermen, operate as an estoppel against the public corporation.¹⁵ However, if the question of fact is one of which purchasers are bound to take notice at their peril,¹⁶ as where they must take notice of amount of indebtedness;¹⁷ or of the facts apparent on the assessment roll, which with the recitals in the bonds in question show that the limit is exceeded;¹⁸ or if the resolution under which the bonds were issued shows on its face that they exceed the constitutional limit of indebtedness;¹⁹ or if the bond shows on its face that the election was held so soon after the organization of the county that by law the township could not issue the bonds;²⁰ or if

¹⁰ *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323.

¹¹ *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Evansville v. Dennett*, 161 U. S. 434, 40 L. ed. 760; *Wesson v. Saline Co.*, 73 Fed. 917, 20 C. C. A. 227; *Ashman v. Pulaski Co.*, 73 Fed. 927, 20 C. C. A. 232; *South St. Paul v. Lamprecht Bros.*, 88 Fed. 449.

¹² *Evansville v. Dennett*, 161 U. S. 434, 40 L. ed. 760; *Haskell Co. v. Ins. Co.*, 90 Fed. 228, 32 C. C. A. 591; *Meade Co. v. Ins. Co.*, 90 Fed. 237, 32 C. C. A. 600; *Pickens Township v. Post*, 99 Fed. 659, 41 C. C. A. 1; *Village of Kent v. Dana*, 100 Fed. 56, 40 C. C. A. 281. Examples of recitals: "In pursuance of" the statute. *Gratton Township v. Chilton*, 97 Fed. 145, 38 C. C. A. 84 [affirming, 82 Fed. 373]. "Full compliance with all requirements of" the statute. *Miller v. Irrigation District*, 99 Fed. 143; *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915A, 910.

¹³ *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225, 75 N. W. 1050.

¹⁴ *Schmidt v. Defiance*, 117 Fed. 702.

¹⁵ *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111.

Contra, *Weil v. Newbern*, 126 Tenn. 223, L. R. A. 1915A, 1009, Ann. Cas. 1913E, 25, 148 S. W. 680.

¹⁶ *Gunnison Co. v. Rollins*, 173 U. S. 255, 43 L. ed. 689.

¹⁷ *State v. Helena*, 24 Mont. 521, 63 Pac. 99.

¹⁸ *Shaw v. Independent School District*, 77 Fed. 277, 23 C. C. A. 169; *Geer v. School District*, 97 Fed. 732, 38 C. C. A. 392; *National Life Ins. Co. v. Mead*, 13 S. D. 37, 48 L. R. A. 785, 82 N. W. 78 [affirmed on rehearing, 13 S. D. 342, 83 N. W. 335]; *Citizens' Bank v. Terrell*, 78 Tex. 450, 14 S. W. 1003.

¹⁹ *Fairfield v. School District*, 111 Fed. 453 (even if they recite that they are within the limit of indebtedness and issued "in strict compliance with the laws of the state").

²⁰ *Sage v. Fargo Township*, 107 Fed. 383, 46 C. C. A. 361.

the fact recited is one which under the law the officers are not authorized to decide,²¹ no estoppel arises. So a recital of full compliance does not estop the corporation from showing that no ordinance had been passed authorizing the issue of bonds, as required by statute.²² No recitals can prevent even a bona fide holder from being charged with notice of the statute and the construction thereof,²³ or the validity of the ordinance,²⁴ by virtue of which the bonds are issued. Thus if the recital is of an election on a given day and the statute under which the bonds are issued shows that no legal election could then have been held, the bonds are invalid.²⁵ An erroneous recital of the statute authorizing the issue,²⁶ or a recital of both a valid and an invalid act authorizing such issue,²⁷ does not invalidate bonds. Purchasers are chargeable with notice of the original order of the commissioners' court as to the purpose for which the bonds are to be used, but not of a subsequent order;²⁸ and with notice apparent on the face of the county records as to a bond election, as where the votes are canvassed by a board having no authority so to do,²⁹ and as to the fact that the persons signing the bonds had ceased to be public officers and had antedated the bonds.³⁰ A bond is valid if signed by a de facto officer,³¹ but invalid if signed by one who is not an officer at all.³² Where there is no recital of compliance with the statute, the registration and certification of bonds

²¹ *Crow v. Oxford*, 119 U. S. 215, 30 L. ed. 388; *Geer v. School District*, 97 Fed. 732, 38 C. C. A. 392.

²² *Swan v. Arkansas City*, 61 Fed. 478.

²³ *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. ed. 129; *Wells v. Supervisors of Pontotoc Co.*, 102 U. S. 625, 26 L. ed. 122; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77; *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887; *Supervisors of Marshal Co. v. Cook*, 38 Ill. 44, 87 Am. Dec. 282; *Bissell v. Kankakee*, 64 Ill. 249, 16 Am. Rep. 554; *Kirsch v. Braun*, 153 Ind. 247, 53 N. E. 1082; *Uncas National Bank v. Superior*, 115 Wis. 340, 91 N. W. 1004.

²⁴ *Klamath Falls v. Sachs*, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 329 [citing, *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Barnett v. Denison*, 145 U.

S. 135, 36 L. ed. 625; *Risley v. Howell*, 57 Fed. 544]; *Peck v. Hempstead*, 27 Tex. Civ. App. 80, 65 S. W. 653.

²⁵ *Sage v. Fargo Township*, 107 Fed. 383, 46 C. C. A. 361; *Manhattan Co. v. Ironwood*, 74 Fed. 535, 20 C. C. A. 642.

²⁶ *D'Esterre v. New York*, 104 Fed. 605, 44 C. C. A. 75.

²⁷ *Evansville v. Dennett*, 161 U. S. 434, 40 L. ed. 760.

²⁸ *Mitchell Co. v. Bank*, 91 Tex. 361, 43 S. W. 880 [reversing, 15 Tex. Civ. App. 172, 39 S. W. 628].

²⁹ *Brown v. Ingalls Township*, 81 Fed. 485.

³⁰ *Lehman v. San Diego*, 73 Fed. 105.

³¹ *Ralls Co. v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *National Life Ins. Co. v. Huron*, 62 Fed. 778, 10 C. C. A. 637.

³² *Coler v. Cleburne*, 131 U. S. 162, 33 L. ed. 146.

in compliance with statute does not effect an estoppel.³³ Recitals do not work an estoppel as against one who acquires bonds from the municipality with knowledge of the facts making such bonds invalid. Thus if the bond issue exceeds the constitutional limits of indebtedness, and one purchaser buys them all, he is charged with notice of their invalidity.³⁴ So if there are no recitals in an original issue of bonds, recitals in refunding bonds given to take up the original issue can not work an estoppel in favor of holders of the original bonds who receive the new issue.³⁵ Estoppel by recitals operates only in favor of the holder of the bonds. The holder of bonds may contradict recitals therein for the purpose of establishing the validity of the bonds.³⁶

§ 1967. Ratification. If a contract is invalid because it is outside of the power of the public corporation, or not in compliance with a mandatory requirement of the law as to its form, ratification is impossible.¹ Thus the allowance by county commissioners

³³ *German Savings Bank v. Franklin Co.*, 128 U. S. 526, 32 L. ed. 519; *Citizens', etc., Association v. Perry Co.*, 156 U. S. 692, 39 L. ed. 585; *Bolles v. Perry Co.*, 92 Fed. 479, 34 C. C. A. 478.

³⁴ *Burlington Savings Bank v. Clinton*, 111 Fed. 439.

³⁵ *Salmon v. Allison*, 125 Fed. 235.

³⁶ *Chicago, etc., Ry. v. Dundy County (Neb.)*, 91 N. W. 554.

¹ *United States. Katzenberger v. Aberdeen*, 121 U. S. 172, 30 L. ed. 911; *Doon v. Cummins*, 142 U. S. 366, 35 L. ed. 1044; *Sage v. Fargo Township*, 107 Fed. 383, 46 C. C. A. 361; *Water Co. v. Wichita*, 234 Fed. 415.

California. Smeltzer v. Miller, 125 Cal. 41, 57 Pac. 668; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. 777.

Illinois. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

Indiana. Gemmill v. Arthur, 125 Ind. 258, 25 N. E. 283; *Indianapolis v. Wann*, 144 Ind. 175, 31 L. R. A. 743, 42 N. E. 901.

Kentucky. Grady v. Pruitt, 111 Ky. 100, 63 S. W. 283.

Michigan. Reed City v. Reed City Veneer & Panel Works, 165 Mich. 599, 131 N. W. 385.

Minnesota. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Minneapolis, 124 Minn. 351, 50 L. R. A. (N.S.) 143, 145 N. W. 609.

North Carolina. Wadsworth v. Comcord, 133 N. Car. 587, 45 S. E. 948.

Pennsylvania. Smith v. Philadelphia, 227 Pa. St. 423, 76 Atl. 221.

Rhode Island. McAleer v. Angell, 19 R. I. 688, 36 Atl. 588.

Washington. State v. Pullman, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265.

Wisconsin. Uncas National Bank v. Superior, 115 Wis. 340, 91 N. W. 1004; *Glidden State Bank v. School District*, 143 Wis. 617, 128 N. W. 285; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132 [distinguishing, *McGillivray v. School District*, 112 Wis. 354, 88 Am. St. Rep. 969, 58 L. R. A. 100, 88 N. W. 310, as a case where the act ratified was within the power of the corporation, though without the power of the agent originally making it]. "When a corpo-

of an invalid claim does not make it valid,² and if money is paid under such allowance it may be recovered.³ An ultra vires contract by which a public corporation agrees to pay to a railway company a part of the expenses incurred by such railway company in strengthening a bridge so as to make it suitable for use by the railway, can not be ratified.⁴

If the invalid contract was one which the corporation could make, and is not void because not in compliance with a mandatory provision of the law, it may be ratified.⁵ Thus a breach of condition avoiding the original liability may be waived by refunding such liability,⁶ and a contract invalid because no appropriation was made therefor may be ratified by an appropriation.⁷ Thus a subsequent resolution may make valid a contract void for want of such resolution.⁸ A contract made by the members of a board of education acting individually may be ratified by their conduct as a board in accepting and using goods delivered thereunder.⁹

Under specific legislative authority a public corporation may ratify a contract into which it did not have authority to enter into in the first instance.¹⁰

If the public corporation has power to ratify a contract, it can ratify it only by express words or unequivocal conduct which

ration or an agent thereof does an act or makes a promise that is forbidden by its charter or is not authorized thereby, either expressly or by fair implication, the act or promise is a nullity and can not be binding by a subsequent ratification." *City of Memphis v. Gas Co.*, 56 Tenn. (9 Heisk.) 531, 543 [quoted in *Watterson v. Nashville*, 106 Tenn. 410, 424, 61 S. W. 782].

² *Commissioners v. Heaston*, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651; *Jones v. Lucas Co.*, 57 O. S. 189, 63 Am. St. Rep. 710, 48 N. E. 862.

³ *Gross v. Whitley County*, 158 Ind. 531, 58 L. R. A. 394, 64 N. E. 25.

⁴ *Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Minneapolis*, 124 Minn. 351, 50 L. R. A. (N.S.) 143, 145 N. W. 609.

⁵ *United States. Supervisors v. Schenck*, 72 U. S. (5 Wall.) 772, 18 L. ed. 556.

Arkansas. Dell Special School Dist. No. 23 v. Johnson, — Ark. —, 195 S. W. 373.

Iowa. Hansen v. Anthon, — Ia. —, 173 N. W. 939.

Missouri. State v. Milling Co., 156 Mo. 620, 57 S. W. 1008.

New Jersey. Frank v. Board of Education, — N. J. L. —, L. R. A. 1917D, 206, 100 Atl. 211.

Pennsylvania. Bell v. Waynesboro, 195 Pa. St. 299, 45 Atl. 930.

⁶ *Graves v. Saline Co.*, 161 U. S. 359, 40 L. ed. 732.

⁷ *Hill v. Indianapolis*, 92 Fed. 467.

⁸ *Cooper v. Cedar Rapids*, 112 Ia. 367, 83 N. W. 1050.

⁹ *Johnson v. School Corporation*, 117 Ia. 319, 90 N. W. 713.

¹⁰ *Mobile Electric Co. v. Mobile*, — Ala. —, L. R. A. 1918F, 667, 79 So. 39; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721.

shows its intentions to be bound thereby.¹¹ A contract which is invalid is not ratified by the act of the public corporation in declaring it to be void and offering to enter into a different contract, which latter offer the adversary party did not accept.¹² Where the individual members of a city council encouraged an attorney to bring an action, and the council as a body ordered the city's attorney to aid in such suit and appropriated money for getting testimony therein, such official acts are not a ratification, the city not being a party to the action.¹³ If a public corporation has power to ratify a contract it can ratify it only by acts as formal as those which were necessary to enter into the original contract in the first instance.¹⁴ If a contract can be made only by an ordinance it can be ratified only by an ordinance.¹⁵

Ratification, if valid, makes the entire contract valid. Thus it validates a bond given by the contractor to the city to protect laborers and materialmen.¹⁶

If a public corporation has power to compromise a claim and it does so, it can not thereafter be heard to contend that the contract which was the basis of the original liability was invalid through failure to comply with statutory requirements and that consideration for such contract of compromise existed.¹⁷

§ 1968. Curative legislation. The legislature may ratify and validate any obligation of a public corporation which it had power to authorize in advance.¹ Thus debts in excess of the statutory

¹¹ Van Buren Light & Power Co. v. Van Buren, 116 Me. 119, 100 Atl. 371.

¹² Van Buren Light & Power Co. v. Van Buren, 116 Me. 119, 100 Atl. 371.

¹³ Root v. Topeka, 63 Kan. 129, 65 Pac. 233.

¹⁴ Astoria v. American La France Fire Engine Co., 225 Fed. 21, 139 C. C. A. 80; McCracken v. San Francisco, 16 Cal. 591; Durango v. Pennington, 8 Colo. 257, 7 Pac. 14.

¹⁵ McCracken v. San Francisco, 16 Cal. 591; Durango v. Pennington, 8 Colo. 257, 7 Pac. 14.

¹⁶ Devers v. Howard, 88 Mo. App. 253.

¹⁷ First National Bank v. Emmetsburg, 157 Ia. 555, L. R. A. 1915A, 982, 138 N. W. 451.

¹ United States. Steele Co. v. Erskine,

98 Fed. 215, 39 C. C. A. 173 [affirming, 87 Fed. 630].

Arizona. Yavapai Co. v. McCord, 6 Ariz. 423, 59 Pac. 99.

Florida. Camp v. State, 71 Fla. 391, 72 So. 483.

Indiana. Schneck v. Jeffersonville, 152 Ind. 204, 52 N. E. 212.

Kansas. Board, etc., of Linn Co. v. Snyder, 45 Kan. 636, 23 Am. St. Rep. 742, 26 Pac. 21.

Ohio. Mill Creek, etc., Ry. Co. v. Carthage, 18 Ohio C. C. 216.

South Carolina. Coleman v. Broad River Township, 50 S. Car. 321, 27 S. E. 774.

North Dakota. Erskine v. Nelson Co., 4 N. D. 66, 27 L. R. A. 696, 58 N. W. 348.

Virginia. Bell v. R. R. Co., 91 Va. 99, 20 S. E. 942.

limit may be made valid by subsequent legislation.² Thus the legislature may authorize a vote to be taken to validate debts incurred in excess of the limit of indebtedness under a constitutional provision making void debts in excess of the limit unless pursuant to a vote.³ So a statute may require a county to repay the amount received from the sale of bonds, invalid because their proceeds were to be devoted to a state armory, though most of the proceeds have been expended on such armory.⁴ So the legislature may validate a debt incurred when the legislature had power to authorize it, though the statute is not passed till after a new constitutional provision is adopted, limiting debts so as to make the amount unlawful.⁵ So Congress may validate a bond of a territory.⁶

If the legislature could authorize a public corporation to incur an obligation without submitting it to a popular vote it may ratify a prior invalid obligation.⁷ It may, by statute, cure irregularities and defects in a prior obligation without submitting such question to popular vote.⁸

A curative act makes bonds valid, even if after the passage of such act a judgment is rendered in a suit instituted before such act was passed adjudging such bonds invalid.⁹ A curative act operates to make prior obligations valid although it is passed after the supreme court has rendered a decision holding such obligations invalid;¹⁰ and judgment should thereafter be entered in conformity to such curative act.¹¹

Such curative acts must be complied with strictly. A statute making valid bonds issued in compliance with a certain ordinance does not make valid any bonds not so issued.¹²

Washington. *State v. Winter*, 15 Wash. 407, 48 Pac. 644; *Spear v. Bremerton*, 95 Wash. 264, 163 Pac. 741.

Contra, *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Post v. Pulaski Co.*, 49 Fed. 628 [affirming, 47 Fed. 282].

A constitutional amendment may ratify a prior debt. *Lucas v. Florence*, 103 S. Car. 169, 87 S. E. 996.

² *Erskine v. Nelson Co.*, 4 N. D. 66, 27 L. R. A. 696, 58 N. W. 348; *Darke v. Salt Lake Co.*, 15 Utah 467, 49 Pac. 267.

³ *West v. Chehalis*, 12 Wash. 369, 50 Am. St. Rep. 896, 41 Pac. 171.

⁴ *New York, etc., Co. v. Board, etc.*, 106 Fed. 123, 45 C. C. A. 233.

⁵ *Schneck v. Jeffersonville*, 152 Ind.

204, 52 N. E. 212 [distinguishing, *Sykes v. Columbus*, 55 Miss. 115].

⁶ *Utter v. Franklin*, 172 U. S. 416, 49 L. ed. 498.

⁷ *Camp v. State*, 71 Fla. 381, 72 So. 483.

⁸ *Camp v. State*, 71 Fla. 381, 72 So. 483.

⁹ *Middleton v. St. Augustine*, 42 Fla. 287, 29 So. 421.

¹⁰ *Spear v. Bremerton*, 95 Wash. 264, 163 Pac. 741.

¹¹ *Spear v. Bremerton*, 95 Wash. 264, 163 Pac. 741.

¹² *Lehman v. San Diego*, 83 Fed. 669, 27 C. C. A. 668. (Where the denomination of the bonds was not fixed in accordance with the ordinance.)

CHAPTER LXI

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I

HISTORY AND NATURE

§ 1969. Origin of corporation. Even in the most primitive society persons act in groups. The action of the group is likely to be different from the action of the separate individuals thereof. The action of the group may be determined by a single dominant individual, by a few of a stronger and more influential members, or by the will of the mass of the members of the group. The internal organization of the group has little or nothing to do with the question of whether the group will be recognized as an independent person in law in dealings between the group and the outside world. Indeed, in many primitive societies, the problem is not whether the group exists and has rights, but whether the individual members are to be regarded as existing and as having legal rights as distinct from the group of which they are members.

The idea of a corporation appears in law in a more or less vague way as soon as men undertake affairs which are too great for one man, which extend over more than one generation, and for which some artificial extension of personality is necessary. The primitive family group is apparently regarded as essentially continuous, without regard to the identity of its members; and in this respect it foreshadows the modern private corporation, but it also suggests the modern public corporation as well as the modern government. In a more advanced civilization when the idea of a state has become established, the corporation appears in the form of religious organizations in which continuity is felt to be necessary, and in organizations formed for the purpose of local government. In English law it is difficult to tell in many cases whether we have a corporation or a number of tenants in common, or co-owners of property. As long as property can be granted "to St. Andrew and to his church at Rochester," or as long as actions can be brought by "the Abbot of Burgh's men" against "Prince Edward's men," the courts will

not be compelled to determine whether the law recognizes the group as a legal personality apart from the individual members thereof. If rules of conveyancing and rules of pleading become more rigid and technical, and when it becomes necessary that the parties to a deed and the parties to an action must all be legal persons, the courts will be forced to determine whether the aggregation is a legal person or is a number of owners in common, and the like; in other words, they will be forced to determine whether they are dealing with a corporation or with a group of natural persons.

To some extent the problems of conveyancing and pleading are matters of names. The real question is likely to be whether it is sufficient to use the name of the group in conveyancing, pleading, and the like, or whether it is necessary to name the individual members thereof. For this reason we find the saying in the year books that a corporation is nothing but a name.¹ A name is, however, a convenient way of expressing an idea, and with the increasing technicality in the use of the name of the corporation or the individual names of the individual parties in conveyancing and pleading, the courts were driven to work out a series of rules as to the nature and existence of the corporation, and to determine the means by which the corporation could be distinguished from other groups which were not recognized as corporations.

§ 1970. Attributes of private corporation. A private corporation is in fact a number of natural persons acting together for certain purposes under a definite organization and endowed by law with certain attributes different from those of a partnership, a voluntary association, or any other union of natural persons. The most characteristic of its attributes is the so-called perpetual succession, which means that the death or withdrawal of one or all of the natural persons does not necessarily dissolve the corporate

¹ Y. B. 21 Edw. IV, f. 13.

See also, I Pollock and Maitland, *History of English Law* (second edition) 490.

While a corporation may insist on being sued by its right name, if it raises the question properly, and if it is not estopped from making such objection, it is estopped from setting up such objection if it has gone to trial upon the merits without inter-

posing such objection, and if judgment has been rendered against it. *University v. Hammock*, 127 Ky. 564, 14 L. R. A. (N.S.) 784, 106 S. W. 219.

A corporation which has made contracts under an assumed name is estopped to claim that such assumed name is not its true name, although incorporation must be proved: *Simpson v. Grand International Brotherhood*, — W. Va. —, 98 S. E. 580.

organization, and the right to contract, sue, and the like, as a person.¹ At the same time the different characteristics of a corporation may be conferred separately upon groups, such as partnerships, without making them corporations;² and, conversely, these characteristics may be taken away, one by one, from a corporation without destroying its corporate character. Whether a group of persons who are authorized to sue and to be sued by a given name, is a corporation or a form of a partnership, is a question which has caused the courts a great deal of difficulty.³ The solution of this question is ordinarily to be determined by ascertaining the intention of the legislature by which such organization was created, but no single characteristic can be selected as conclusive.

No definition of the corporation can be based on its attributes alone.⁴

¹ *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L. R. A. 927, 93 N. W. 1024.

² *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842; *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96.

³ *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585, 30 C. C. A. 295; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9; *Warner v. Ray*, 23 Wend. (N. Y.) 103.

⁴ "A corporation has been called 'a mere capacity to sue and be sued, and to take and to grant,' which is as ridiculous as it would be to say 'that a man is a mere capacity to walk with two feet.' It is not a capacity, but a political person, in which many capacities reside." I Kyd on Corporations, Introduction, 13, 14.

"When it is said that a corporation is immortal, we are to understand nothing more than that it is capable of an indefinite duration, and the authorities cited to prove its immortality do not warrant the conclusion drawn from them. If a man give lands, says Sir Edward Coke, to a mayor and commonalty, or other body aggregate, consist-

ing of many persons capable, without naming successors, the law construes it to be a fee simple, because, in judgment of law, they never die: where the sense is plain that these natural persons, though capable to take in their natural capacities jointly, which the law would adjudge an estate for lives, yet the grant being made to them in their corporate name, they take in that capacity, and the grant is not determinable on the death of any of the individuals, but continues as long as the corporation continues.

"In support of this idea of the immortality of corporations, a passage is also cited from Grotius, which, however, when fairly considered, is so far from justifying the conclusion drawn from it, that it proceeds on the supposition that they may cease to exist.

"It has been said that a corporation aggregate has neither predecessor nor successor—an expression which probably arose from the comparison of a corporation with a natural body, with respect to its personal identity, and which means nothing more than that all the individual members that have existed from the foundation to the present time, or that shall ever here-

§ 1971. Legal personality of corporation. The essential feature, therefore, of the corporation, is the fact that the law recognizes it as a legal person, separate and apart from its members.¹ If the stockholders in a corporation formed under the laws of one state, organize a corporation under the laws of another state for the purpose of succeeding to the former corporation, the two corporations

after exist, are but one person in law, in the same manner as the river Thames is still the same river, though the parts which compose it are continually changing." I Kyd on Corporations, Introduction, 17, 18.

"Several other epithets have been given to a corporation, which, unless particularly explained, are apt to bewilder and mislead the understanding: thus it has been said, that 'a corporation aggregate of many, is invisible, immortal, and rests only in intendment and consideration of the law'; that it is 'a mere metaphysical being, a mere ens rationis.'

"That a body framed by the policy of man, a body whose parts and members are mortal, should in its own nature be immortal, or that a body composed of many bulky, visible bodies, should be invisible, in the common acceptance of the words, seems beyond the reach of common understandings. A corporation is as visible a body as an army; for, though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind: when, therefore, a corporation is said to be invisible, that expression must be understood, of the right in many persons, collectively, to act as a corporation, and then it is as visible in the eye of the law, as any other right whatever, of which natural persons are capable; it is a right of such a nature, that every member, separately considered, has a freehold in it, and all, jointly considered, have an inheritance which may go in succession. Natural persons, as such, are capable of taking and hold-

ing this right, which is not taken or held in their politic, but in their natural capacity; for many men, as men, are capable of union, which, if it requires proof or illustration, is evident from the charters of creation, and the pleadings in all such cases, in which it is said that the 'men and burgesses,' or 'the men and citizens,' are constituted one body corporate or politic. And as the natural persons essentially constitute the body politic, so all the operations and exercise of this right are performed only by the natural persons." I Kyd on Corporations, Introduction, 15, 16, 17.

¹Black. Com. I, 467. Marshall, C. J., said that a corporation is "an artificial being, invisible, intangible and immortal, and existing only in contemplation of the law." *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 636, 4 L. ed. 629. Substantially similar definitions are common. Blackstone calls corporations "artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality."

England. *Queen in Prosecution v. Arnand*, 16 L. J. Q. B. (N.S.) 50; *Gramophone & Typewriter Limited v. Stanley*, [1906] 2 K. B. 856, [1908] 2 K. B. 89; *Salomon v. Salomon* [1897], A. C. 22 [reversing in part, *Broderip v. Salomon* (1895), 2 Ch. 323].

United States. *Bank v. Earle*, 38 U. S. (13 Pet.) 519, 10 L. ed. 274; *Baltimore, etc., R. R. Co. v. Church*, 108 U. S. 317, 27 L. ed. 739; *Nashua, etc., R. R. Co. v. Lowell, etc., R. R. Co.*, 136 U. S. 356, 34 L. ed. 363.

are regarded as different entities.² A change in stockholders of a corporation has no effect upon pre-existing liability of a corporation.³ Directors who have taken property as security for a corporation may convey it to the corporation by public sale, free from the equity of redemption of the creditor.⁴ So where the same persons own all the stock of two corporations the contract of one is not the contract of the other.⁵ The fact that the same person owns the majority of the stock in two corporations, does not prevent one of them from dealing with the other.⁶ If a corporation which has operated two different kinds of property is reorganized so as to form two different kinds of corporations, one for each kind of property, one corporation can not be held liable for the debts of the other.⁷ The fact that the stock of one corporation is held by another, does not render the holding corporation liable for the contracts of the other corporation.⁸ A covenant that land should never

Alabama. *Bass v. International Harvester Co.*, 169 Ala. 154, 33 L. R. A. (N.S.) 374, 53 So. 1014.

Illinois. *Coal Belt Electric Ry. Co. v. Peabody Coal Co.*, 230 Ill. 164, 120 Am. St. Rep. 282, 82 N. E. 627.

Louisiana. *Mioton v. Del Corral*, 132 La. 730, 61 So. 771.

Massachusetts. *Smith v. Hurd*, 53 Mass. (12 Met.) 371, 46 Am. Dec. 690; *Aberthow Construction Co. v. Ransome*, 192 Mass. 434, 78 N. E. 485.

New Jersey. *Wooster v. Crane*, 73 N. J. Eq. 22, 66 Atl. 1093; *Jackson v. Hooper*, 76 N. J. Eq. 592, 75 Atl. 568 [reversing, *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130].

New York. *Landers v. Church*, 114 N. Y. 626, 21 N. E. 420; *Rudd v. Robinson*, 126 N. Y. 113, 22 Am. St. Rep. 816, 12 L. R. A. 473, 26 N. E. 1046; *Stone v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 202 N. Y. 352, 35 L. R. A. (N.S.) 770, 95 N. E. 816; *United States Radiator Corporation v. State*, 208 N. Y. 144, 46 L. R. A. (N.S.) 585, 101 N. E. 783.

Utah. *Weyeth, etc., Co. v. James, etc., Co.*, 15 Utah 110, 47 Pac. 604.

Virginia. *People's Pleasure Park Co.*

v. Rohleder, 109 Va. 439, 61 S. E. 794 [affirmed on rehearing, 63 S. E. 981].

Wisconsin. *State v. Ry. Co.*, 45 Wis. 579. For discussions of the nature of the corporation, see *New York Trust Co. v. Carpenter*, 250 Fed. 668; *Marsch v. Southern New England R. Corporation*, 230 Mass. 483, 120 N. E. 120; *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Ia. 629, 46 L. R. A. (N.S.) 290, 142 N. W. 434.

² *Wooster v. Crane*, 73 N. J. Eq. 22, 66 Atl. 1093.

³ *Andres v. Morgan*, 62 O. S. 236, 78 Am. St. Rep. 712, 56 N. E. 871.

⁴ *Copsey v. Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7. As to contracts between a corporation and its officers, see § 410.

⁵ *Way Cross, etc., R. R. Co. v. R. R. Co.*, 109 Ga. 827, 35 S. E. 275.

⁶ *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Ia. 629, 46 L. R. A. (N.S.) 290, 142 N. W. 434.

⁷ *New York Trust Co. v. Carpenter*, 250 Fed. 668.

⁸ *Marsch v. Southern New England R. Corporation*, 230 Mass. 483, 120 N. E. 120; *Stone v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 202 N. Y. 352, 35 L. R. A. (N.S.) 770, 95 N. E. 816.

vest in a colored person, or person of African descent, is not broken by a conveyance to a corporation, the stockholders of which are persons of African descent, which buys the property for use as a park for negroes.⁹ For purposes of taxation, corporations are to be regarded as distinct, although one corporation owns all of the stock of another.¹⁰ If a corporation formed under the laws of one state, is compelled by the laws of another state to reincorporate, it does not thereby cease to be a citizen of the former state.¹¹ The consolidation of a corporation formed under the laws of one state with a corporation formed under the laws of another, does not destroy the power of the first state to compel its corporation to perform a contract specifically, even if such contract is invalid under the laws of the second state.¹² Under a statute which provides that a common-law judge should hear a case in equity if the chancellor were a "party," a chancellor has refused to hear a case involving the rights of an insurance company of which he was a stockholder.¹³ This decision is apparently an attempt to supplement a poorly-drawn statute by refusing to recognize the distinction between the corporation and its members. No such difficulty arises under common-law rules or under statutes which require the judge to be "disinterested," or which forbid him to act if he has an "interest." Under such a statute a judge can not determine the rights of a corporation of which he is a stockholder.¹⁴ A stockholder may take an acknowledgment,¹⁵ or act as a witness,¹⁶ to a conveyance or mortgage to the corporation of which he is a member. If A, who is insolvent, forms a corporation for the purpose of defrauding his creditors, the transfer of his property to such corporation can not be set aside, if other persons who do not know of such fraudulent intent take stock in such corporation, and pay value therefor in reliance upon A's transfer of his property to such

⁹ *People's Pleasure Park Co. v. Rohleder*, 109 Va. 439, 61 S. E. 794 [affirmed on rehearing, 63 S. E. 981].

¹⁰ *Gramophone & Typewriter Limited v. Stanley* [1906], 2 K. B. 856 [1908], 2 K. B. 89.

¹¹ *Missouri-Pacific Ry. v. Castle*, 224 U. S. 541, 56 L. ed. 875.

¹² *Mackay v. New York, N. H. & H. R. R. Co.*, 82 Conn. 73, 72 Atl. 583.

¹³ *Washington Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1.

¹⁴ *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815; *Nettleton's Appeal*, 28 Conn. 268; *Gregory v. Cleveland, Columbus & Cincinnati R. R.*, 4 O. S. 675; *Bank v. Fitzsimons*, 2 Binn. (Pa.) 454.

¹⁵ *Read v. Toledo Loan Co.*, 68 O. S. 280, 96 Am. St. Rep. 663, 67 N. E. 729.

¹⁶ *Read v. Toledo Loan Co.*, 68 O. S. 280, 96 Am. St. Rep. 663, 67 N. E. 729.

corporation.¹⁷ If A has bought goods under a contract of conditional sale, the bill of which is not filed in compliance with statute, and A conveys such goods to a corporation which he has formed, such sale can not be set aside if other persons have taken stock for value, in reliance upon such transfer of such property by A.¹⁸

No contract between the stockholders can prevent the separate legal identity of the corporation.¹⁹ The fact that the stockholders have agreed that the corporation shall be operated as a partnership, has no effect as against legislation which vests control of a corporation in the board of directors.²⁰ Conversely, a stockholder can not be held liable for the acts of the corporation.²¹

The fact that a single individual owns all of the stock of the corporation, and that he controls the corporation as if the corporate property were his own, does not prevent the law from regarding the corporation as a legal person, separate from the stockholder, whenever it is necessary so to do for the purposes of its creation.²² One who owns all of the stock of a corporation can not bring an action to recover damages for breach of a contract between the corporation and a third person.²³ In the absence of fraud, a contract between the sole stockholder and the corporation is valid and enforceable.²⁴ A sole stockholder is not liable criminally for acts of the corporation which he does not perform in person, and for which he would not be liable if it were not for the corporate organization.²⁵ A representation to the sole stockholder, to induce him to purchase stock, can not operate as an estoppel in favor of the corporation.²⁶

¹⁷ *Benton v. Minneapolis Tailoring & Mfg. Co.*, 73 Minn. 498, 76 N. W. 265.

¹⁸ *Bass v. International Harvester Co.*, 169 Ala. 154, 33 L. R. A. (N.S.) 374, 53 So. 1014.

¹⁹ *Jackson v. Hooper*, 76 N. J. Eq. 592, 75 Atl. 568 [reversing, *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130].

²⁰ *Jackson v. Hooper*, 76 N. J. Eq. 592, 75 Atl. 568 [reversing, *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130].

²¹ *Aberthow Construction Co. v. Ransome*, 192 Mass. 434, 78 N. E. 485.

²² *Aiello v. Crampton*, 201 Fed. 891, 120 C. C. A. 189; *Taylor v. Danielsonville Cotton Co.*, 82 Conn. 220, 72 Atl.

1080; *Martin v. D. B. Martin Co.*, — Del. —, 88 Atl. 612; *State v. Miner*, 233 Mo. 312, 135 S. W. 483.

²³ *Mioton v. Del Corral*, 132 La. 730, 61 So. 771.

²⁴ *Salomon v. Salomon* [1897], A. C. 22 [reversing in part, *Broderip v. Salomon* (1895), 2 Ch. 323]; *Taylor v. Danielsonville Cotton Co.*, 82 Conn. 220, 72 Atl. 1080.

²⁵ *State v. Miner*, 233 Mo. 312, 135 S. W. 483.

²⁶ *Coal Belt Electric Ry. Co. v. Peabody Coal Co.*, 230 Ill. 164, 120 Am. St. Rep. 282, 82 N. E. 627.

§ 1972. Corporation as "person." A corporation is a "person" within the meaning of the Fourteenth Amendment, securing equal protection of the law.¹ It is a "person" within the meaning of statutes which are intended to secure the rights,² such as statutes which authorized "any person" to file claims,³ or which authorize contracts with "any person or persons" for certain purposes,⁴ or which provides that a "person" may arbitrate certain claims.⁵ It was at one time held that a corporation was not a person within the meaning of a criminal statute.⁶ This is probably a relic of the original unwillingness of the courts to recognize the fact that a corporation could commit a crime. At modern law a corporation is generally held to be a "person" within the meaning of a criminal statute,⁷ such as a statute with reference to obtaining property under false pretenses.⁸

§ 1973. Corporation as "citizen." A corporation is a citizen within the meaning of the clause of the Constitution of the United States,¹ which provides that its judicial power shall extend to controversies between citizens of different states.² It is not a citizen

¹ *Southern Ry. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536.

² *Missouri, Kansas & Texas Ry. v. Cade*, 233 U. S. 642, 58 L. ed. 1135. (The supreme court of the United States will not construe a state statute as excluding corporations by using the word "person," and as therefore unconstitutional, unless it is bound by the construction placed upon such a statute by the supreme court of the state.) *Springfield v. Walker*, 42 O. S. 543; *Cincinnati Gas, Light & Coke Co. v. Avondale*, 43 O. S. 257.

³ *Missouri, Kansas & Texas Ry. v. Cade*, 233 U. S. 642, 58 L. ed. 1138.

⁴ *Cincinnati Gas, Light & Coke Co. v. Avondale*, 43 O. S. 257.

⁵ *Springfield v. Walker*, 42 O. S. 543. (A municipal corporation.)

⁶ *State v. Cincinnati Fertilizer Co.*, 24 O. S. 611.

⁷ *State v. Salisbury Ice & Fuel Co.*, 166 N. Car. 366, 52 L. R. A. (N.S.) 216, 81 S. E. 737.

⁸ *State v. Salisbury Ice & Fuel Co.*,

166 N. Car. 366, 52 L. R. A. (N.S.) 216, 81 S. E. 737.

¹ Article III, section 2, of the constitution of the United States.

² This is the practical effect of the decisions. *Sun Printing and Publishing Association v. Edwards*, 194 U. S. 377, 48 L. ed. 1027; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606.

It has been sought to reach this result by use of the useless and arbitrary fiction that the stockholders are presumed conclusively to be citizens of the state by which the corporation was created; and to say that the corporation is a citizen of the state of which its members are citizens, in accordance with this fictitious rule of citizenship. *Marshall v. Baltimore and Ohio Ry.*, 57 U. S. (16 How.) 314, 14 L. ed. 953.

The use of this fiction results in the absurdity that a stockholder who is a citizen of a state other than that which created the corporation may show diversity of citizen as a fact to enable him to bring action against such

within the clause of the Constitution of the United States,³ which provides that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.⁴ It is not a citizen within the meaning of the clause of the Fourteenth Amendment,⁵ to the effect that no state shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States.⁶ A domestic corporation may be a "citizen resident within the state," within the meaning of a statute for granting liquor licenses.⁷

§ 1974. Existence of corporation as "legal fiction." The existence of the corporation apart from its stockholders is said to be a legal fiction.¹ The creation of corporations is permitted in order to subserve the public interest, and not in order to permit the evasion or violation of rules of law. Wherever the theory that the corporation is a legal person apart from its members will result in an evasion of the law, the courts refuse to permit such evasion; and they put such refusal on the ground that the separate existence

corporation in the federal courts, while it will be presumed by a fiction, that, in his capacity as a member of the defendant corporation, he is a citizen of the state that created it. See *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606.

³ Article IV, section 2, of the constitution of the United States.

⁴ *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, 56 L. ed. 332 [affirming, *New York Life Ins. Co. v. Deer Lodge County*, 43 Mont. 243, 115 Pac. 911].

⁵ Constitution of the United States; Amendment XIV, section 1.

⁶ *Western Turf Association v. Greenburg*, 204 U. S. 359, 51 L. ed. 520; *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 So. 282; *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922, 52 L. R. A. 195, 47 Atl. 401; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940.

⁷ *Greenough v. Police Commissioners*, 30 R. I. 212, 136 Am. St. Rep. 953, 74 Atl. 785.

¹ *United States. United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257,

55 L. ed. 458; *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. ed. 577; *Linn & Lane Timber Co. v. United States*, 236 U. S. 574, 59 L. ed. 725.

California. *Higgins v. California Petroleum & Asphalt Co.*, 122 Cal. 373, 55 Pac. 155; *Higgins v. California Petroleum & Asphalt Co.*, 147 Cal. 363, 81 Pac. 1070.

Illinois. *Donovan v. Purtell*, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334.

New Hampshire. *Bowditch v. Jackson Co.*, 76 N. H. 351, 82 Atl. 1014.

Ohio: *Parkside Cemetery Association v. Cleveland, Bedford & Geauga Lake Traction Co.*, 93 O. S. 161, 112 N. E. 596 [citing, *State v. Standard Oil Co.*, 49 O. S. 137; *First National Bank v. Trebein Co.*, 59 O. S. 316; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 O. S. 189].

Tennessee. *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

Wisconsin. *Milbraith v. State*, 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252.

of a corporation is merely a legal fiction,² which is not favored in law.³ Thus where A transferred his business to a corporation in which he owned practically all the stock, it was held to be substantially a transfer to himself, as far as it operated as a fraud on his creditors;⁴ and a corporation organized without capital or assets to cover a real partnership was treated as not existing.⁵ If one corporation organizes another for its own convenience, it has been held that the first corporation is liable for money advanced to the second corporation, and used by it in transacting the business of the first corporation.⁶ If a corporation is formed in Arizona to do business in California, in order to evade a California statute which makes the stockholders personally liable for their proportion of the debts of the corporation, the stockholders may be held liable for such debts on the theory that the corporation is their agent in

² "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood." "Now so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored." *State v. Standard Oil Co.*, 49 O. S. 137, 177, 34 Am. St. Rep. 541, 15 L. R. A. 145, 30 N. E. 279.

"Modern decisions are tending to a disregard of the mental conception that a corporation is an entity separate from its corporators, as in many instances it is simply a 'stumbling block' in the way of doing justice between real persons." *Andres v. Morgan*, 62 O. S. 236, 245, 78 Am. St. Rep. 712, 56 N. E. 875.

See also, *People v. Refining Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, 9 L. R. A. 33, 24 N. E. 834.

³ *Bowditch v. Jackson Co.*, 76 N. H. 351, 82 Atl. 1014.

⁴ *Metcalf v. Arnold*, 110 Ala. 180, 55 Am. St. Rep. 24, 20 So. 301; *Benton v. Minneapolis Tailoring & Mfg. Co.*, 73 Minn. 498, 76 N. W. 265.

"His identity as owner of the property was no more changed by his conveyance to the company than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before." *Bank v. Trebein*, 59 O. S. 316, 325, 52 N. E. 834 [citing, *Hibernia Ins. Co. v. Transportation Co.*, 13 Fed. 516; *Kellogg v. Bank*, 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 587; *Terhune v. Bank*, 45 N. J. Eq. 344, 19 Atl. 377; *Bennett v. Minott*, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; *Montgomery, etc., Co. v. Drenelt*, 133 Pa. St. 585, 19 Am. St. Rep. 663, 19 Atl. 428].

See however, *Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co.*, 23 S. D. 221, 29 L. R. A. (N.S.) 589, 121 N. W. 620.

⁵ *Christian, etc., Co. v. Lumber Co.*, 121 Ala. 340, 25 So. 566.

⁶ *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

legal effect.⁷ If A has formed a number of corporations, and transfers property from one to another in order to defraud his creditors, his oral promise to reimburse one who has been defrauded by one of such corporations under his management is regarded as his personal obligation, and not as a promise to answer for the debt of another.⁸ If A and B form a corporation to take over the business of a partnership of which they were members, A may be guilty of embezzlement by reason of the misapplication by him, on behalf of the corporation, of the funds of a depositor.⁹ A judgment against a corporation can not be evaded by the transfer of the property of the corporation to another corporation, the stock of which is owned by the person who owns substantially all of the stock of the first corporation.¹⁰ If A has acquired property fraudulently, his transfer of such property to a corporation which he forms and in which he is practically the sole stockholder, does not prevent the owner of such property from recovering it from the corporation.¹¹

It is urged, on the other hand, that the rule that a corporation is a legal personality is only the recognition, by law, of the fact of the existence of a group which acts as a unit.¹²

§ 1975. Definitions of private corporation. The rule that a corporation is a legal person gives little help in determining what view the law will take of any given group. The different definitions of a corporation which have been suggested, differ from one another in that some of them emphasize the separate legal personality of the corporation,¹ some emphasize the fact that the corpora-

⁷ *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. ed. 577.

⁸ *Donovan v. Purtell*, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334.

⁹ *Milbraith v. State*, 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252.

¹⁰ *Higgins v. California Petroleum & Asphalt Co.*, 122 Cal. 373, 55 Pac. 155; *Higgins v. California Petroleum & Asphalt Co.*, 147 Cal. 363, 81 Pac. 1070.

¹¹ *Linn & Lane Timber Co. v. United States*, 236 U. S. 574, 59 L. ed. 725.

¹² See, *Maitland's Collected Papers*, volume 3, pages 321 et seq.

¹ "Bodies politike, etc." This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by Littleton a

body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, etc." I Coke's Institutes. 250a.

"According to the several definitions we have in our introduction offered of a corporation, it means an intellectual body, composed of individuals, and created by law; a body which is united under a common name, and the members of which are so capable of succeeding each other, that the body (like a river) continues always the same, notwithstanding the change of the parts that compose it." Angell & Ames on Corporations (eleventh edition), section 30, page 23.

tion is after all an aggregation of natural persons,² some emphasize the method of its creation at modern law, insisting that it is the creature of the state,³ or of the legislature,⁴ and others insist upon the fact that the right to be a corporation is a franchise.⁵ These

"A corporation is an artificial person, like the state. It is a distinct existence—an existence separate from that of its stockholders and directors." I Cook on Corporations (seventh edition), section 1, page 2.

²Olympia Mining & Milling Co. v. Kerns, 24 Ida. 481, 135 Pac. 255.

"A corporation then, or a body politic, or body incorporate, is a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." I Kyd on Corporations, Introduction, 13.

"A private corporation is a voluntary union of persons, joined together by written articles of association or incorporation under legislative authority, or by special statute on proper application to the legislature, to accomplish some pecuniary or ideal purpose authorized by the governing body of the state. Its leading features are that it has a continuous succession during the period prescribed for its existence, an individual name by which it may enter into contracts and sue and be sued, acting as a unit in respect to all matters within the scope of the purposes for which it is created, and a

distinct existence or legal entity separate and distinct from the natural persons composing it. The essential idea of a corporation is that it has 'the capacity to exist and act within the powers granted, as a legal entity, apart from the individual or individuals who constitute its members.'" I Thompson on Corporations (second edition), section 2, page 4.

³"Corporations are the creatures of statute. * * * The mode of formation, the powers to be exercised, and the manner of such exercises are matters of policy to be determined by the legislature, for the public policy which dictates the enactment of a law is determined by the legislature. Public policy is but the manifest will of the state (Jacoway v. Denton, 25 Ark. 625, 634), which must and does vary with the habits, capacities, and opportunities of the public (36 Ch. Div. 359). And when the legislature has spoken and enacted a law embodying a certain principle, the policy is determined, and the courts are not concerned with the wisdom or expediency of the legislation or policy adopted, but are merely concerned with the interpretation of the law for the purpose of ascertaining the intent of the legislature. The only limits upon the legislative power in the establishment of public policy are the restrictions contained in the state and federal constitutions." Chaffee v. Farmers' Co-operative Elevator Co., — N. D. —, 168 N. W. 616.

⁴People v. Forest Home Cemetery Co., 258 Ill. 36, 101 N. E. 219; Chaffee v. Farmers' Co-operative Elevator Co., — N. D. —, 168 N. W. 616.

⁵"A corporation has also been called a franchise. The propriety of this ap-

definitions are not inconsistent except so far as inconsistency may result from an over-emphasis on one particular feature, rather than upon a recognition of all the elements which go to make a corporation. It is said that a corporation is the creature of statute, and that the legislature determines the method by which it is formed, the powers which shall be conferred upon it and the method by which such powers shall be exercised.⁶ This is a correct statement under modern constitutional law, but it can not be regarded as a statement of any essential element of a corporation. No statement of the essential features of a corporation can be regarded as correct which excludes the corporations which existed at common law or by immemorial prescription or by royal charter.

While the term "corporate" is in itself broad enough to include public corporations as well as private corporations, it is ordinarily used at modern law with reference to private corporations, unless the context or some qualifying adjective shows that public corporations are included.⁷

pellation depends on the more or less extensive meaning in which the word 'franchise' is used. In its most extensive sense it expresses every political right which can be enjoyed or exercised by a freeman: in this sense, the right of being tried by a jury, the right a man may have to an office, the right of voting at elections, may, with propriety, be called franchises; and in this sense, the right of acting, as a corporation, may be called a franchise, existing collectively in all the individuals of whom the corporation is composed; in this sense, and in this sense alone, 'the franchise of being a corporation,' can have any precise meaning.

"In a less general and more appropriate sense, the word 'franchise' means a royal privilege in the hands of a subject, by which he either receives some profit, or has the exclusive exercise of some right: of the first kind are the goods of felons, waifs, estrays, wrecks, or the like; of the second are courts, gaols, return of writs, fairs, markets,

and many others. They are estates and inheritances, which may be granted and conveyed from one to another, as other estates, which is not the case with a corporation. In this sense a corporation can not be called a franchise—the latter is a privilege, or liberty, which can have no existence without reference to some person to whom it may belong; the former is a political person, capable, like a natural person, of enjoying a variety of franchises; it is to a franchise, as the substance to its attribute; it is something to which many attributes belong, but is itself something distinct from those attributes." I Kyd on Corporations, Introduction, 14.

⁶ *Chaffee v. Farmers' Co-operative Elevator Co.* — N. D. —, 168 N. W. 616.

⁷ *Strawberry Hill Land Corporation v. Starbuck*, — Va. —, 97 S. E. 362.

See also, *Foster v. Cowlitz County*, 100 Wash. 502, 171 Pac. 539.

§ 1976. Effect of divergence as to fundamental legal theories of corporation. This contradiction between the fact that a corporation is an association of natural persons and the theory that it is a distinct legal entity, is the cause of the undoubted confusion that now exists in the law of corporations. The courts vacillate between a desire to effect justice by treating contracts and other transactions of a corporation as they would those of a partnership or other association of individuals as far as rights of creditors are concerned, and a desire, in conformity to precedent, to treat them as those of an artificial person of limited powers, distinct from its stockholders. This confusion as to the legal effect of contracts of corporations is increased by additional causes: First, rules which properly apply to public corporations which exercise governmental powers affecting the whole public have been extended to private corporations. Second, rules which properly determine the extent of corporate power as between the state and the corporation in a direct proceeding to oust the corporation from unlawful exercise of franchises, have been extended to determine the validity of contracts entered into voluntarily between the corporation and private individuals. Third, rules which properly determine the rights of stockholders who actively dissent from the management of the corporation to invoke the action of courts of equity to restrain the directors from exceeding their authority, have been extended so as to determine the validity of contracts entered into by a corporation without objection from its stockholders, and often with their active assent; and these rules have been so applied as to render invalid contracts which the stockholders might not have been able to prevent the directors from making.

II

POWERS

§ 1977. The charter of the corporation. The charter of the corporation measures the powers which it may exercise lawfully.¹ This charter is given by the state and accepted by the corporation. Under the old system of incorporation a corporation was created by a special act of the legislature, which was known as its charter,

¹ In re German Savings & Loan Association, 253 Fed. 722; General Investment Co. v. Bethlehem Steel Corporation, 248 Fed. 303; Alabama City, G. & A. Ry. Co. v. Kyle, — Ala. —, 81 So. 54; German-American Bank v. Kopp, 132 Md. 422, 103 Atl. 1009; Sturdevant Bros., etc., Co. v. Bank, 69 Neb. 220, 95 N. W. 819 [affirming on rehearing, 62 Neb. 472, 87 N. W. 156].

and which created, determined and limited its corporate powers. Many state constitutions now provide that corporations must be incorporated under general laws. Under such provisions a corporation is usually created by filing articles of incorporation in accordance with the provisions of the general incorporation laws; and when its charter is spoken of this is a convenient and stereotyped form of expression used to denote its articles of incorporation, together with the general laws applicable to a corporation, which determine its corporate powers.² A corporation can not by its articles of association assume a greater power than that given in the general statute,³ though such addition does not invalidate the powers authorized by statute.⁴ A corporation can not be organized for the purpose of practicing law,⁵ even under a statute which authorizes a corporation to be organized for any lawful business,⁶ since practicing law is not a lawful business except for those who are admitted to practice in accordance with statute. Accordingly, a corporation can not be formed for the purpose of defending its members in all civil or criminal actions.⁷

Since the charter of a corporation is given by the state, the members of a corporation can not alter or increase the powers of the corporation as the members of a partnership can alter or increase the powers of the partnership. This distinction results in many of the practical differences between the contracts of partnerships and those of corporations. The moment at which a corporation de jure comes into existence depends on local statute. In Wisconsin it exists as soon as its articles of association are recorded;⁸ in Ohio it does not exist until it organizes by electing a board of directors, after the stock is subscribed.⁹

² *Danville v. Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; *McLeod v. Medical College*, 69 Neb. 550, 96 N. W. 265.

³ *Oregon, etc., Co. v. Ry. Co.*, 130 U. S. 1, 32 L. ed. 837; *People v. Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 8 L. R. A. 497, 22 N. E. 798; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 72 Am. St. Rep. 326, 54 N. E. 407.

⁴ *Shoun v. Armstrong* (Ter. Ch. App.), 59 S. W. 790.

⁵ *In re Co-operative Law Co.*, 198 N. Y. 479, 32 L. R. A. (N.S.) 55, 92 N. E. 15; *State v. Merchants' Protective*

Corporation, — Wash. —, 177 Pac. 604.

⁶ *In re Co-operative Law Co.*, 198 N. Y. 479, 32 L. R. A. (N.S.) 55, 92 N. E. 15.

⁷ *State v. Merchants' Protective Corporation*, — Wash. —, 177 Pac. 604.

⁸ *Badger Paper Co. v. Rose*, 95 Wis. 145, 37 L. R. A. 162, 70 N. W. 302; *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.*, 144 Wis. 224, 32 L. R. A. (N.S.) 436, 128 N. W. 861.

⁹ *State v. Ins. Co.*, 49 O. S. 440, 34 Am. St. Rep. 573, 16 L. R. A. 611, 31 N. E. 658.

§ 1978. Scope and construction of corporate charters. The original rule for determining the powers of a corporation was that the charter must be construed strictly against the corporation,¹ and this is still repeated by some courts.² It is still in force when the grant construed is a gift of franchises or exclusive privileges,³ or of exemption from taxation,⁴ or of immunity from damages for a wrongful act,⁵ or other gift in derogation of sovereign authority; but it has little application to the construction of corporate powers when the rights and liabilities of those dealing with the corporation are concerned.

After the supreme court of the United States held, in the Dartmouth College case,⁶ that the charter of a corporation might be a contract between the state and the corporation, and, accordingly, under the clause of the federal constitution prohibiting a state from impairing the obligation of contracts, it would be beyond the power of the state to revoke corporate powers once granted, the state courts were more than ever disposed to adhere to the old rule. But when by express reservation in state constitutions corporate powers remain under state control, the tendency is toward a more reasonable construction of grants of corporate authority.⁷

¹ United States. *Perrine v. Canal Co.*, 50 U. S. (9 How.) 172, 13 L. ed. 92.

California. *Bartram v. Turnpike Co.*, 25 Cal. 283.

Illinois. *St. Louis, etc., Co. v. Haller*, 82 Ill. 208.

Nebraska. *Lincoln, etc., Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802.

New Jersey. *Mayor of Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 547; *Morris Canal, etc., Co. v. R. R.*, 16 N. J. Eq. 419.

Ohio. *Straus v. Insurance Co.*, 5 O. S. 59; *Bank v. Swayne*, 8 Ohio 257, 32 Am. Dec. 707; *Bonham v. Taylor*, 10 Ohio 108; *State v. Cincinnati, etc., Co.*, 18 O. S. 262.

Pennsylvania. *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; *Commonwealth v. R. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471.

Tennessee. *Talmdge v. Transportation Co.*, 40 Tenn. (3 Head.) 337.

² Oregon, etc., *Co. v. Oregonian Ry.*, 130 U. S. 1, 32 L. ed. 837; *Pearsall v.*

Ry., 161 U. S. 646, 40 L. ed. 838; *Louisville, etc., Ry. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849 [reversing, 73 Fed. 933; *American, etc., Co. v. R. R.*, 157 Ill. 641, 42 N. E. 153]; *Illinois Health University v. People*, 166 Ill. 171, 46 N. E. 737.

³ *Stein v. Water Supply Co.*, 141 U. S. 67, 35 L. ed. 622; *Covington, etc., Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560; *Indianapolis, etc., R. R. Co. v. R. R. Co.*, 127 Ind. 360, 8 L. R. A. 539, 24 N. E. 1054, 26 N. E. 893; *State v. Cincinnati Gas, Light & Coke Co.*, 18 O. S. 262; *State v. Hamiltons*, 47 O. S. 52, 23 N. E. 935.

⁴ *Chesapeake, etc., Ry. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121.

⁵ *Killam v. Norfolk & W. Ry. Co.*, 122 Va. 541, 98 S. E. 506.

⁶ *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. ed. 629.

⁷ *National Bank v. Insurance Co.*, 41 O. S. 1; *Gaff v. Flesher*, 33 O. S. 107.

In determining the scope of corporate power in making contracts two rules have been advanced, which in their abstract form are not perfectly consistent: The first is that corporate power includes only such as is expressly granted by the corporate charter, together with those powers which are necessary to carry the express powers into execution.⁸ The second rule is that corporate power includes express powers and such incidental powers as are proper and convenient for executing the express powers given by the charter;⁹ or as otherwise expressed, it has within the limits of its general grant of power all the powers that an individual would have in executing such general power.¹⁰ In practical application

⁸ **United States.** *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 9 L. ed. 773; *Minturn v. Larue*, 64 U. S. (23 How.) 435, 16 L. ed. 574; *General Investment Co. v. Bethlehem Steel Corporation*, 248 Fed. 303; *In re German Savings & Loan Association*, 253 Fed. 722.

California. *Vandall v. Dock Co.*, 40 Cal. 83.

Illinois. *Chicago, etc., Co. v. Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; *People, ex rel., Peabody v. Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 8 L. R. A. 497, 22 N. E. 798; *People, ex rel., Moloney v. Pullman's, etc., Co.*, 175 Ill. 125, 51 N. E. 664; *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

Indiana. *Franklin National Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 39 L. R. A. 725, 49 N. E. 592.

Kansas. *Fulton v. Land, etc., Co.*, 47 Kan. 621, 28 Pac. 720; *Bankers' Union v. Crawford*, 67 Kan. 449, 73 Pac. 79.

Louisiana. *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 So. 408.

Maryland. *German-American Bank v. Kopp*, 132 Md. 422, 103 Atl. 1009.

Massachusetts. *Lindenborough Glass Co. v. Glass Co.*, 111 Mass. 315.

Missouri. *State, ex rel., Crow v. Trust Co.*, 144 Mo. 562, 46 S. W. 593.

Pennsylvania. *Equitable Trust Co.*

v. Garis, 190 Pa. St. 544, 70 Am. St. Rep. 644, 42 Atl. 1022.

Tennessee. *Union Bank v. Jacobs*, 25 Tenn. (6 Humph.) 515.

Texas. *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055. "It is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities such as an individual or an ordinary partnership, and if such a power is claimed for it, the words giving the power, or from which it is necessarily implied must be found in the charter or it does not exist." *National, etc., Association v. Bank*, 181 Ill. 35, 40, 72 Am. St. Rep. 245, 54 N. E. 619.

⁹ **United States.** *White Water, etc., Co. v. Vallette*, 62 U. S. (21 How.) 414, 16 L. ed. 154; *Green Bay & Minnesota Ry. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. ed. 413.

Alabama. *Alabama City, G. & A. Ry. Co. v. Kyle*, — Ala. —, 81 So. 54.

California. *McKiernan v. Lenzen*, 56 Cal. 61.

Minnesota. *Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673.

Ohio. *Central, etc., Co. v. Dairy Co.*, 60 O. S. 96, 53 N. E. 711.

Pennsylvania. *Malone v. Lancaster, etc., Co.*, 182 Pa. St. 309, 37 Atl. 932.

¹⁰ *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Thompson v. Lambert*, 44 Ia. 239; *Stockton v. Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl.

there is little difference between these two rules, as the term "necessary" in the first rule is usually treated as equivalent to "suitable" or "appropriate."¹¹ "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it."¹²

§ 1979. Implied powers. If power is either expressly given or expressly denied to a corporation by its charter, the only question open for discussion is the meaning of the express terms of the charter. But where a corporation attempts to exercise power neither expressly given nor withheld by its charter, the question presented is whether the power is implied from those expressly given. An exhaustive discussion of this question would occupy more space than can be given to it here, and properly belongs to corporation law. The following illustrations are given rather as suggestive examples than as an exhaustive enumeration of implied powers.

§ 1980. Borrowing money. A corporation has an implied power to borrow money for corporate purposes,¹ and to give its notes for its debts,² or its negotiable bonds,³ to pledge its bonds for

971; Ohio, etc., *Co. v. Merchants', etc.*, Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742.

¹¹ *General Investment Co. v. Bethlehem Steel Corp.*, 248 Fed. 303.

¹² *Hood v. New York, etc., R. R. Co.*, 22 Conn. 1, 16 [quoted in *Niccollet National Bank v. Friak-Turner Co.*, 71 Minn. 413, 418, 70 Am. St. Rep. 334, 74 N. W. 160].

See also, *General Investment Co. v. Bethlehem Steel Corp.*, 248 Fed. 303.

¹ *Kneeland v. Ry. Co.*, 167 Mass. 161, 45 N. E. 86; *Turney v. Combination Brick Co.*, 184 Mich. 439, 151 N. W. 590; *Jacobs v. Monaton Realty Investment Co.*, 212 N. Y. 48, 105 N. E. 968; *Eastman v. Parkinson*, 133 Wis. 375, 13 L. R. A. (N.S.) 921, 113 N. W. 649.

² *United States. Tod v. Land Co.*, 57 Fed. 47.

California. Temple, etc., Ry. v. Hellman, 103 Cal. 634, 37 Pac. 530.

Massachusetts. Bank v. Gaslight Co., 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; *Kneeland v. Ry.*

Co., 167 Mass. 161, 45 N. E. 86; *Pratt v. Higginson*, 230 Mass. 256, 119 N. E. 661.

Michigan. Peninsular, etc., Bank v. Hosie, 112 Mich. 351, 70 N. W. 890.

Minnesota. Africa v. News-Tribune Co., 82 Minn. 283, 84 N. W. 1019.

New Jersey. National Bank v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

Wisconsin. Eastman v. Parkinson, 133 Wis. 375, 13 L. R. A. (N.S.) 921, 113 N. W. 649.

Under sections 3088 and 3093 of the civil code of California, a bond which shows upon its face that it is secured by a trust deed or by a mortgage is non-negotiable, and this applies to bonds issued by corporations, although the reasons for making them non-negotiable which apply to bonds issued by natural persons, do not apply with equal force to bonds issued by corporations. *Crocker National Bank v. Byrne*, — Cal. —, 173 Pac. 752.

³ *Pratt v. Higginson*, 230 Mass. 256, 119 N. E. 661.

its indebtedness,⁴ and to secure its debts by mortgage.⁵ Thus a corporation formed to buy land may mortgage land thus bought for the purchase money,⁶ and after-acquired property may be mortgaged.⁷ Under a statute requiring the consent of the stockholders at a regularly called meeting as a condition precedent to the validity of a mortgage, a mortgage given under other circumstances is said to be *ultra vires*.⁸ However, such a statute restricting the power to give mortgage, requiring a majority of the stockholders to acquiesce, applies to the corpus of the property, not to the output.⁹

§ 1981. Borrowing in excess of limitation of indebtedness. If a corporation borrows money in excess of its limitation of indebtedness from one who does not know that the limitation is exceeded, the weight of authority is that the corporation is liable therefor,¹ at least to the extent of benefits received in the transaction,² or as

⁴United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Machine Co., 182 Ky. 473, 206 S. W. 806; New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880 [sub nomine, Rawlings v. Gaslight Co., 60 S. W. 206].

The fact that a corporation pledges bonds the par value of which exceeds the amount for which they are pledged, does not render the transaction invalid. United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Machine Co., 182 Ky. 473, 206 S. W. 806.

⁵United States. Jones v. Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030.

⁶Illinois. Wood v. Whelen, 93 Ill. 153.

⁷Indiana. Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

⁸Kentucky. Bell, etc., Co. v. Glass Works Co., 106 Ky. 7, 23; 50 S. W. 2, 1092; 51 S. W. 180 [reversing on rehearing, 48 S. W. 440].

⁹Massachusetts. Burrill v. Bank, 43 Mass. (2 Met.) 163, 35 Am. Dec. 395.

¹Ohio. Hays v. Gallion, etc., Co., 29 O. S. 330.

²Tennessee. Hunt v. Gaslight Co., 95 Tenn. 136, 31 S. W. 1006.

³Texas. Threadgill v. Pumphrey, 87 Tex. 573, 30 S. W. 356 [affirming, 9 Tex. Civ. App. 184, 28 S. W. 450].

⁴Wisconsin. Eastman v. Parkinson, 133 Wis. 375, 13 L. R. A. (N.S.) 921, 113 N. W. 649.

⁵Sheppard v. Mining Co., 25 Ont. 305.

⁶Frank v. Hicks, 4 Wyom. 502, 35 Pac. 473 [rehearing denied, 4 Wyom. 534, 35 Pac. 1025]. By statute in Georgia, a corporation can not mortgage future income. Lubroline Oil Co. v. Bank, 104 Ga. 376, 30 S. E. 409.

⁷Southern, etc., Association v. Stable Co., 128 Ala. 624, 25 So. 654.

⁸Alabama, etc., Co. v. McKeever, 112 Ala. 134, 20 So. 64.

⁹Wood v. Water Works Co., 44 Fed. 146, 12 L. R. A. 168; Weber v. Bank, 64 Fed. 208; Humphrey v. Association, 50 Ia. 607; Garrett v. Plow Co., 70 Ia. 697, 59 Am. Rep. 461, 29 N. W. 395; Warfield v. Canning Co., 72 Ia. 666, 2 Am. St. Rep. 263, 34 N. W. 467.

¹⁰Peatman v. Centreville, etc., Co., 100 Ia. 245, 69 N. W. 541; Beach v. Wakefield, 107 Ia. 567, 591; 76 N. W. 688 [modified on rehearing, 78 N. W. 197].

far as it is used to pay pre-existing indebtedness.³ One lending money is subrogated to prior debts as far as they are discharged by the new loan,⁴ but is not subrogated to the security or priority of such creditors.⁵ Subsequent creditors who knew that the prior indebtedness exceeded the limit can not attack the validity of a mortgage given to secure such debt.⁶ Its mortgage for such indebtedness can not be attacked by subsequent lienholders.⁷ Some jurisdictions hold that the corporation is liable only up to the amount limited,⁸ and where the subsequent creditors do not know of the prior debt the mortgage is void as to the excess above the limit of indebtedness as against their rights, and recording the mortgage is not notice.⁹ If the loan does not exceed the amount limited by the charter, and the lender does not know of the existence of prior loans, the fact that such prior loans, together with the loan in question, exceed the limitation of the charter, does not render the loan invalid.¹⁰

§ 1982. Accommodation paper. A corporation has no power to issue accommodation paper,¹ even if the transaction is one in which it would be good business policy for a natural person to ex-

³ *In re Cork, etc., Co.*, L. R. 4 Ch. App. 748; *Powell v. Blair*, 133 Pa. St. 550, 19 Atl. 559.

⁴ *In re Cork, etc., Co.*, L. R. 4, Ch. App. 748.

⁵ *In re Wrexham, etc., Ry.* [1899], 1 Ch. 440, 68 L. J. Ch. 270.

⁶ *Central Trust Co. v. Columbus, etc., Ry. Co.*, 87 Fed. 815 [citing, *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317; *Logan County National Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107]; *Beach v. Wakefield*, 107 Ia. 567, 591; 76 N. W. 688, 78 N. W. 197.

⁷ *Beach v. Wakefield*, 107 Ia. 567, 591; 76 N. W. 688, 78 N. W. 197.

⁸ *First National Bank v. Kiefer, etc., Co.*, 95 Ky. 97, 23 S. W. 675; *Kraniger v. Building Society*, 60 Minn. 94, 61 N. W. 904.

⁹ *Bell, etc., Co. v. Glass Works*, 106 Ky. 7, 23; 50 S. W. 2, 1092; 51 S. W.

180 [reversing on rehearing, 48 S. W. 440].

¹⁰ *Citizens' Bank v. Bank of Waddy*, 126 Ky. 169, 11 L. R. A. (N.S.) 598, 103 S. W. 249.

¹ *United States. Tod v. Land Co.*, 57 Fed. 47; *Lyon, etc., Co. v. Bank*, 85 Fed. 120, 29 C. C. A. 45; *Park Hotel Co. v. Bank*, 86 Fed. 742, 30 C. C. A. 409.

Alabama. *Steiner v. Lumber Co.*, 120 Ala. 128, 26 So. 494.

California. *Hall v. Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

Connecticut. *Aetna, etc., Bank v. Ins. Co.*, 50 Conn. 167.

Georgia. *Luden v. Enterprise Lumber Company*, 146 Ga. 284, L. R. A. 1917C, 485, 91 S. E. 102.

Illinois. *Wheeler v. Bank*, 188 Ill. 34, 58 N. E. 598.

Iowa. *Lucas v. Transfer Co.*, 70 Ia. 541, 59 Am. Rep. 449, 30 N. W. 771.

Kentucky. *Trapp v. Bank*, 101 Ky. 485, 41 S. W. 577 [modified on rehearing, 43 S. W. 470]; *M. V. Monarch Co.*

cute an accommodation paper.² Hence, a corporation can not guarantee commercial paper executed by another.³ So a corporate note, signed for the corporation by its president, payable to himself, is prima facie void, even if the holder of the note requested that it be made payable to the president.⁴ Some authorities seem to dissent from this view, and to hold that the assent of all the stockholders and directors may bind the corporation on an accommodation paper.⁵ But where the corporation is really the principal debtor its note is binding, though it takes the form of accommodation paper.⁶ A corporation is liable on an indorsement made in part for the benefit of the corporation and in part for the benefit of another, where the corporation received and retained benefits;⁷ it may buy goods by indorsing a note of another;⁸ and it is liable where the money was nominally lent to its stockholders,⁹ or its directors,¹⁰ but really to the corporation, though the transaction takes the form of the corporation's securing their personal debts. A real estate company may give its note for the debt of another, which is secured by attachment on land previously purchased by such corporation;¹¹ and where a partnership incorporates and the corporation becomes

v. Bank, 105 Ky. 430, 88 Am. St. Rep. 310, 49 S. W. 317.

Massachusetts. Monument, etc., Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Nebraska. Preston v. Cereal Co., 67 Neb. 45, 93 N. W. 136.

New Jersey. Blake v. Mfg. Co. (N. J. Eq.), 38 Atl. 241.

New York. Bank of Genesee v. Bank, 13 N. Y. 309; *National, etc., Bank v. German, etc., Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567.

Ohio. Benedict v. Bank, 4 Ohio N. P. 231, 6 Ohio Dec. 320.

Pennsylvania. Culver v. Reno, etc., Co., 91 Pa. St. 367.

Rhode Island. Cook v. American Tubing & Webbing Co., 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641.

West Virginia. Haupt v. Vint, 66 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

Wisconsin. Madison, etc., Co. v. Road Co., 7 Wis. 59.

²*Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641.

³*M. V. Monarch Co. v. Bank*, 105 Ky. 430, 88 Am. St. Rep. 310, 49 S. W. 317.

⁴*Porter v. Grain Co.*, 78 Minn. 210, 80 N. W. 965.

⁵*Murphy v. Improvement Co.*, 97 Fed. 723; *Martin v. Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303 (obiter).

⁶*Burke Brick Co. v. First National Bank*, 249 Fed. 607, 161 C. C. A. 533; *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345; *Bank v. Flour Co.*, 41 O. S. 552.

⁷*Lyon, etc., Co. v. Bank*, 85 Fed. 120, 29 C. C. A. 45.

⁸*National Bank v. Allen*, 90 Fed. 545, 33 C. C. A. 169.

⁹*Stough v. Mill Co.*, 54 Neb. 500, 74 N. W. 868.

¹⁰*Allen v. Hotel Co.*, 95 Tenn. 480, 32 S. W. 962.

¹¹*Leonard, etc., Co. v. Bank*, 86 Fed. 502, 30 C. C. A. 221.

liable for partnership obligations,¹² a note for such obligation, signed by the corporation as surety, is binding on the corporation, since as to the payee it is a corporation debt.¹³ So a corporation may buy a business and assume the debts thereof.¹⁴ A corporation is liable on its accommodation paper if in the hands of a bona fide holder for value and before maturity.¹⁵ But where certain warehouse receipts were given by a corporation as collateral security to a bank, for its loan, and before the loan was entirely paid the treasurer of the corporation notified the bank that the corporation was indebted to him and that the receipts were to remain to secure his existing indebtedness to the bank and this statement was false, it was held that the pledging of the receipt for his debt was ultra vires.¹⁶ If a corporation has received a negotiable instrument and if it transfers such instrument in the ordinary course of business, it is liable upon its indorsement thereon.¹⁷ If the payment of a debt of a corporation will discharge the debt of a third person at the same time, a note given by such corporation for such debt is a valid obligation and not an accommodation instrument.¹⁸ If a corporation has given accommodation paper and has received the amount thereof from the primary debtors, the corporation is liable thereon.¹⁹

¹² *Pratt v. Mfg. Co.*, 64 Fed. 569; *Schufeldt v. Smith*, 139 Mo. 367, 40 S. W. 887; *Reed Bros. Co. v. Bank*, 46 Neb. 168, 64 N. W. 701; *Andres v. Morgan*, 62 O. S. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

Apparently contra, *Lamkin v. Mfg. Co.*, 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042, where it seems to be held that the corporation may assume the partnership debts, but is not otherwise liable.

¹³ *Andres v. Morgan*, 62 O. S. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

¹⁴ *Dominion, etc., Co. v. Publishing Co.*, 32 N. B. 692; *Farmers' Bank v. Steamboat Co.*, 108 Ky. 447, 56 S. W. 719.

¹⁵ *Georgia. Jacobs, etc., Co. v. Banking, etc., Co.*, 97 Ga. 473, 25 S. E. 171.

Massachusetts. Monument National Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Minnesota. American, etc., Bank v. Gluck, 68 Minn. 129, 70 N. W. 1065.

New Jersey. National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

Pennsylvania. Empire National Bank v. High Grade Oil Refining Co., 260 Pa. St. 255, 103 Atl. 602.

¹⁶ *Wheeler v. Bank*, 186 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598 [reversing, 85 Ill. App. 28].

¹⁷ *In re Prospect Leasing Co.*, 260 Fed. 707.

¹⁸ *Bank v. Flour Co.*, 41 O. S. 552; *Andres v. Morgan*, 62 O. S. 236, 56 N. E. 875.

¹⁹ *Burke Brick Co. v. First National Bank*, 249 Fed. 607, 161 C. C. A. 533.

§ 1983. Suretyship. A contract of suretyship in no way beneficial to the corporation is ultra vires.¹ The courts are divided as to the power of a corporation to enter into contracts of guaranty as an incidental means of carrying on its business. It is often stated as an abstract proposition that a corporation may guarantee performance of the contracts of others whenever it is reasonably necessary or proper for carrying its own express powers into effect,² but like other abstract rules this form of statement is of little practical value.

Some authorities hold that a contract of suretyship is invalid where not expressly authorized, even if on an independent consideration,³ or if very beneficial to the corporation.⁴ Thus it can not guarantee performance of a contract for erecting a plant to get the sale of iron work for the plant to the contractor whose contract it guarantees;⁵ nor can it sign an appeal bond as surety in order to keep the defendant in business so that he can continue to buy beer of the corporation,⁶ or to obtain a preference in collecting claims by suit;⁷ nor can a bank become surety on a replevin bond;⁸ nor can a railway guarantee expenses of a festival to induce an increase in passenger traffic.⁹ In the absence of specific statutory authority, a railway has no power to guaranty interest on bonds and divi-

¹ *Wheeler v. Bank*, 188 Ill. 34, 30 Am. St. Rep. 161, 58 N. E. 598; *Pollitz v. Public Utilities Commission*, 96 O. S. 49, L. R. A. 1918D, 166, 117 N. E. 149; *Haupt v. Vint*, 68 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

² *United States. Zabriskie v. R. R. Co.*, 64 U. S. (23 How.) 381, 16 L. ed. 488; *Tod v. Land Co.*, 57 Fed. 47; *Marbury v. Land Co.*, 62 Fed. 335, 10 C. C. A. 393.

Georgia. Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S. E. 358.

New Jersey. Ellerman v. Chicago, etc., Co., 49 N. J. Eq. 217, 23 Atl. 287.

New York. Holmes v. Willard, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083.

Ohio. Pollitz v. Public Utilities Commission, 96 O. S. 49, L. R. A. 1918D, 166, 117 N. E. 149.

³ *Great Northwest, etc., Ry. v. Charlebois* [1899], App. Cas. 114; *Ward v. Joel*, 105 Fed. 224, 44 C. C. A. 456;

Rogers v. Belting Co., 184 Ill. 574, 56 N. E. 1017 [reversing, *Jewell Belting Co. v. Rogers*, 84 Ill. App. 249].

⁴ *Western Maryland R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 2 L. R. A. (N.S.) 867, 62 Atl. 351; *Pollitz v. Public Utilities Commission*, 96 O. S. 49, L. R. A. 1918D, 166, 117 N. E. 149.

⁵ *Humboldt, etc., Co. v. Milling Co.*, 62 Fed. 356, 10 C. C. A. 415.

⁶ *Best Brewing Co. v. Klassen*, 195 Ill. 37, 76 Am. St. Rep. 26, 50 L. R. A. 765, 57 N. E. 20.

⁷ *Kelly, etc., v. Varnish Co.*, 90 Ill. App. 287.

⁸ *Sturdevant Bros. v. Bank*, 69 Neb. 220, 95 N. W. 819 [affirming on rehearing, 62 Neb. 472, 87 N. W. 156]. (It not appearing that such course of action was necessary to protect the bank's interests.)

⁹ *Davis v. R. R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

dends on stock of a summer hotel company, although the construction and operation of such hotel will increase the business of the railway.¹⁰ A railway corporation has no power to join with other railways in a guaranty of bonds issued by a different railway, of which such guaranteeing railway owns but a part.¹¹

In other jurisdictions it is held that contracts of guaranty are binding if they are reasonably adapted to giving opportunities to the corporation to secure business of the sort for which it was formed, by means of entering into such contract of guaranty.¹² It has been held that a corporation formed for the purpose of selling lumber may become surety on the bond of a contractor in order to secure the sale of lumber to him.¹³ A railroad, to obtain consent for its right of way, may guarantee the value of lots or agree to pay the difference between a fixed price and what the lots will bring at auction.¹⁴ A corporation formed to sell land may agree to join with another person in repurchasing land sold and to divide the profit and loss with such co-purchaser in order to diminish its own losses;¹⁵ a guaranty by a brewing company of the rent of the building in which its beer is sold has been upheld,¹⁶ and so has the liability of a brewery and distillery upon a liquor dealer's bond, required by statute;¹⁷ a hotel may subscribe toward the expenses of a military encampment to draw trade;¹⁸ a corporation formed to manufacture and deal in merchandise may make a subscription to secure the location of a postoffice in an adjoining building in

¹⁰ *Western Maryland R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 2 L. R. A. (N.S.) 887, 62 Atl. 351.

¹¹ *Pollitz v. Public Utilities Commission*, 96 O. S. 49, L. R. A. 1918D, 166, 117 N. E. 149.

¹² *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357; *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082; *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294.

¹³ *Central Lumber Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543 [affirming, 102 Ill. App. 333]; *F. Wittmer, etc., Co. v. Rice*, 23 Ind. App. 586, 55 N. E. 868; *Wheeler, etc., Co. v. Land Co.*, 14 Wash. 630, 45

Pac. 316; *Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 84 N. W. 833.

¹⁴ *Vanderveer v. Ry. Co.*, 82 Fed. 365.

¹⁵ *Bates v. Beach Co.*, 109 Cal. 160, 41 Pac. 855; same case, *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605.

¹⁶ *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082 (under Iowa statute); *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Or. 560, L. R. A. 1918C, 1001, 170 Pac. 294; *Winterfield v. Brewing Co.*, 96 Wis. 239, 71 N. W. 101.

¹⁷ *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357.

¹⁸ *Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044.

order to increase its trade;¹⁹ and a lumber company may guarantee bonds of a railroad to carry its lumber to market.²⁰ A corporation formed to lay out and sell lots and promote a town may guarantee the location and operation of a railway in order to induce a store to move to the town,²¹ and a street railway company may subscribe to induce a baseball company to locate its grounds on said car line.²² So where a debtor corporation had given a creditor corporation an order for the proceeds of the sale of certain articles in process of manufacture, it was held that the creditor corporation might guarantee payment for finishing such articles.²³ A corporation can not guarantee the bonds of another corporation,²⁴ nor dividends on stock,²⁵ though it may guarantee bonds of another company which it has taken for a debt, in order to effect a sale.²⁶ A corporation which may lease another road may guarantee the bonds of such other road as a consideration for the lease.²⁷ A corporation can not assume individual debts of a stockholder,²⁸ or give a mortgage,²⁹ or issue corporate securities,³⁰ or stock therefor,³¹ though where a corporation receives its assets in fraud of the creditors of the chief stockholders and issues stock for such assets, it may buy the judgments and secure release of the assets from attachment;³² and it can not assume the debts of another corporation except to the extent of the assets which it receives.³³ While the conflict in some of the cases cited is hopeless, many of them may be recon-

¹⁹ *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 50 Am. St. Rep. 146, 42 N. E. 176.

²⁰ *Mercantile Trust Co. v. Kiser*, 91 Ga. 636, 18 S. E. 356.

²¹ *Arkansas, etc., Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706.

²² *Temple, etc., Ry. Co. v. Hoffman*, 103 Cal. 634, 37 Pac. 530.

²³ *Flint, etc., Co. v. Mfg. Co. (Ind.)*, 56 N. E. 858.

²⁴ *Louisville, etc., Co. v. Ohio, etc., Co.*, 69 Fed. 431; *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055. (A land company was not allowed to guarantee bonds of a street railway company to secure passenger service to the addition laid out by the land company.)

²⁵ *Rhorer v. Middlesboro, etc., Co.*, 103 Ky. 146, 44 S. W. 448.

²⁶ *Marbury v. Land Co.*, 62 Fed. 335,

10 C. C. A. 393; *Ellerman v. Chicago, etc., Co.*, 49 N. J. Eq. 217, 23 Atl. 287.

See also, *Broadway National Bank v. Baker*, 176 Mass. 294, 57 N. E. 603.

²⁷ *Low v. R. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629.

²⁸ *Gilbert v. Mfg. Co.*, 98 Fed. 208.

²⁹ *Singer Piano Co. v. Barnard, etc.*, 113 Ia. 664, 83 N. W. 725 (the debts being for unpaid subscriptions for stock).

³⁰ *Wheeler v. Bank*, 188 Ill. 34, 80 Am. St. Rep. 181, 58 N. E. 598; *Wilson v. Ry. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

³¹ *Farrington v. R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 5 L. R. A. 849, 23 N. E. 109.

³² *Sutton v. Dudley*, 193 Pa. St. 194, 44 Atl. 436.

³³ *Kentucky, etc., Association v. Lawrence*, 106 Ky. 88, 49 S. W. 1059.

ciled by this statement of the rule. Where the contract of guaranty is the consideration of a valid contract of sale, to or by the corporation, it is valid. The corporation may agree to pay for the goods, as well as it may pay cash for them, and it makes no difference to whom the money is to be paid. But where the contract of guaranty is merely collateral to the authorized contract of sale, and forms an inducement therefor, the conflict is hopeless. Where power is given to one corporation to aid another, it may do so by guaranteeing its bonds.²⁴

§ 1984. Lending money. A corporation has usually an implied power to lend money where this is an appropriate means of carrying on its business.¹ It may loan undivided profits.² So a mutual benefit society may take a note for money lent.³ A statute restricting the manner of lending on the security of chattels "or otherwise," does not apply to real estate mortgages.⁴ A statute forbidding any corporation except a building and loan association to lend money to a stockholder, prevents an insurance company from advancing money to its stockholders.⁵ A bank has implied power to lend money.⁶ A contract entered into by a bank, by which it agrees to lend money, is not rendered invalid because of the fact that if such loan is made, it will incidentally result in saving another bank from the necessity of closing.⁷ A corporation which is formed for the purpose of constructing canals and the like, has no implied power to lend money in connection with a sale of land which it does not need in its corporate business;⁸ and such power is not conferred by a general provision authorizing it to own realty and personalty, and to employ them in such a manner as it may desire to do.⁹

§ 1985. Power to acquire real property. A corporation may acquire and hold realty which is proper for the exercise of its cor-

²⁴ *Zabriskie v. R. R. Co.*, 64 U. S. (23 How.) 381, 16 L. ed. 488.

¹ *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068.

² *Dock v. Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

³ *Kripner v. Lincoln*, 66 Ill. App. 532.

⁴ *Commercial, etc., Association v. Mackenzie*, 85 Md. 132, 36 Atl. 754.

⁵ *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

⁶ *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

⁷ *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

⁸ *Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982.

⁹ *Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982.

porate powers.¹ It can not acquire land for purposes not connected with the purposes of its creation.² Thus a company formed to build cars can not own land to build a town on and operate a sewage system and a sewage farm.³ A building and loan association can not buy as an investment realty on which it has no prior lien.⁴ In New Jersey it was held that a cemetery company may exchange its stock of little value for land to prevent competition.⁵ A corporation may acquire land in exchange for its stock of merchandise when it is going out of business.⁶ A corporation authorized to hold land may contract for proper easements for such land, as a bank may contract for an easement of light and air;⁷ and a street railway company which has acquired a right to operate a road by horsepower over the roadbed of a turnpike company may contract for the right to use electricity by paying an extra amount for the additional servitude;⁸ or a corporation formed to lay out lots and sell them may build a bridge for access to such lots.⁹ A corporation having legal capacity to hold property may hold it in trust as an individual could if not inconsistent with its corporate powers.¹⁰

A corporation can not acquire realty for purposes which are not within the general scope of its corporate powers.¹¹ A brewing

¹ Kentucky. *Lathrop v. Bank*, 38 Ky. (8 Dana) 114, 33 Am. Dec. 481.

Massachusetts. *Richardson v. Mechanic Association*, 131 Mass. 174.

Michigan. *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243.

New York. *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255, 18 N. E. 692.

Ohio. *Overmyer v. Williams*, 15 Ohio 26; *Covington, etc., Co. v. Magruder*, 63 O. S. 456, 59 N. E. 216.

A constitutional provision restricting the purchase of land by a corporation does not prevent it from acquiring oil and gas leases. *McCray v. Miller*, — Okla. —, 184 Pac. 781.

² United States. *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513.

California. *Coleman v. Turnpike Co.*, 49 Cal. 517.

Kentucky. *Cynthiana, etc., Co. v. Hutchinson (Ky.)*, 60 S. W. 378.

Illinois. *People v. Car Co.*, 175 Ill. 125, 51 N. E. 664.

Indiana. *Taber v. Ry. Co.*, 15 Ind. 459.

Nebraska. *Thompson v. West*, 59 Neb. 677, 49 L. R. A. 337, 82 N. W. 13.

New Jersey. *State v. Newark*, 26 N. J. L. 519 [affirming, 25 N. J. L. 315].

³ *People v. Car Co.*, 175 Ill. 125, 51 N. E. 664.

⁴ *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

⁵ *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668, 35 Atl. 896.

⁶ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756.

⁷ *First, etc., Church v. Bank*, 57 N. J. L. 27, 29 Atl. 320.

⁸ *Little, etc., Co. v. Ry. Co.*, 194 Pa. St. 144, 75 Am. St. Rep. 690, 45 Atl. 66.

⁹ *Fort Worth City Co. v. Bridge Co.*, 151 U. S. 294, 38 L. ed. 167.

¹⁰ *White v. Rice*, 112 Mich. 403, 70 N. W. 1024.

¹¹ *United States Brewing Co. v. Doles & Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N.S.) 898, 102 N. E. 753.

company has no power to take a lease of realty for the purpose of constructing a combination of a saloon and boarding-house combined thereon.¹²

§ 1986. Power to acquire personal property. The power of a corporation to acquire personal property suitable for its business,¹ such as supplies of material for manufacturing,² or means of transportation for its materials and product,³ is so much broader than its power to acquire realty that it is rarely questioned. A corporation can not, however, buy property suitable only for purposes outside the scope of the corporate business. Thus a bank can not buy a manufacturing plant.⁴ So a corporation formed to manufacture and sell cotton-seed products, including fertilizer, can not buy a different kind of fertilizer to resell at a profit.⁵

A national bank has no power to buy ordinary goods or merchandise,⁶ even if it buys such goods by buying a bill of lading attached to a draft.⁷ A purchase of a draft with a bill of lading for merchandise attached thereto, is not buying or selling chattels,⁸ and it is not rendered invalid by a statute which forbids a bank to engage in trade or commerce by buying or trading chattels.⁹

A corporation may purchase an established business.¹⁰ Power to construct a railway is not, however, power to buy another railway.¹¹ A manufacturing or trading corporation can not buy up claims against others as a speculation.¹² It may buy up claims, however, as a means of carrying its own powers into execution. Thus a

¹² *United States Brewing Co. v. Do-
lese & Shepard Co.*, 259 Ill. 274, 47 L.
R. A. (N.S.) 898, 102 N. E. 753.

¹ *Adams Mining Co. v. Senter*, 26
Mich. 73.

² *National, etc., Bank's Appeal*, 55
Conn. 469, 12 Atl. 646.

³ *Callaway, etc., Co. v. Clark*, 32 Mo.
305.

⁴ *Harding v. Glucose Co.*, 182 Ill. 551,
74 Am. St. Rep. 189, 55 N. E. 577.

⁵ *Richmond Guano Co. v. Oil Mill &
Ginnery*, 119 Fed. 709.

⁶ *Leonhardt v. Small*, 117 Tenn. 153,
119 Am. St. Rep. 994, 6 L. R. A. (N.S.)
887, 96 S. W. 1051.

⁷ *Leonhardt v. Small*, 117 Tenn. 153,
119 Am. St. Rep. 994, 6 L. R. A. (N.S.)
887, 96 S. W. 1051.

⁸ *Marsh Milling & Grain Co. v. Guar-
anty State Bank*, — Okla. —, L. R. A.
1918D, 704, 171 Pac. 1122.

⁹ *Marsh Milling & Grain Co. v. Guar-
anty State Bank*, — Okla. —, L. R. A.
1918D, 704, 171 Pac. 1122.

¹⁰ *Central Ohio Natural Gas & Fuel
Co. v. Capital City Dairy Co.*, 60 O. S.
96, 53 N. E. 711.

Third persons can not attack such
transfer. *Ehrman v. Union Central
Life Ins. Co.*, 35 O. S. 324; *Union Cen-
tral Life Ins. Co. v. Curtis*, 35 O. S. 343.

¹¹ *Campbell v. Marietta & Cincinnati
R. R.*, 23 O. S. 168.

¹² *Farwell Co. v. Wolf*, 96 Wis. 10,
65 Am. St. Rep. 22, 37 L. R. A. 138,
70 N. W. 289, 71 N. W. 109.

hardware company may buy up claims against its debtor for its own protection.¹³ So a corporation has implied power to purchase all the assets of a partnership, including an action for damages in tort.¹⁴

§ 1987. Power to purchase its own stock. Whether a corporation can buy its own stock is another disputed point. The greater number of cases hold that it may except when it is insolvent and such purchases would defraud creditors.¹ If a corporation issues stock under a contract by which stockholders are to receive their dividends in the free use of telephones, and the corporation is to

¹³ *Mahoney v. Hardware Co.*, 19 Mont. 377, 48 Pac. 545 [same case, 27 Mont. 463; 71 Pac. 674].

¹⁴ *Central Ohio Nat'l Gas and Fuel Company v. Dairy Company*, 60 O. S. 96, 53 N. E. 711.

¹ *United States. First National Bank v. Salem Capital Flour Mills Co.*, 39 Fed. 89; *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

Illinois. Chicago, etc., R. R. Co. v. Marseilles, 84 Ill. 145; *Clapp v. Peterson*, 104 Ill. 26; *Republic, etc., Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680; *First National Bank v. Peoria Watch Co.*, 191 Ill. 128, 60 N. E. 859.

Iowa. Iowa Lumber Co. v. Foster, 49 Ia. 25, 31 Am. Rep. 140; *Rollins v. Wagon, etc., Co.*, 80 Ia. 380, 20 Am. St. Rep. 427, 45 N. W. 1037; *West v. Averill Grocery Co.*, 109 Ia. 488, 80 N. W. 555; *Wisconsin Lumber Co. v. Greene & Western Telephone Co.*, 127 Ia. 350, 109 Am. St. Rep. 387, 101 N. W. 742.

Massachusetts. Davis v. Proprietors, etc., 57 Mass. (8 Met.) 321; *Leland v. Hayden*, 102 Mass. 542; *Dupee v. Powder Co.*, 114 Mass. 37; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432; *Tuttle v. Batchelder & L. Co.*, 170 Mass. 315, 49 N. E. 640.

Montana. Porter v. Plymouth Gold Mining Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

Missouri. Eggmann v. Blanke, 40 Mo. App. 318.

Nebraska. Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376; *Singhaus v. Piper*, — Neb. —, 172 N. W. 523.

New Jersey. Chapman v. Rheostat Co., 62 N. J. L. 497, 41 Atl. 690; *Berger v. Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68 [reversing, 63 N. J. Eq. 506, 53 Atl. 14]; *Oliver v. Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

New York. City Bank v. Bruce, 17 N. Y. 507; *Strong v. R. R. Co.*, 93 N. Y. 426.

North Carolina. Blalock v. Mfg. Co., 110 N. Car. 99, 14 S. E. 501.

Ohio. Taylor v. Miami Exporting Co., 6 Ohio 176.

Pennsylvania. Eby v. Guest, 94 Pa. St. 160; *Dock v. Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

Texas. Howe, etc., Co. v. Jones, 21 Tex. Civ. App. 198, 51 S. W. 24.

Wisconsin. Shoemaker v. Lumber Co., 97 Wis. 585, 73 N. W. 333; *Calteaux v. Mueller*, 102 Wis. 525, 78 N. W. 1082; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Pabst v. Goodrich*, 133 Wis. 43, 14 Am. & Eng. Ann. Cas. 824, 113 N. W. 398; *Gilchrist v. Highfield*, 140 Wis. 476, 17 Am. & Eng. Ann. Cas. 1257, 123 N. W. 102; *Atlanta & W. Butter & Cheese Association v. Smith*, 141 Wis. 377, 32 L. R. A. (N.E.) 137, 123 N. W. 106.

repurchase the stock at par, in case it sells the franchise, such provision will be enforced if the corporation sells its franchise while it is solvent, so that the rights of creditors are not impaired.² In some of the cases cited on this point, the only power involved was the power to rescind a conditional contract for the sale of stock on breach of that condition,³ or where the purchaser has never paid for his stock,⁴ or where the capital expended for stock was expended under a statute authorizing the reduction of the capital stock.⁵ If a contract of subscription to stock of a corporation contains a provision to the effect that the subscriber may return his stock upon the happening of some specified event, the corporation can not treat such clause as invalid and treat the rest of the contract of subscription as valid.⁶ A statute which provides that the directors can not withdraw the capital stock or pay any part thereof to the stockholders or reduce it, does not render invalid a clause in a contract of subscription to stock by which the corporation agrees to repurchase such stock if the subscribers so elect.⁷ Unless it is shown that a corporation is insolvent or that its creditors will be prejudiced in some way by its purchase of its own stock, it will not be assumed that its purchase of its own stock is prejudicial to its creditors.⁸

Other authorities deny the right of a corporation to buy its own stock,⁹ except where the corporation acquires such stock to prevent the loss of a prior debt due to the corporation from the stockholder.

² *Wisconsin Lumber Co. v. Greene & Western Telephone Co.*, 127 Ia. 350, 109 Am. St. Rep. 387, 101 N. W. 742.

³ *Chicago, etc., R. R. Co. v. Marseilles*, 84 Ill. 145 (subscription conditioned on completion of road in one year); *Chapman v. Rheostat Co.*, 62 N. J. L. 497, 41 Atl. 690.

⁴ *Shoemaker v. Lumber Co.*, 97 Wis. 585, 73 N. W. 333.

⁵ *Strong v. Ry. Co.*, 93 N. Y. 426.

⁶ *Porter v. Plymouth Gold Mining Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 936.

⁷ *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N.S.) 156, 129 Pac. 582.

⁸ *Fitzpatrick v. McGregor*, 133 Ga. 332, 25 L. R. A. (N.S.) 50, 65 S. E. 859;

Atlanta & W. Butter & Cheese Association v. Smith, 141 Wis. 377, 32 L. R. A. (N.S.) 137, 123 N. W. 106.

⁹ *England. Bellerby v. S. S. Co.* [1902], 2 Ch. 14; *The Manor* [1907], P. 339, 4 B. R. C. 500.

Alabama. Hall v. Alabama Terminal & Improv. Co., 143 Ala. 464, 2 L. R. A. (N.S.) 130, 39 So. 285.

Arkansas. Lefker v. Harner, 123 Ark. 575, L. R. A. 1916F, 281, 186 S. W. 75.

California. San Luis Obispo Bank v. Wickersham, 99 Cal. 655, 34 Pac. 444.

Kansas. Abeles v. Cochran, 22 Kan. 805, 31 Am. Rep. 194.

Kentucky. Price v. Coal Co. (Ky.), 32 S. W. 267.

Ohio. Coppin v. Greenless, etc., Co., 38 O. S. 275, 43 Am. Rep. 425.

Under a statute which provides that a corporation shall not withdraw or pay to any stockholder any part of the capital stock or reduce the capital stock except in the manner specified by statute, a contract by a solvent corporation, which has no creditors to purchase its own stock, is contrary to public policy.¹⁰ General authority granted by statute to a trust company to purchase stocks and other securities, does not confer upon it authority to buy its own stock.¹¹

Special considerations apply where the minimum capital of a corporation is fixed by law and where the corporation attempts to purchase its own stock and to retire it so as to reduce its capital below the amount fixed by law as a minimum. Such a transaction is in violation of the law which fixes the amount of the capital stock and is invalid.¹² A trust company can not buy its own stock

South Dakota. *Adams, etc., Co. v. Deyette*, 8 S. D. 119, 59 Am. St. Rep. 751, 31 L. R. A. 497, 65 N. W. 471 [same case, 5 S. D. 418, 49 Am. St. Rep. 887, 59 N. W. 214].

Tennessee. *Whaley v. King*, — Tenn. —, 206 S. W. 31; *Herring v. Co-operative Association* (Tenn. Ch. App.), 52 S. W. 327 (orally affirmed by supreme court).

Washington. *Kom v. Cody Detective Agency*, 76 Wash. 540, 50 L. R. A. (N. S.) 1073, 136 Pac. 1155.

"The purchase by a corporation of shares of its own capital stock is a fraud upon its creditors. Such shares neither import nor represent any right or claim in or to, or to subject to their payment the assets of the corporation as against the rights of creditors. Shares purchased by the corporation have no value as assets for the payment of corporate debts. Obviously, therefore, the transaction involves, on the one hand, the diversion of corporate assets to persons—shareholders—who have no debt against the company, nor the shadow of claim to or against its assets so far as creditors are concerned; and, on the other, the acquisition by the company in the stead of assets thus diverted, of a mere right to reissue

certain shares, or shares to a certain amount, in its capital, which right is of no value as assets for creditors. Such a diversion of corporate property is, in respect of creditors, essentially a gift to the shareholders whose shares are purchased by the company—a purely voluntary transfer of corporate assets in fraud of corporate creditors, fraudulent and void as to creditors, and this regardless of the intention actuating the company and the selling shareholders. 2 *Morawetz Corp.*, §§ 789, 790, 793, 794; 2 *Thomp. Corp.*, §§ 2054 et seq.; *Hall v. Henderson*, 126 Ala. 449, 480-482, 61 L. R. A. 621, 85 Am. St. Rep. 53, 28 So. 531, and authorities there cited." *Hall v. Alabama Terminal & Improvement Co.*, 143 Ala. 464, 2 L. R. A. (N.S.) 130, 39 So. 285.

¹⁰ *Kom v. Cody Detective Agency*, 76 Wash. 540, 50 L. R. A. (N.S.) 1073, 136 Pac. 1155.

¹¹ *Lefker v. Harner*, 123 Ark. 575, L. R. A. 1916F, 281, 186 S. W. 75.

¹² *Lefker v. Harner*, 123 Ark. 575, L. R. A. 1916F, 281, 186 S. W. 75.

"The shareholder of a corporation especially should be bound by the law of its creation and the statutes by which it is governed, and if such shareholder enters into a transaction with

and retire it so as to reduce its capital below the amount which the law requires.¹³

All the authorities agree that a corporation may acquire its own stock in order to prevent the loss of a prior debt due to the corporation from a stockholder.¹⁴

If the creditors of the corporation object to its purchase of its own stock, such purchase may be avoided as far as concerns their interests.¹⁵ Even in jurisdictions in which a corporation can ordinarily purchase its own stock, it can not make such purchase if it is insolvent or if such purchase will otherwise affect its creditors prejudicially.¹⁶ A loan to an insolvent corporation to enable it to buy its own stock was held to be illegal and void as in fraud of its creditors.¹⁷ If a stockholder, who is solvent, is indebted to the corporation, which is insolvent, and he delivers to such corporation shares of its own stock in payment of his debt, such transaction may be set aside by a subsequent receiver and the amount thus

the officers of the corporation by which the capital stock is reduced below the minimum required by the law, his act is at least a legal fraud upon the creditors of the corporation, and he is liable to the extent of the amount that he has received in return for the shares of stock sold to the corporation and paid out of its capital stock. A similar question arose in *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364. In that case the receiver of an insolvent corporation sued a stockholder of the corporation for assets received by him in payment for a sale of his stock to the corporation, and the complaint failed to allege that the corporation was insolvent at the time of the alleged sale. The court held that such an allegation was immaterial, since the thing which was unlawfully done reduced the available resources of a now insolvent company, and if such reduction had not been made, the amount would now be on hand for the benefit of creditors. See also *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539; *Atlanta & W. Butter & Cheese Assn. v. Smith*, 141 Wis. 377, 32 L. R. A. (N.S.) 137, 135 Am. St. Rep. 42, 123 N. W. 106; *Tier-*

ney v. Ledden, 143 Ia. 286, 121 N. W. 1050, 21 Ann. Cas. 105." *Lefker v. Harner*, 123 Ark. 575, L. R. A. 1916F, 281, 186 S. W. 75.

¹³ *Lefker v. Harner*, 123 Ark. 575, L. R. A. 1916F, 281, 186 S. W. 75.

¹⁴ *Union National Bank v. Hunt*, 7 Mo. App. 42; *Taylor v. Exporting Co.*, 6 Ohio 176; *Morgan v. Lewis*, 48 O. S. 1, 17 N. E. 558; *Batley v. Eureka Bank*, 62 Kan. 384, 63 Pac. 437; *Faulkner v. Topeka Bank*, 77 Kan. 385, 94 Pac. 153; *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N.S.) 668, 132 Pac. 200.

¹⁵ *Hall v. Henderson*, 126 Ala. 449, 85 Am. St. Rep. 53, 61 L. R. A. 621, 28 So. 531.

¹⁶ *Fitzpatrick v. McGregor*, 133 Ga. 332, 65 S. E. 859 [sub nomine, *McGregor v. Fitzpatrick*, 25 L. R. A. (N. S.) 50]; *Brown v. Reed*, 31 Ida. 529, 174 Pac. 136; *Atlanta & W. Butter & Cheese Association v. Smith*, 141 Wis. 377, 32 L. R. A. (N.S.) 137, 123 N. W. 106.

¹⁷ *Adams, etc., Co. v. Deyette*, 8 S. D. 119, 59 Am. St. Rep. 751, 31 L. R. A. 497, 65 N. W. 471.

credited upon his indebtedness may be recovered.¹⁸ A purchase of its own stock by an insolvent corporation from a solvent stockholder, is invalid even though the stockholder is acting in good faith and does not know that the corporation is insolvent.¹⁹ Under this theory if a corporation attempts to purchase its own stock, it may avoid such transaction and recover from the stockholder the amount which the corporation has paid to him.²⁰ If the corporation has not avoided such transaction before it became insolvent, its receiver, assignee or trustee in insolvency may set the transaction aside and recover such amount.²¹

A statute which provides that a corporation can not purchase or hold its own stock either absolutely or as collateral, after it has once been issued, does not apply to an illegal or excessive issue of stock;²² and the corporation may purchase the stock which has thus been illegally overissued as a means of complying with the statutory restriction upon the amount of stock which it may issue.²³

Under a statute which authorizes a corporation to acquire its own stock for legitimate corporate purposes, the issue of stock for an unascertained consideration and retransfer of the greater part of such stock to the corporation to be held as treasury stock, is not a legitimate corporate purpose.²⁴

§ 1988. Power to purchase stock in other corporation. It is usually held that a corporation has no implied power to buy and hold stock in another corporation,¹ as where the incorporation laws gave no authority to a manufacturing corporation to purchase stock, but such power was inserted by the incorporators in the

¹⁸ *Fitzpatrick v. McGregor*, 133 Ga. 332, 65 S. E. 859 [sub nomine, *McGregor v. Fitzpatrick*, 25 L. R. A. (N. S.) 50].

¹⁹ *Fitzpatrick v. McGregor*, 133 Ga. 332, 65 S. E. 859 [sub nomine, *McGregor v. Fitzpatrick*, 25 L. R. A. (N. S.) 50].

²⁰ *Whaley v. King*, — Tenn. —, 206 S. W. 31.

²¹ *Whaley v. King*, — Tenn. —, 206 S. W. 31.

²² *Kelly v. Central Union Fire Ins. Co.*, 101 Kan. 91, L. R. A. 1918C, 1170, 165 Pac. 806.

²³ *Kelly v. Central Union Fire Ins.*

Co., 101 Kan. 91, L. R. A. 1918C, 1170, 165 Pac. 806.

²⁴ *Knickerbocker Importation Co. v. State Board of Assessors*, 74 N. J. L. 583, 9 L. R. A. (N.S.) 885, 65 Atl. 913. (In any event, the corporation is to be taxed upon the entire amount of the capital stock without deduction for the amount which it has thus proportioned.)

¹ *United States. California National Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 196; *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40, 44 L. ed. 65; *Pauly v. Coronado Beach Co.*, 56 Fed. 428; *Marbury v. Land Co.*, 62 Fed.

articles of incorporation.² A railway company has no power to subscribe for stock in a corporation for the purpose of acquiring and holding land.³

A corporation may acquire stock in the usual course of its business as it may other property. Thus a bank may lend money on stock as collateral, and sell the stock, buying it itself;⁴ or may

335, 10 C. C. A. 393; *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N.S.) 1153.

Alabama. *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 49 Am. St. Rep. 57, 16 So. 637 (indirectly through a trustee).

Arkansas. *Lester v. Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

California. *Knowles v. Sanderecock*, 107 Cal. 629, 40 Pac. 1047; *Chemical National Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071.

Colorado. *Glengary, etc., Co. v. Boehmer*, 28 Colo. 1, 62 Pac. 839.

Georgia. *Hazelhurst v. Ry.*, 43 Ga. 13.

Illinois. *McCoy v. Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043 [affirming, 87 Ill. App. 605]; *People ex rel. Moloney v. Pullman's, etc., Co.*, 175 Ill. 125, 51 N. E. 684; *Martin v. Stove Co.*, 78 Ill. App. 105.

Maine. *Franklin Co. v. Lewiston Inst.*, 68 Me. 43, 28 Am. Rep. 9.

Minnesota. *Hunt v. Malting Co.*, 90 Minn. 282, 96 N. W. 85.

Nebraska. *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. Rep. 479, 20 L. R. A. 780, 55 N. W. 631; *Nebraska Shirt Co. v. Horton (Neb.)*, 93 N. W. 225.

New Jersey. *Central R. R. Co. v. R. R. Co.*, 31 N. J. Eq. 475; *Coler v. Power Co.*, 65 N. J. Eq. 347, 54 Atl. 413 [reversing, 64 N. J. Eq. 117, 53 Atl. 680].

New York. *Talmage v. Pell*, 7 N. Y. 328.

Ohio. *Valley Ry. Co. v. Iron Co.*, 46 O. S. 44, 1 L. R. A. 412, 18 N. E. 486.

Tennessee. *Buckeye, etc., Co. v. Har-*

vey, 92 Tenn. 115, 36 Am. St. Rep. 71, 18 L. R. A. 252, 20 S. W. 427; *McC Campbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070; *Clark v. Memphis St. Ry. Co.*, 123 Tenn. 232, 130 S. W. 751; *Hotel Co. v. Dyer*, 125 Tenn. 302, 142 S. W. 1117; *Wood v. Green*, 131 Tenn. 583, 175 S. W. 1139; *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

Washington. *Denny Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002.

Contra, that a corporation may be a stockholder in another corporation. *United, etc., Co. v. Electric Light Co.*, 68 Fed. 673; *Elevator Co. v. M. & C. R. R.*, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

See also, *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

By statute in Indiana a corporation can not purchase stock in another corporation without the written consent of all the stockholders of each corporation. *Midland Steel Co. v. Bank*, 26 Ind. App. 71, 59 N. E. 211.

² *People v. Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 8 L. R. A. 497, 22 N. E. 798.

³ *McC Campbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070.

⁴ *Chemical, etc., Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071; *Calumet Paper Co. v. Investment Co.*, 96 Ia. 147, 59 Am. St. Rep. 362, 64 N. W. 782; *Talmage v. Pell*, 7 N. Y. 328.

take it in payment of a debt;⁵ or it may acquire stock as a part of a contract of compromise.⁶ A corporation, formed to deal in jewelry, may trade jewelry for stock in another corporation.⁷ A corporation may subscribe for stock in another corporation as an incidental part of a transaction which is otherwise valid.⁸ A bank may subscribe for stock in a corporation which is formed to hold real estate and which proposes to construct a building, part of which it proposes to lease to such bank,⁹ at least if the promoter enters into a contract to repurchase such stock in a certain time.¹⁰ If a corporation is retiring from business, it may dispose of its assets for stock in the purchasing corporation,¹¹ especially if such stock is taken for distribution among the stockholders of the selling company as a means of effecting a practical dissolution.¹² The rule that a corporation can not buy stock in another does not apply to a contract by one corporation to purchase the assets of another;¹³ and it does not render invalid a contract by which a prospective purchaser takes charge of the property of the prospective seller for a short term of years in order to determine whether the sale will be mutually advantageous.¹⁴

A corporation can not purchase the stock of a rival in order to suppress competition.¹⁵ A corporation can not subscribe stock in another corporation for the purpose of engaging indirectly in busi-

⁵ *First National Bank v. Exchange Bank*, 92 U. S. 128, 23 L. ed. 679; *National Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Holmes, etc., Co. v. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

⁶ *First National Bank v. National Exchange Bank*, 92 U. S. 122, 23 L. ed. 679.

⁷ *White v. Marquardt & Sons*, 105 Ia. 145, 74 N. W. 930 [affirming on rehearing, 70 N. W. 193].

⁸ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

⁹ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

¹⁰ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

¹¹ *Metcalf v. Furniture Co.*, 122 Fed. 115; *Holmes v. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917A, 1174, 82 Atl. 1014; *Logie v. Mother Lode Copper Mines Co.*, — Wash. —, 179 Pac. 835. (Under a statute authorizing the purchase and sale of property including the stock of another corporation.)

¹² *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917A, 1174, 82 Atl. 1014.

¹³ *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

¹⁴ *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

¹⁵ *United States. De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40, 44 L. ed. 66.

ness in which it can not engage directly.¹⁶ A corporation which is formed to buy lands, securities, stock, etc., has no power to subscribe to stock in a corporation which is formed for the purpose of building and operating cotton gins.¹⁷

If power to own stock in other corporations is expressly granted, it may, of course, be exercised.¹⁸ So power to consolidate and power to guarantee bonds includes power to buy stock;¹⁹ as does power to buy, sell and deal in public and private stock,²⁰ or power to buy "bonds, other securities and personal property."²¹ Authority to buy stock does not include the right to get control of a corporation so as to prevent payment of interest on bonds, and resistance to a foreclosure suit,²² nor to manage such other corporation.²³ But power to "take stock" is not power to sell all its assets in exchange for stock of the other corporation.²⁴ Even where the statute forbids a corporation to buy stock in another it may take stock

Alabama. *Memphis, etc., Company v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 L. R. A. 605, 7 So. 108.

Illinois. *People v. Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 8 L. R. A. 497, 22 N. E. 798.

Nebraska. *State v. Distilling Co.*, 29 Neb. 700, 46 N. W. 155.

New Hampshire. *Pearson v. R. R.*, 62 N. H. 537, 13 Am. St. Rep. 590.

Contra, "under our liberal corporation laws," *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 524; 78 Am. St. Rep. 612, 46 L. R. A. 255, 43 Atl. 723 [affirming in part and reversing in part, 56 N. J. Eq. 680, 39 Atl. 923]. It depends on the objects to be attained, agreements to pool stock not being necessarily illegal. *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 636 [affirming, 60 N. J. Eq. 17, 46 Atl. 591].

¹⁶ *Harrill v. Davis*, 168 Fed. 187, 94 C. A. 47, 22 L. R. A. (N.S.) 1153.

¹⁷ *Harrill v. Davis*, 168 Fed. 187, 94 C. A. 47, 22 L. R. A. (N.S.) 1153.

¹⁸ **United States.** *Tod v. Land Co.*, 57 Fed. 47; *Rogers v. Ry. Co.*, 91 Fed. 299, 33 C. C. A. 517.

Georgia. *Trust Co. v. State*, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323.

Kansas. *Atchison, etc., R. R. Co. v. Davis*, 34 Kan. 209, 6 Pac. 530; *Atchison, etc., R. R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; *Atchison, etc., R. R. Co. v. Cochran*, 43 Kan. 225, 19 Am. St. Rep. 129, 7 L. R. A. 414, 23 Pac. 151.

New Jersey. *Rubino v. Car Co. (N. J. Eq.)*, 53 Atl. 1050; *Ditman v. Distilling Co.*, 64 N. J. Eq. 537, 54 Atl. 570.

Pennsylvania. *Northern Central Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

Washington. *Logie v. Mother Lode Copper Mines Co.*, — Wash. —, 179 Pac. 835.

¹⁹ *Louisville, etc., Co. v. Ry. Co.*, 75 Fed. 433.

²⁰ *Market, etc., Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

²¹ *Calumet Paper Co. v. Investment Co.*, 96 Ia. 147, 59 Am. St. Rep. 362, 64 N. W. 782.

²² *Farmers', etc., Co. v. Ry. Co.*, 150 N. Y. 410, 55 Am. St. Rep. 689, 34 L. R. A. 76, 44 N. E. 1043.

²³ *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 So. 408.

²⁴ *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981.

in a building and loan association as a means of borrowing money, where such borrowing is proper.²⁸

§ 1989. Partnership contracts. A corporation can not enter into a partnership, since this places in the hands of others than the corporation's agents power to incur obligation due from the corporation,¹ though it may be co-owner with another;² and a purchase of land by a corporation and another, the appointee of the corporation taking the legal title and managing the property, is valid.³ If a corporation and an individual attempt to form a partnership, and acquire realty with partnership assets, the courts will not, in a proceeding to partition such realty, determine the question of the invalidity of such partnership as long as the rights of third persons are not involved.⁴ If a corporation and an individual enter into a contract by which the individual is to operate certain property of the corporation, and the individual and the corporation are to divide the expenses and the profits in certain proportions, such contract is valid, whether a technical partnership is created or not.⁵ In jurisdictions in which a corporation may be a member of a partnership, it is liable for the obligations of the partnership incurred by any member thereof.⁶ A contract between corporations supplying a city with water to work together, a director of each corporation acting together as trustees with limited powers of management, is valid, since it is not a partnership.⁷

²⁸ *Norwalk, etc., Co. v. Norwalk, etc., Co.*, 14 Ohio C. C. 1, 7 Ohio C. D. 275 [reversing, 6 Ohio Dec. 70].

¹ *United States. Pearce v. R. R.*, 62 U. S. (21 How.) 441, 16 L. ed. 184.

Alabama. Central, etc., Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

Illinois. Bishop v. Preservers' Co., 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765.

Massachusetts. Whittenton Mills v. Upton, 76 Mass. (10 Gray) 582, 71 Am. Dec. 681.

New York. People v. Refining Co., 121 N. Y. 582, 18 Am. St. Rep. 843, 9 L. R. A. 33, 24 N. E. 834.

Ohio. Merchants' National Bank v. Wagon Co., 6 Ohio N. P. 264; *Geurinck v. Alcott*, 66 O. S. 94, 63 N. E. 714.

Pennsylvania. Boyd v. Carbon-Black Co., 182 Pa. St. 206, 37 Atl. 937.

Tennessee. Mallory v. Oil Works, 86 Tenn. 598, 8 S. W. 396.

Texas. Sabine, etc., Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837.

² *Clinchfield Fuel Co. v. Henderson Iron Works Co.*, 254 Fed. 411; *Calvert v. Stage Co.*, 25 Or. 412, 36 Pac. 24.

³ *Bates v. Beach Co.*, 109 Cal. 160, 41 Pac. 855.

⁴ *Farrell v. Forest Investment Co.*, — Fla. —, 1 A. L. R. 25, 74 So. 216.

⁵ *Clinchfield Fuel Co. v. Henderson Iron Works Co.*, 254 Fed. 411. (Contract between corporation on the one hand and partnership on the other.)

⁶ *Haiku Sugar Co. v. Johnstone*, 249 Fed. 103.

⁷ *San Diego, etc., Co. v. Flume Co.*, 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495. But in *Mallory v. Oil Works*, 86 Tenn. 598, 8 S. W. 396, a similar ar-

A corporation can not be held liable for acts of a person whom it has held out as a partner.⁸ If a corporation has acquired shares in a joint stock association which is in legal effect a partnership, it can not be regarded as a member of such partnership and it can not be held liable in solido for the debts of the partnership.⁹ While it has been held by a state court that a national bank which acquires shares in a joint stock association which in legal effect is a partnership, can be compelled to pay a proportionate part of the debts of such joint stock company,¹⁰ the United States supreme court has held that it can not be compelled to pay even its proportionate share of such debts.¹¹

Some jurisdictions hold that such a partnership is valid as to third parties, either to enable them to recover against such partnerships,¹² or to enable the partnership to recover against them.¹³ It has also been suggested that the corporation is estopped to deny the partnership, though the final disposition of the case made discussion of this question unnecessary.¹⁴

§ 1990. Power to dispose of corporate property. The power of a corporation to dispose of its property may be considered under three general heads: First, its power to dispose of such property as does not interfere with the continuance of its corporate functions is an implied one.¹ If a corporation owns stock in another corporation as consideration for its grant of a right to use a patent,

rangement in which the trustees had more extensive powers of management was held a co-partnership.

⁸ *Merchants' National Bank v. Wehrmann*, 69 O. S. 160, 68 N. E. 1004; *Murray, etc., Co. v. Bank* (Tex. Civ. App.), 61 S. W. 508.

⁹ *Merchants' National Bank v. Wehrmann*, 69 O. S. 160, 68 N. E. 1004.

¹⁰ *Merchants' National Bank v. Wehrmann*, 69 O. S. 160, 68 N. E. 1004.

¹¹ *Bank v. Wehrmann*, 202 U. S. 295, 50 L. ed. 1036 [reversing, *Merchants' National Bank v. Wehrmann*, 69 O. S. 160, 68 N. E. 1004].

¹² *Johnson v. Mfg. Co.*, 103 Wis. 291, 79 N. W. 236.

¹³ *Wilson v. Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

¹⁴ *Willey v. Bank*, 141 Cal. 508, 75 Pac. 106 [reversing in banc, 72 Pac. 832].

¹ *Kansas. State v. Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349.

Louisiana. State v. Warehouse Co., 109 La. 64, 33 So. 81; *Joy v. Road Co.*, 11 Mich. 155.

New Jersey. Stockton Attorney General v. Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971.

New York. Holmes, etc., Mfg. Co. v. Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

North Carolina. Benbow v. Cook, 115 N. Car. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

Ohio. Reynolds v. County, 5 Ohio 204; *Wiswell v. First Congregational Church*, 14 O. S. 31.

it has power to sell such stock and to pay the proceeds over to the operating company, under a contract which provides for a subsequent accounting between the two corporations.² Such transaction is not in legal effect a gift by one corporation to another.³ Thus a corporation formed to establish a soldiers' home and to hold land, may sell land not needed by it.⁴ A corporation may sell surplus steam for heating purposes;⁵ or may lease property not then used;⁶ or may temporarily lease all its plant in order to get money to conduct its business,⁷ even if the minority stockholders object.⁸ A corporation authorized to hold land may lease it to be used for purposes for which the corporation could not itself have used it.⁹ Thus a steamship company may lease its land for hotel purposes, reserving a certain cash rent and a per cent. of the income from the hotel in excess of a fixed sum.¹⁰ So a lease may be valid where the business of the lessee is incidental to the business of the lessor. A railroad company may lease property not needed in its own business to a public warehouse company.¹¹ Second, as to property essential to carrying on its business, a corporation may dispose of such property on going out of business,¹² and a solvent waterpower company going out of business may, by consent of all interested,

Virginia. *Davis v. Lee Camp* (Va.), 18 S. E. 839.

West Virginia. *Howard v. Tatum*, 81 W. Va. 561, 94 S. E. 965.

²*Howard v. Tatum*, 81 W. Va. 561, 94 S. E. 965.

³*Howard v. Tatum*, 81 W. Va. 561, 94 S. E. 965.

⁴*Davis v. Lee Camp* (Va.), 18 S. E. 839.

⁵*People v. Car Co.*, 175 Ill. 125, 51 N. E. 664.

⁶*Simpson v. Hotel Co.*, 8 H. L. Cas. 711; *People v. Car Co.*, 175 Ill. 125, 51 N. E. 664; *Brown v. Winnisimmet Co.*, 93 Mass. (11 All.) 326; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121.

⁷*Pennsylvania, etc., Co. v. Ry. Co.*, 118 U. S. 290, 30 L. ed. 83; *Hancock v. Holbrook*, 9 Fed. 353; *Cass v. Steel Co.*, 9 Fed. 640; *Plant v. Macon, etc., Ice Co.*, 103 Ga. 666, 30 S. E. 567 [citing, *Simpson v. Hotel Co.*, 8 H. L. Cas. 711]; *Treadwell v. Mfg. Co.*, 73 Mass. (7 Gray) 393, 66 Am. Dec. 490 [distinguishing, *Thomas v. R. R. Co.*, 101 U. S. 71, 25 L. ed. 960].

⁸*Bartholomew v. Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45.

⁹*Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Benton v. Elizabeth*, 61 N. J. L. 693, 40 Atl. 1132 [affirming, 61 N. J. L. 411, 39 Atl. 683].

¹⁰*Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57.

¹¹*State v. Warehouse Co.*, 109 La. 64, 33 So. 81.

¹²California. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

Iowa. *Warfield v. Canning Co.*, 72 Ia. 666, 2 Am. St. Rep. 263, 34 N. W. 467.

Kansas. *State v. Canal Co.*, 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349; *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756.

Michigan. *Detroit v. Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039.

Ohio. *Reynolds v. Stark Co.*, 5 Ohio 204.

convey its land in satisfaction of its own stock.¹³ Franchises for use of streets may be alienated.¹⁴ A corporation formed to deal in plate glass, etc., may sell its stock of glass, and agree not to compete for twenty years.¹⁵ A corporation which is financially unable to continue business, has implied authority to lease all of its property for a term of years.¹⁶ Third, a corporation can not retain its corporate existence and transfer its property to another corporation, not as a means of winding up, but as a permanent investment.¹⁷ Such transactions are contrary to public policy, as by such means the corporation maintains a corporate existence and yet makes it impossible for the corporation to exercise those functions for which it was created by the state.¹⁸ This principle applies with especial force to contracts whereby corporations of a public character attempt to transfer their powers and functions.¹⁹ Thus neither a turnpike company,²⁰ nor a gas company,²¹ can transfer their property so that they disable themselves from serving the public. Under a statute, however, which authorizes a corporation to lease its property or franchises, a lease may be made for so long a time as to amount practically to a conveyance in fee.²²

§ 1991. Examples of powers of particular corporations. A corporation which is formed to operate a railway and which is given express authority to build and operate steamboats in connection with its business, may hire boats belonging to others for use in its business;¹ and it may, as consideration for the use of such

¹³ *Dupee v. Power Co.*, 114 Mass. 37.

¹⁴ *Detroit v. Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039; *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 47 L. R. A. 87, 80 N. W. 383.

¹⁵ *McCausland v. Hill*, 23 Ont. App. 738.

¹⁶ *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 15 L. R. A. (N.S.) 846, 87 Pac. 315.

¹⁷ *McCutcheon v. Merz & Co.*, 71 Fed. 787, 31 L. R. A. 415 [affirming, 67 Fed. 414]; *Byrne v. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54.

¹⁸ *Thomas v. R. R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Central Transportation Co. v. Palace Car Co.*, 139 U. S. 24, 35 L. ed. 55; *People v. Sugar Refining Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843,

9 L. R. A. 33, 24 N. E. 834; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

See, *Lease of Railroad by Majority of Stockholders with Assent of Legislature*, by Charles Doe, 8 Harvard Law Review, 295, 396.

¹⁹ *Smith v. Cornelius*, 41 W. Va. 59, 30 L. R. A. 747, 23 S. E. 599.

²⁰ *Lancaster, etc., Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

²¹ *Chicago, etc., Co. v. Gas Light Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169.

²² *Dickinson v. Traction Co.*, 119 Fed. 871.

¹ *Green Bay & Minnesota Ry. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. ed. 413.

boats, enter into a contract by which it guarantees that the gross earnings of such boats shall not fall below a specified amount.² A railway corporation may agree to pay commissions upon the sale of unimproved land, along its line, belonging to other persons, in order to induce persons to locate along its line.³ A railroad may establish a relief fund for its employees, to insure them against accidents and relieve itself from liability therefor;⁴ and its maintaining such department is not engaging in insurance.⁵ A statute which authorizes a quarry or mining corporation to construct a lateral railway to connect with a railway operated by a railway corporation, is valid if such lateral railway when constructed will be open to the public.⁶ A corporation which is organized to manufacture automobiles has power to engage in smelting ore to secure iron for its own use.⁷ Authority to deal in provisions and packing-house products, confers authority to purchase crude glycerine.⁸ A corporation which is formed to conduct a wholesale and retail implement business, may act as a sales agent for threshing machines.⁹ A corporation may defend its employees in a libel suit, where the paper was published in the usual course of business;¹⁰ a bridge company

² *Green Bay & Minnesota Ry. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. ed. 413.

³ *Thrallkill v. Crosbyton-Southplains Railroad Co.*, 246 Fed. 687, L. R. A. 1918C, 90.

⁴ *King v. Atlantic C. L. R. Co.*, 157 N. Car. 44, 48 L. R. A. (N.S.) 450, 72 S. E. 801; *Beck v. R. R. Co.*, 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908 [citing and following, *Owens v. Ry. Co.*, 35 Fed. 715, 1 L. R. A. 75; *State v. Ry. Co.*, 36 Fed. 655; *Otis v. Ry. Co.*, 71 Fed. 136; *Vickers v. Ry. Co.*, 71 Fed. 139; *Eckman v. R. R. Co.*, 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496; *Pittsburg, etc., Ry. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423; *Donald v. Ry. Co.*, 93 Ia. 284, 33 L. R. A. 492, 61 N. W. 971; *Fuller v. Relief Association*, 67 Md. 433, 10 Atl. 237; *Chicago, etc., R. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Pittsburg, etc., Company v. Cox*, 55 O. S. 497, 35 L. R. A. 507, 45 N. E. 641;

Ringle v. R. R., 164 Pa. St. 529, 44 Am. St. Rep. 628, 30 Atl. 492; and disappearing, *Miller v. Ry. Co.*, 65 Fed. 305; *Pittsburg, etc., Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582; *State v. Ry.*, 68 O. S. 9, 96 Am. St. Rep. 635, 67 N. E. 93.

⁵ *King v. Atlantic C. L. R. Co.*, 157 N. Car. 44, 48 L. R. A. (N.S.) 450, 72 S. E. 801; *State v. Pittsburg, C., C. & St. L. Ry. Co.*, 68 O. S. 9, 96 Am. St. Rep. 635, 67 N. E. 93.

⁶ *Westport Stone Co. v. Thomas*, 175 Ind. 319, 35 L. R. A. (N.S.) 646, 94 N. E. 406.

⁷ *Dodge v. Ford Motor Co.*, — Mich. —, 170 N. W. 668.

⁸ *Illinois Cudahy Packing Co. v. Kansas City Soap Co.*, 247 Fed. 556.

⁹ *Advance Rumely Thresher Co. v. Evans Metcalf Implement Co.*, 103 Kan. 532, 175 Pac. 392.

¹⁰ *Breay v. Nurses' Association* [1897], 2 Ch. 272, 66 L. J. Ch. N. S. 587.

may acquire land for the bridge and its approaches;¹¹ and a land company may employ a surveyor.¹² If a corporation is regarded as having an insurable interest in the life of an officer,¹³ such as a president and general manager,¹⁴ it may effect insurance on his life for its benefit. A mutual insurance company, if not forbidden by statute, may write ordinary insurance.¹⁵ A national bank may be liable for a special gratuitous bailment.¹⁶ A corporation has the right to secure a substantial monopoly in a business, if it does so by its efficiency and its ability to undersell its competitors.¹⁷ A chamber of commerce has power to grant a bonus to a steamship line in order to secure better rates for transportation.¹⁸ A corporation formed "to encourage immigration" may advertise.¹⁹ A public service corporation has power to enter into contracts in its private capacity, as well as in its public capacity.²⁰

On the other hand, a boom company,²¹ or a corporation formed to improve the navigation of a stream,²² can not handle or drive logs. A corporation formed for "manufacturing and selling heating and ventilating apparatus," can not act as a broker of bonds;²³ one formed to make insulated cables can not contract to lay an electric conduit, taking risk of liability for damages;²⁴ and a corporation formed for the purpose of "discussing, arbitrating and settling all matters pertaining to the prosperity and promotion of the jobbing plumber's supply business," can not engage in notify-

¹¹ Covington, etc., Co. v. Magruder, 63 O. S. 455, 59 N. E. 216.

¹² Heinze v. Dock Co., 109 Wis. 99, 85 N. W. 145.

¹³ Mutual Life Ins. Co. v. Board, 115 Va. 836, L. R. A. 1915F, 979, 80 S. E. 565.

¹⁴ Mutual Life Ins. Co. v. Board, 115 Va. 836, L. R. A. 1915F, 979, 80 S. E. 565.

It has no power to continue a policy on the life of an ex-president. Victor v. Louise Cotton Mills, 148 N. Car. 107, 16 L. R. A. (N.S.) 1020, 61 S. E. 648.

¹⁵ Continental Fire Association v. Masonic Temple Co., 26 Tex. Civ. App. 139, 62 S. W. 930.

¹⁶ National Bank v. Graham, 100 U. S. 699, 25 L. ed. 750; Bank v. Zent, 39 O. S. 105.

¹⁷ Dodge v. Ford Motor Co., — Mich. —, 170 N. W. 668.

¹⁸ Gregg v. Little Rock Chamber of Commerce, 120 Ark. 426, L. R. A. 1916B, 1006, 179 S. W. 658.

¹⁹ Colorado Springs Co. v. Publishing Co., 97 Fed. 843, 38 C. C. A. 433.

²⁰ Killam v. Norfolk & W. Ry. Co., 122 Va. 541, 96 S. E. 506.

See also, Western Union Telegraph Co. v. Louisville & Nashville Ry., 250 Fed. 199.

²¹ Bangor Boom Co. v. Whiting, 29 Me. 123.

²² Northwestern, etc., Co. v. O'Brien, 75 Minn. 335, 77 N. W. 989.

²³ Peck-Williamson, etc., Co. v. Board, etc., 6 Okla. 279, 50 Pac. 236.

²⁴ Safety, etc., Co. v. Mayer, etc., of Baltimore, 74 Fed. 363, 20 C. C. A. 453.

ing creditors of delinquencies of debtors.²⁵ Since a bank can not conduct a manufacturing business, a mortgage in which the bank undertakes to carry on such business is invalid.²⁶ A corporation which is formed for the purpose of dealing in goods and merchandise, has no power to make contracts of commercial insurance,²⁷ at least if it has not complied with the statutory requirements for engaging in such business.²⁸ A railway has no power to enter into a contract to give advance information as to the location of its stations.²⁹ A bank has no implied power to pledge its assets to its surety upon a bond given to secure a depositor.³⁰

§ 1992. Contracts collateral to corporate business. A corporation may make valid contracts in a business, collateral to that for which it was incorporated, if such business is a reasonably proper method for carrying on the principal business.¹ A corporation has implied authority to incur expenses in setting before its shareholders the facts which have given rise to a dispute between some

²⁵ *Hartnett v. Plumbers', etc., Association*, 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002.

²⁶ *Louis Bletz v. Bank (Ky.)*, 55 S. W. 697.

²⁷ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

²⁸ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

²⁹ *Minnesota, D. & P. R. Co. v. Way*, 34 S. D. 435, L. R. A. 1915B, 925, 148 N. W. 858.

³⁰ *Commercial Bank & Trust Co. v. Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (N.S.) 950, 156 S. W. 160.

¹ *England. Peel v. London & N. W. R. Co.* [1907], 1 Ch. 5.

United States. Thrailkill v. Crosbyton-Southplains Railroad Co., 246 Fed. 687, L. R. A. 1918C, 90.

Arkansas. Arkansas, etc., Ry. Co. v. Dickinson, 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802; *Gregg v. Little Rock Chamber of Commerce*, 120 Ark. 426, L. R. A. 1916B, 1006, 179 S. W. 658.

Colorado. Denver & Rio Grande Railroad Company Employees' Relief Asso-

ciation v. Rishmiller, — Colo. —, L. R. A. 1918D, 559, 171 Pac. 501.

Indiana. Westport Stone Co. v. Thomas, 175 Ind. 319, 35 L. R. A. (N. S.) 646, 94 N. E. 406; *Cox v. Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 50 L. R. A. (N.S.) 453, 103 N. E. 337.

Kansas. McAdow v. Kansas City Western Ry. Co., 96 Kan. 423, L. R. A. 1917B, 1158, 151 Pac. 1113; *Advance Rumely Thresher Co. v. Evans Metcalf Implement Co.*, 103 Kan. 532, 175 Pac. 392.

Maryland. Dawson v. Western Maryland R. Co., 107 Md. 70, 14 L. R. A. (N. S.) 809, 68 Atl. 301.

Michigan. Dodge v. Ford Motor Co., — Mich. —, 3 A. L. R. 413, 170 N. W. 668.

Ohio. Youngstown Park & F. S. R. Co. v. Kessler, 84 O. S. 74, 36 L. R. A. (N.S.) 50, 95 N. E. 509.

Oregon. Oregon R. & Nav. Co. v. McDonald, 58 Or. 228, 32 L. R. A. (N. S.) 117, 112 Pac. 413.

Virginia. Mutual Life Insurance Co. v. Board, 115 Va. 836, L. R. A. 1915F, 979, 80 S. E. 565.

of its shareholders and its directors, as to its policy.² A corporation may bind itself by a contract offering a reward,³ such as an offer of a reward by a railway corporation for the arrest and conviction of persons who cause train wrecks;⁴ or by a contract which extends over a period of time beyond the charter of the contracting corporation;⁵ and it may make a deposit of securities in order to obtain permission to do business in another state, as required by the laws of such state.⁶ It may give a bonus in stock, to induce buyers to take bonds, and a dissenting stockholder can not have the value of the stock bonus deducted from bonds,⁷ or may pay reasonable commission to brokers for placing shares.⁸ A mining corporation, with power to build or subscribe to the stock of a railroad necessary to facilitate the transportation of its produce to market, may join with a railroad company in a mortgage to obtain money for the purpose of enlarging the facilities of the railroad to transport the coal;⁹ a gas company may buy the right to use steam heater, radiating mantel and gas-consuming appliances, if proper for the gas business;¹⁰ and a railroad company, authorized to erect all convenient buildings for the accommodation and use of its passengers, may lease a summer hotel and covenant to insure it,¹¹ or may operate steamboats as part of its line of transportation.¹² A railway company can not bind itself by a guaranty of interest on bonds and dividends on the stock of a summer hotel company.¹³ A railway may take a conveyance of its right of way upon condition

² Peel v. London & N. W. R. Co. [1907], 1 Ch. 5.

³ Norwood, etc., Co. v. Andrews, 71 Miss. 641, 16 So. 262.

⁴ Arkansas, etc., Ry. Co. v. Dickinson, 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802.

⁵ Union Pacific Ry. Co. v. Ry. Co., 163 U. S. 564, 41 L. ed. 265.

⁶ Lewis v. American, etc., Association, 98 Wis. 203, 39 L. R. A. 559, 73 N. W. 793.

⁷ Dickerman v. Trust Co., 176 U. S. 181, 44 L. ed. 423.

⁸ Metropolitan, etc., Association v. Scrimgeour [1895], 2 Q. B. 604.

⁹ Central Trust Co. v. Columbus, etc., Co., 87 Fed. 815 [citing, Attorney-General v. Ry. Co., L. R. 5 App. Cas. 473; Zabriskie v. R. R. Co., 64 U. S.

(23 How.) 381, 16 L. ed. 488; Green Bay, etc., R. R. Co. v. Union, etc., Steamboat Co., 107 U. S. 98, 27 L. ed. 413; Vandall v. Dock Co., 40 Cal. 83; Hill v. Nisbet, 100 Ind. 341; Whetstone v. University, 13 Kan. 320].

¹⁰ Malone v. Lancaster, etc., Co., 182 Pa. St. 309, 37 Atl. 932 [citing, Brown v. Winnisimmet Co., 93 Mass. (11 All.) 326; Lyndeborough Glass Co. v. Glass Co., 111 Mass. 315].

¹¹ Jacksonville, etc., Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515.

¹² Green Bay, etc., Co. v. R. R. Union, etc., Steamboat Co., 107 U. S. 98, 27 L. ed. 413.

¹³ West Maryland R. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 111 Am. St. Rep. 362, 62 Atl. 351.

that its road shall be completed by a certain specified time.¹⁴ A railway may agree to furnish permanent employment as long as the employe is competent, as a part of a contract of compromise.¹⁵ A railway company may agree to pay to its employes a portion of their wages during time lost by inability due to accidents in the service of the railway company.¹⁶ A street railway corporation may enter into a valid contract to furnish or to pay for medical services rendered to persons injured by its operations.¹⁷ A railway may agree to pay commissions upon the sale of lands not belonging to it, but located along its line, in order to encourage the settlement of such land.¹⁸ A railway relief association has power to render medical and surgical aid to persons who are not members, if there is room in its hospital.¹⁹ A canal company may bind itself to locate a basin upon a tract of land, in consideration of the conveyance of such tract to the canal company.²⁰ A corporation formed to engage in business may buy necessary supplies.²¹ A corporation which is formed for a general automobile and taxicab business, has authority to buy automobile supplies,²² and its officers can not be held liable personally upon such contract.²³ A manufacturing corporation which uses large quantities of metal may engage in the business of smelting ore in order to secure such metal.²⁴ A corporation may make a bona fide contract for future purchase of material necessary to its business.²⁵ A corporation can not deal in futures regularly, unless specially authorized;²⁶ nor can a manufacturing corporation buy in order to sell at a profit.²⁷ Thus a corporation

¹⁴ *Oregon R. & Nav. Co. v. McDonald*, 58 Or. 228, 32 L. R. A. (N.S.) 117, 112 Pac. 413.

¹⁵ *Cox v. Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 50 L. R. A. (N.S.) 453, 103 N. E. 337.

¹⁶ *McAdow v. Kansas City W. R. Co.*, 96 Kan. 423, L. R. A. 1917B, 1158, 151 Pac. 1113.

¹⁷ *Youngstown Park & F. S. R. Co. v. Kessler*, 84 O. S. 74, 36 L. R. A. (N.S.) 50, 95 N. E. 509.

¹⁸ *Thraillkill v. Crosbyton-Southplains R. Co.*, 246 Fed. 687, 158 C. C. A. 643, L. R. A. 1918C, 90.

¹⁹ *Denver & Rio Grand Railroad Company Employes' Relief Association v. Rishmiller*, — Colo. —, L. R. A. 1918D, 859, 171 Pac. 501.

²⁰ *Dawson v. Western Maryland R. Co.*, 107 Md. 70, 14 L. R. A. (N.S.) 809, 68 Atl. 301.

²¹ *Shapleigh Hardware Co. v. Lewis*, 118 Miss. 587, 79 So. 765.

²² *Shapleigh Hardware Co. v. Lewis*, 118 Miss. 587, 79 So. 765.

²³ *Shapleigh Hardware Co. v. Lewis*, 118 Miss. 587, 79 So. 765.

²⁴ *Dodge v. Ford Motor Co.*, — Mich. —, 170 N. W. 668, 3 A. L. R. 413.

²⁵ *Sampson v. Cotton Mills*, 82 Fed. 833.

²⁶ *Jemison v. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482, 9 L. R. A. 708, 25 N. E. 264.

²⁷ *Day v. Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

formed to manufacture and sell ready-made clothing has no implied power to buy ready-made clothing to resell it at a profit.²⁸ The right of a mining or manufacturing corporation to operate a store for its employes is thus open to question,²⁹ though a manufacturing company may undoubtedly sell its own goods at a retail store;³⁰ and a corporation formed to do "a general brewing and malting business, and manufacture and sell soda water," may lease a "saloon," as it could not be said as a matter of law that a saloon was not a place for the sale of soda water.³¹

The mere fact, however, that a branch of business is profitable or advantageous to a corporation does not make it one of the implied powers of a corporation. "The exercise of a power that might be beneficial to the principal business is not necessarily incident to it."³² A railway company has no power to acquire or to manage a public warehouse,³³ though it may acquire and operate a grain elevator for storage pending transportation.³⁴ A brewery has no implied power to take a lease of land and to construct a saloon thereon.³⁵ A land company can not operate a street car line, and a street car company can not buy land and sell it in lots.³⁶ It has been held that a corporation formed for the purpose of manufacturing and selling electricity can not engage in the business of

²⁸ *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

²⁹ That it can, see *Searight v. Payne*, 74 Tenn. (6 Lea) 283. That it can not, see *Chewacla Lime Works v. Dismukes*, etc., 87 Ala. 344, 4 L. R. A. 100, 6 So. 122.

³⁰ *Dauchy v. Brown*, 24 Vt. 197.

³¹ *Brewer, etc., Co. v. Boddie*, 181 Ill. 622, 55 N. E. 49 [affirming, 80 Ill. App. 353].

³² *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413, 418; 70 Am. St. Rep. 334, 74 N. W. 160 [quoted in *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880].

"It can not be held that every act in furtherance of the interests of a corporation is *inter vires*. Many acts can be suggested which, though beneficial to the business of a corporation, are too remote from its general purposes

to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case." *Best Brewing Co. v. Klassen*, 185 Ill. 37, 40; 76 Am. St. Rep. 26, 50 L. R. A. 765, 57 N. E. 20.

See also, *United States Brewing Co. v. Dolese and Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N.S.) 898, 102 N. E. 753.

³³ *People v. Illinois Central R. Co.*, 233 Ill. 378, 16 L. R. A. (N.S.) 604, 84 N. E. 368.

³⁴ *People v. Illinois Central R. Co.*, 233 Ill. 378, 16 L. R. A. (N.S.) 604, 84 N. E. 368.

³⁵ *United States Brewing Co. v. Dolese & Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N.S.) 898, 102 N. E. 753.

³⁶ *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

selling electrical appliances.³⁷ The power to increase the capital stock is not implied.³⁸ A corporation can not change its principal office without amending its fundamental law and articles of association.³⁹ There is, it must be admitted, some lack of harmony in the cases discussed in this section.

Whether a bank has implied power to engage in ordinary business transactions in order to assist its debtor to perform a contract so that it may recover his debt to such bank, out of the proceeds of such contract between such debtor and a third person when such contract is performed, is a question upon which there is a conflict of authority. In some jurisdictions it is held that such contract is beyond the power of the bank.⁴⁰ Even where it is held that such contract is beyond the power of the bank, it is held that the bank is liable for the benefits which its debtor has received under such transaction.⁴¹ This liability is especially clear where the bank has thus been able to save a part or all of its debt, and where the amount which is thus saved exceeds the liabilities thus incurred.⁴² This principle has, however, been applied where the transaction ultimately involved the bank in loss.⁴³ In other jurisdictions analogous contracts are upheld, if the bank enters into them with the honest purpose of saving a prior debt. A bank which takes over a business as a reasonable means of saving a debt, may continue such business if it does, in good faith, as a means of saving such debt.⁴⁴ A bank which holds a mortgage on timber land may take in such land and engage in cutting such timber in order to

³⁷ *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880.

³⁸ *Cooke v. Marshall*, 191 Pa. St. 315, 43 Atl. 314.

³⁹ *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090 [reversing, 68 Ill. App. 378].

⁴⁰ *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128]; *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

⁴¹ *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Ear-*

ling, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128]; *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

⁴² *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

⁴³ *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

See also, *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128].

⁴⁴ *Reynolds v. Simpson*, 74 Ga. 454.

save the mortgage debt.⁴⁶ A bank may enter into a contract to pay the compensation of an administrator of its debtor's estate.⁴⁶ As a fair means of collecting a debt, a bank may agree to procure the release of a mortgage held by a third person on the property of the debtor;⁴⁷ or it may bind itself by contract for gathering the crops of its debtor to save its debt.⁴⁸

III

FORM OF CONTRACT

§ 1993. Form necessary in contracts of private corporations. Under some statutes it is provided that contracts of corporations shall be binding only if in writing, and under some statutes such provision applies only to contracts exceeding a certain amount. Under such statute a contract in excess of such amount is invalid.¹ A contract which is in excess of the amount fixed by statute is void in toto, and not merely void as to such excess. While it was said in California that such a statute applied only in contracts which were purely executory, and did not apply to contracts which have been performed,² this statement was subsequently limited; and it was held that the contract itself was invalid whether executed or executory,³ and that if such contract were performed on the part of the adversary party, the liability of the corporation was in quasi-contract for reasonable compensation.⁴ Such a statute is held to apply only to domestic corporations,⁵ and not to foreign corporations.⁶

In the absence of statutory restrictions, a corporation may be bound by an implied contract in the same manner in which an indi-

⁴⁶ John A. Roebling Sons' Co. v. First Nat. Bank, 30 Fed. 744.

⁴⁶ Lowe v. Ring, 106 Wis. 647, 82 N. W. 571.

⁴⁷ McCraith v. National Mohawk Valley Bank, 104 N. Y. 414, 10 N. E. 862.

⁴⁸ Bovey-Shute Lumber Co. v. Farmers' & Merchants' Bank, — N. D. —, 173 N. W. 455.

¹ Curtis v. Piedmont Lumber, Ranch & Mining Co., 113 N. Car. 417, 18 S. E. 705.

² Pixley v. Western Pacific Ry., 33 Cal. 183, 91 Am. Dec. 623.

³ Foulke v. San Diego & Gila Southern Pacific Ry., 51 Cal. 365. (The court here says that "the statute must be limited to contracts wholly executory," but that as far as the contract has been performed, recovery is limited to reasonable compensation for benefits received.)

⁴ Foulke v. San Diego & Gila Southern Pacific Ry., 51 Cal. 365.

⁵ Rumbough v. Southern Improvement Co., 106 N. Car. 461, 11 S. E. 528.

⁶ Rumbough v. Southern Improvement Co., 106 N. Car. 461, 11 S. E. 528.

vidual might be bound.⁷ Since the executive officers of a corporation are regarded for some purposes as the corporation itself,⁸ a statute which provides that authority to enter into a written contract must be conferred by writing, has been held not to apply to a contract entered into on behalf of the corporation by its executive officers.⁹ In the absence of a general statute or a provision in the charter of a corporation which requires the use of a seal, the rule at modern law is that the use of a corporate seal as a means of evidencing and authenticating the acts of a corporation, is not necessary, unless a seal would be necessary in the case of similar acts of an individual.¹⁰

In the absence of statutory requirements it is not necessary that the acts of the board of directors in making contracts should be entered upon their records.¹¹ If a board of directors has authorized an offer, and such act appears of record, it is not necessary that the fact of the acceptance of such offer should appear of record.¹² The principles which determine the nature of the liability assumed by a written instrument which is executed on behalf of the corporation, and which determine whether the corporation itself acquires rights or liabilities thereunder, or whether the rights and liabilities thus acquired are those of the officers or agents of the corporation personally, are the same, substantially, as those which apply in the case of natural persons, and are discussed elsewhere.¹³ A note which is made payable to the order "of directors of the A. B. Co.," is in legal effect payable to the A. B. Co.¹⁴ If a deed is personally executed on behalf of the corporation under its seal, and such deed is delivered, it will be presumed that such deed was authorized by the directors, although the authority therefor is not entered upon the minutes of the corporation.¹⁵

⁷ *Mahoney v. Hartford Investment Corporation*, 82 Conn. 281, 73 Atl. 766; *Eudakaitis v. St. George's Lithuanian Society*, 87 Conn. 1, 86 Atl. 562.

⁸ See §§ 1793 et seq.

⁹ *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 146 C. C. A. 623, 17 A. L. R. 1127.

¹⁰ *State v. Watters*, — Fla. —, 78 So. 671.

¹¹ *Iowa Drug Co. v. Souers*, 139 Ia.

72, 19 L. R. A. (N.S.) 115, 117 N. W. 300; *Cincinnati, Hamilton & Dayton R. R. Co. v. Harter*, 26 O. S. 426.

¹² *Iowa Drug Co. v. Souers*, 139 Ia. 72, 19 L. R. A. (N.S.) 115, 117 N. W. 300.

¹³ See ch. LXVI.

¹⁴ *First National Bank v. Walker*, 39 Okla. 620, 50 L. R. A. (N.S.) 1115, 136 Pac. 406.

¹⁵ *Cincinnati, Hamilton & Dayton R. R. Co. v. Harter*, 26 O. S. 426.

IV

ULTRA VIRES

§ 1994. **The origin of the doctrine of ultra vires.** When it is once ascertained that a given contract is in excess of corporate power, only the first step has been taken to determine its legal effect. As with contracts of infants and insane persons, rights and liabilities may grow out of contracts made by corporations which have not the legal capacity to bind themselves thereby fully and completely. The rules determining the legal effect of such contracts are grouped under the general head of the doctrine of ultra vires. This term means "beyond the powers" of the corporation; that the contract in question is beyond and outside of the scope of the powers conferred by its founders.¹ The use of the technical Latin phrase has probably helped to obscure the real meaning of the doctrine. Rules have been formulated as to the effect of ultra vires contracts which could scarcely have been applied had the subject been discussed under its English name.² The real difficulty of this topic is that there was practically no foundation for it at common law, since no business corporations existed; and that, without such foundation and without opportunity to observe the practical working of the rules that they were laying down, the courts were forced, by reason of the sudden growth of manufacturing, trading and transportation corporations, to develop new rules, and to elaborate a subject whose fundamental principles were not understood. Early precedents, hastily decided, present difficulties in many jurisdictions, as they do not harmonize with the modern trend of judicial decision; and the courts, unwilling to overrule them, follow them blindly, or distinguish them in cases often indistinguishable. The modern cases are therefore in hopeless confusion. There are conflicting views, not only upon isolated rules, but upon the whole theory of the subject; upon the question of what facts are operative as well as upon the question of what decision is to be rendered upon the facts given. No general statement can therefore be made of the present scope of the doctrine of ultra vires, except that ultra vires contracts do not, under some circumstances, have the validity of contracts entered into within the limits of corporate.

¹ *Citizens' Savings Bank v. Hawkins*, 71 Fed. 369, 18 C. C. A. 78; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

² *National Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235.

power. In its early form, the doctrine of ultra vires was severely simple. Contracts which were ultra vires were void.³ Thus where an insurance company engaged in the banking business and discounted notes, it could not recover upon such notes, though it might on the loan.⁴ A corporation which was authorized to loan money only on note and mortgage can not recover other loans.⁵ This rule proved so disastrous in its effects on modern business that it was promptly "barnacled over with exceptions, and muzzled by estopels,"⁶ and practically discarded in many jurisdictions.⁷

§ 1995. Preliminary considerations. All persons dealing with a corporation must take notice of its charter,¹ and of statutory

³ *Pearce v. R. R.*, 62 U. S. (21 How.) 441, 16 L. ed. 184; *Rock River Bank v. Sherwood*, 10 Wis. 230, 78 Am. Dec. 689.

"Where an act is not ultra vires for want of power in the corporation, but for want of power in its agents or officers, or because of the disregard of mere formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons; where, however, the contract of a corporation is ultra vires in the proper sense—that is to say, beyond the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—the contract is not only voidable, but is wholly void, and without any legal effect. The objection to the contract in such case is not merely that the corporation ought not to have made it, but that it could not make it. Such a contract can not be ratified by either party, because it could not have been authorized by either party. No performance on either side can give the unlawful contract validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it,

may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such prerequisites might, in fact, have been complied with; but when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped to show that it was prohibited by those laws, by consenting to it or acting upon it." *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 8 L. R. A. (N.S.) 966, 79 N. E. 133.

⁴ *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Utica Insurance Co. v. Scott*, 19 Johns (N. Y.) 1.

⁵ *Life, etc., Ins. Co. v. Insurance Co.*, 7 Wend. (N. Y.) 31.

⁶ *Walker's Am. Law*, p. 242n (last edition).

⁷ "The safety of men in their daily contracts requires that this doctrine of ultra vires should be confined within narrow bounds." *Directors, etc., of the Eastern, etc., Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 371 [quoted in *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 34; 36 L. R. A. 664, 45 N. E. 390].

¹ *United States. Pearce v. R. R.*, 62 U. S. (21 How.) 441, 16 L. ed. 184; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176; *McCormick v. Bank*, 165 U. S. 538, 41 L. ed. 817.

limitations on its corporate power.² Why this rule applies to corporations and not to partnerships,³ is by no means clear on principle. It is not limited to those cases of general laws alone, but extends to private acts of the legislature, foreign laws which are a part of the charter of the foreign corporation in question and to the articles of incorporation.⁴ A rigid application of this rule would charge persons with knowledge which it might be absolutely impossible for them to acquire, and would seriously affect the validity of contracts of corporations.⁵ It will not be presumed that a corporation has exceeded its powers in making a contract.⁶ This

Alabama. *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307.

Illinois. *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626 [affirming, 53 Ill. App. 396]; *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

Iowa. *Humphrey v. Association*, 50 Ia. 607.

Louisiana. *New Orleans, etc., Co. v. Dock Co.*, 28 La. Ann. 173, 26 Am. Rep. 90.

Maine. *Franklin Co. v. Lewiston Inst.*, 68 Me. 43, 28 Am. Rep. 9.

Massachusetts. *Davis v. R. R.*, 131 Mass. 258, 41 Am. Rep. 221.

Minnesota. *Kraniger v. Building Society*, 60 Minn. 94, 61 N. W. 904; *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

Missouri. *Taylor v. St. Louis National Life Ins. Co.*, 266 Mo. 283, 181 S. W. 8.

New York. *Jemison v. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482, 9 L. R. A. 708, 25 N. E. 264.

Tennessee. *Elevator Co. v. Memphis, etc., Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

Texas. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123.

West Virginia. *Smith v. Cornelius*, 41 W. Va. 59, 30 L. R. A. 747, 23 S. E. 599.

"A party dealing with a corporation

having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and can not plead ignorance in avoidance of the defense." *National, etc., Association v. Bank*, 181 Ill. 35, 44; 72 Am. St. Rep. 245, 54 N. E. 619.

See, however, *Minneapolis Fire & Marine Insurance Co. v. Norman*, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229, in which it was held that a policyholder was not negligent in failing to ascertain the powers conferred upon a foreign insurance company by its charter.

² *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

³ See § 1706.

⁴ *McCormick v. Bank*, 165 U. S. 538, 41 L. ed. 817. The rule applies "whether such charter be a private act or a general law under which corporations of this class are organized." *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40, 59; 44 L. ed. 66 [citing, *Zabriskie v. R. R.*, 64 U. S. (23 How.) 381, 16 L. ed. 488; *Thomas v. R. R.*, 101 U. S. 71, 25 L. ed. 950; *Pennsylvania Co. v. R. R.*, 118 U. S. 290, 630, 30 L. ed. 83, 284; *Oregon Ry. Co. v. Ry. Co.*, 130 U. S. 1, 32 L. ed. 837; *Pittsburgh, etc., Ry. Co. v. Bridge Co.*, 131 U. S. 371, 33 L. ed. 157].

⁵ See §§ 1977 and 1978.

⁶ *United States v. Ohio, etc., Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

is merely an application of the broader principle that capacity is always presumed, and that a lack of it must be shown affirmatively. Furthermore, while persons may be arbitrarily required to take notice of the powers of a corporation, they can not be required to know all the facts and circumstances connected with the business of the corporation.⁷ Accordingly, if a contract may, under some states of fact, be within the power of the corporation, persons dealing with the corporation may assume that the proper facts exist which are requisite to the validity of the contract,⁸ and it is no defense to an action on the contract that it was under the existing facts ultra vires, unless it can be shown that the contracting party knew the facts which rendered it ultra vires. This doctrine is applied generally to contracts performed by one party,⁹ as where one who does not know that the limit of corporate indebtedness has been reached loans money to the corporation.¹⁰ If a bank borrows an amount which does not exceed the amount which it has authority by its charter to borrow, the lender is not prevented from recovering such amount by the fact that the bank has borrowed other amounts which, together with the amount of the loan in

Alabama. *Allen v. West Point Mining & Mfg. Co.*, 132 Ala. 292, 31 So. 462; *Alabama City, G. & A. Ry. v. Kyle*, — Ala. —, 81 So. 54.

Indiana. *International, etc., Association v. Wall*, 153 Ind. 554, 55 N. E. 431.

Iowa. *Wardner, etc., Co. v. Jack*, 82 Ia. 435, 48 N. W. 729; *West v. Grocery Co.*, 109 Ia. 488, 80 N. W. 555.

Nebraska. *Gorder v. Plattsmouth, etc., Co.*, 36 Neb. 548, 54 N. W. 830.

New Jersey. *Elkins v. R. R.*, 36 N. J. Eq. 241.

⁷ **California.** *Kennedy v. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

Kentucky. *Citizens' Bank v. Bank of Waddy's Receiver*, 126 Ky. 169, 11 L. R. A. (N.S.) 598, 103 S. W. 249.

Massachusetts. *Monument National Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

Tennessee. *Bissell v. R. R.*, 22 N. Y. 256; *Miller v. Ins. Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

Wisconsin. *North Hudson, etc., Association v. Bank*, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300.

⁸ **United States.** *Colorado Springs Co. v. Publishing Co.*, 97 Fed. 843, 38 C. C. A. 433.

California. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Kennedy v. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

Massachusetts. *Monument National Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

Tennessee. *Miller v. Ins. Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

Wisconsin. *North Hudson, etc., Association v. Bank*, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300.

⁹ *Tourtelot v. Whithed*, 9 N. D. 407, 84 N. W. 8.

¹⁰ *Humphrey v. Association*, 50 Ia. 607; *Auerbach v. Mill Co.*, 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799; *Ellsworth v. St. Louis, etc., Co.*, 98 N. Y. 553.

question, exceed its charter limitation if the lender does not know of such other loans.¹¹ This principle also applies where a corporation purchases property which it might buy for a given purpose from one who does not know that it is to be used for other purposes.¹²

§ 1996. What ultra vires includes. Ultra vires contracts are, strictly speaking, only those which are defective solely because they are beyond the power of the corporation.¹ Where the legislature has forbidden a corporation to engage in certain transactions, by statutes either declaratory of the common law, or modifying it, such transactions are in some respects decided on different principles from ultra vires contracts.² Ultra vires is also loosely used by some authorities to cover two classes of contracts which do not belong to it: First, contracts which the corporation might lawfully have made, but which the agents making them were not authorized to make, are not properly ultra vires contracts. Their validity turns on questions of agency as affected by the nature of the corporation.³ Second, if the contract is one which is treated as illegal if made by a natural person, it is as illegal if made by a corporation, but as a rule, no more so and no less. These contracts

¹¹ *Citizens' Bank v. Bank of Waddy's Receiver*, 126 Ky. 169, 11 L. R. A. (N.S.) 598, 103 S. W. 249.

¹² *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. ed. 547; *Thompson v. Lambert*, 44 Ia. 239; *Luttrell v. Martin*, 112 N. Car. 593, 17 S. E. 573.

¹ *Alabama City, G. & A. Ry. Co. v. Kyle*, — Ala. —, 81 So. 54; *Georgia Granite R. Co. v. Miller*, 144 Ga. 665, 87 S. E. 897; *Kadish v. Association*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 8 L. R. A. (N.S.) 966, 79 N. E. 133; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363.

"An ultra vires contract is one that is wholly and manifestly outside of the charter or constituent act of the corporation or some valid legislative act applicable to it, and contracts in this sense ultra vires import, in general, no corporate liability directly upon the contract. Corporations have no powers except those which their charters confer expressly or as in-

cidental to their existence." *Alabama City, G. & A. Ry. Co. v. Kyle*, — Ala. —, 81 So. 54.

See, on the general subject of ultra vires, *The Unauthorized or Prohibited Exercise of Corporate Power*, by George Wharton Pepper, 9 *Harvard Law Review*, 255; *Non-Public Corporations and Ultra Vires*, by Jesse W. Lillienthal, 11 *Harvard Law Review*, 387; *Ultra Vires Corporation Leases*, by Edward Avery Harriman, 14 *Harvard Law Review*, 332; *Ultra Vires Acts under the California Decisions*, by Robt. L. McWilliams, 6 *California Law Review*, 319; *Rights under Unauthorized Corporation Contracts*, by Geo. W. Pepper, 8 *Yale Law Journal*, 24, and *The Punishment of a Corporation: The Standard Oil Case*, by Charles G. Little, 3 *Illinois Law Review*, 445.

² See §§ 677 et seq.

³ *Kelley v. Varnish Co.*, 90 Ill. App. 287.

"The plea of ultra vires as used herein is intended doubtless to mean that act of the cashier in guarantee-

are treated elsewhere.⁴ An ultra vires contract in the proper sense is "nothing criminal or against good morals."⁵ The defense of ultra vires can not be set up unless it is pleaded specially,⁶ while in many jurisdictions the defense of illegality can be set up whether it is pleaded or not.⁷ In many cases it is, however, said that an ultra vires contract is "unlawful and void."⁸ In some cases ultra vires contracts are treated as though they were illegal.⁹ If a bank has borrowed money in violation of statute, the lender can not recover as against the depositors if the bank is insolvent.¹⁰

This, however, is undoubtedly a loose use of the terms "unlawful" and "void." This confusion in terms often arises in cases such as contracts tending to create monopolies,¹¹ or transferring

ing payment of the account to the powder company without the knowledge, consent, or ratification of the board of directors. It is not used in its primary sense or meaning as being beyond the scope of the powers of the corporation to perform it under any circumstances or for any purpose. There are many shades of meaning and distinction employed and understood by the term, but, as we use it here, it is meant thereby to challenge the authority of the cashier of defendant bank to bind the same as a guarantor without the knowledge or consent or ratification of the board of directors. Used in this sense, it becomes a matter of primary importance to ascertain at first whether or not the bank secured a benefit or a beneficial effect of the alleged contract. Ordinarily, where the bank or corporation secures a benefit or beneficial effect from the contract, or when the contract is not plainly beyond the scope or power of the parties making it, the above principle can not be invoked or relied upon. It is only in cases of ambiguity or vagueness, or where the contract is doubtful in this respect, that it can be applied. But if the contract complained of is one which clearly contemplates some act beneficial to the corporation, it will generally be upheld and the plea disregarded." *Crowder State Bank v.*

Aetna Powder Co., 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

⁴ See chs. XX to XXXVII.

⁵ *Illinois, etc., Bank v. Ry. Co.*, 117 Cal. 332, 343, 49 Pac. 197. "Ultra vires and illegality represent totally different and distinct ideas." *Bissell v. R. R.*, 22 N. Y. 258, 269.

⁶ *Blackwood v. Lansing Chamber of Commerce*, 178 Mich. 321, 144 N. W. 823; *Duluth, South Shore & Atlantic Railway Co. v. Wilson*, 200 Mich. 313, L. R. A. 1918E, 763, 167 N. W. 55.

⁷ See §§ 1050 et seq.

⁸ *McCormick v. Bank*, 165 U. S. 538, 549, 41 L. ed. 817 [quoted in *California, etc., Bank v. Kennedy*, 167 U. S. 362, 368, 42 L. ed. 198].

See also, *State v. Corning State Savings Bank*, 136 Ia. 79, 113 N. W. 500; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

⁹ *State v. Corning State Savings Bank*, 136 Ia. 79, 113 N. W. 500.

¹⁰ *State v. Corning State Savings Bank*, 136 Ia. 79, 113 N. W. 500.

¹¹ *People v. Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 8 L. R. A. 497, 22 N. E. 798; *Harding v. Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 75 Am. St. Rep. 184, 48 L. R. A. 568, 56 N. E. 822. (Holding that the Associated Press can not give a monopoly of its news to one paper.)

the performance of duties toward the public,¹² where the contract is both ultra vires and illegal. If the contract is illegal as in violation of established principles of public policy, it can not, of course, be enforced.¹³ If the contract is not merely ultra vires, but is also forbidden by statute, no action can be brought on such contract.¹⁴ Thus if the statute provides an exclusive method of giving a mortgage, a mortgage executed in any other manner and under any other circumstances is void.¹⁵ So if the statute provides a limit to the rate of interest which a corporation may agree to pay, a contract for a higher rate is void.¹⁶ But the purpose of a statute restricting the exercise of corporate power must always be considered in construing it, and if intended to protect those dealing with the corporation—as where a corporation is forbidden to transact business until its stock subscription is made,¹⁷ or a foreign insurance company is forbidden to write policies until it complies with certain statutory provisions intended for the security of policyholders¹⁸—such provisions will not make such contracts

¹² *United States. Oregon, etc., R. R. v. Oregonian, etc., R. R.*, 130 U. S. 1, 32 L. ed. 837; *Central Transportation Co. v. Car Co.*, 139 U. S. 24, 35 L. ed. 55.

Illinois. Chicago, etc., Co. v. Gaslight Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169.

Maine. Brunswick Gaslight Co. v. Gas, etc., Co., 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

New Jersey. Stockton v. R. R., 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

West Virginia. Smith v. Cornelius, 41 W. Va. 59, 30 L. R. A. 747, 23 S. E. 599.

¹³ Contract by one insurance company to buy out another. *McClure v. Levy*, 147 N. Y. 215, 41 N. E. 492.

¹⁴ "The contract here involved was not only void by reason of its being ultra vires, but it was also void on the ground of illegality. There is a marked distinction between contracts which are void merely by reason of being ultra vires, and contracts which are void by reason of being both ultra vires and illegal. Validity can not be given to an illegal contract through any principle of estoppel. As between parties

in pari delicto, the courts will leave them where it has found them. Courts will not adjudicate rights under illegal contracts." *Minnesota, D. & P. R. Co. v. Way*, 34 S. D. 435, L. R. A. 1915B, 925, 148 N. W. 856. See upon this question, *Visalia Gas Co. v. Sims*, 104 Cal. 328, 43 Am. St. Rep. 105, 37 Pac. 1042; *McNulta v. Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; *In re Assignment Mutual, etc., Ins. Co.*, 107 Ia. 143, 70 Am. St. Rep. 149, 77 N. W. 143; *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. 695; *New York, etc., Trust Co. v. Helmer*, 77 N. Y. 64. The United States supreme court cases cited in this section and in § 1997 are many of them cases involving contracts forbidden by statute or invalid as against public policy. The court, however, places its decision on the broad ground of ultra vires.

¹⁵ *Southern, etc., Association v. Stable Co.*, 128 Ala. 624, 29 So. 654.

¹⁶ *Southern, etc., Association v. Stable Co.*, 119 Ala. 175, 24 So. 886.

¹⁷ *City of Spokane v. Amsterdam Trust Co., etc.*, 22 Wash. 172, 60 Pac. 141.

¹⁸ *Union, etc., Co. v. McMillen*, 24 O. S. 67.

void. A statute as to the mode of pledging property, which is enacted for benefit of stockholders, can not be taken advantage of by creditors.¹⁹

§ 1997. The reasons underlying the doctrine of ultra vires. "The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."¹ In some cases the doctrine of ultra vires is placed especially upon the theory that the members of the corporation have agreed by their certificate of incorporation that the capital of the corporation shall be devoted to the purposes specified in such certificate.² Where the interests of the stockholders are regarded as paramount, the courts are likely to hold that if the stockholders acquiesce in the transaction in question, with full knowledge of the facts, they can not take advantage thereafter of the original want of power. In jurisdictions in which the interest of the state in restricting corporations to the exercise of the powers conferred upon them is regarded as paramount, the courts are less willing to give effect to the acquiescence of the stockholders in ultra vires transactions. A distinction might well be drawn between powers which the corporation could have assumed if it had so chosen—by inserting such powers in such charter originally, or by amending its charter so as to assume such powers—and powers which are forbidden to the corporation under all circumstances, or in connection with the powers which it has already assumed, or powers which the corporation can exercise only

¹⁹ Anderson v. Bank, 122 Ala. 275, 25 So. 523.

¹ McCormick v. Bank, 165 U. S. 538, 549, 41 L. ed. 817 [citing, Pearce v. R. R., 62 U. S. (21 How.) 441, 16 L. ed. 184; Pittsburgh, etc., Co. v. Bridge Co., 131 U. S. 371, 33 L. ed. 157; Central, etc., Co. v. Car Co., 139 U. S. 24, 35 L. ed. 55; quoted in California, etc., Bank v. Kennedy, 167 U. S. 362, 368,

42 L. ed. 198, which cites on this point the English cases, Mann v. Tramways Co. (1893), App. Cas. 69; Ooregum Mining Co. v. Roper (1892), App. Cas. 125; Directors, etc., Iron Co. v. Riche, L. R. 7 H. L. 653; so Lucas v. Transfer Co., 70 Ia. 541, 59 Am. Rep. 449, 30 N. W. 771].

² General Investment Co. v. Bethlehem Steel Corporation, 248 Fed. 303.

upon the payment of a special license fee therefor. In the former case, no good reasons appear for refusing to give effect to such contracts, if the stockholders have acquiesced therein, since there can be no interest on the part of the state to be protected in cases in which the corporate powers could have been had for the asking. In the latter classes of cases, the state appears to have a strong interest in preventing the corporation from exercising such powers which are not conferred upon it and which it could not have obtained from the state.

The reasons which are assigned for the doctrine of ultra vires can not be considered conclusive. Even if all persons are required to take notice of the powers of a corporation, it is hard to see why ultra vires contracts should be nullities any more than the contracts of an infant should be nullities. All persons are bound to take notice of the contractual powers of an infant and of the fact of infancy,³ yet his contracts are not unlawful or void. While it is very generally held that those who deal with a corporation are charged with notice of its charter, and of the limitations upon its powers,⁴ the consequences which follow from the recognition of this principle depend upon the question of which of the two remaining interests to be considered in determining the validity and effect of ultra vires contracts the law will regard as the paramount one. Stockholders who acquiesce in ultra vires contracts can not rightfully complain that they never undertook the risk, and the interest of the state would be better subserved by a greater willingness to take away charters for abuse of corporate powers, than by treating as void a contract of which the corporation has had the full benefit. Accordingly, many courts place the doctrine on different grounds, with different practical results.⁵

It is said in many cases, that the defense of ultra vires is one which is not favored at law,⁶ whether such defense is invoked on behalf of the corporation or against it.⁷ It is said that ultra vires can be used as a defense only when "consistent with the obligations of justice,"⁸ and that it will not be permitted as a defense

³ See § 1625.

⁴ See §§ 1995 et seq.

⁵ See §§ 1998 et seq., and § 2010.

⁶ *Thrallkill v. Crosbyton-Southplains*
R. Co., 246 Fed. 687, 158 C. C. A. 643,
L. R. A. 1918C, 90.

⁷ *Thrallkill v. Crosbyton-Southplains*

R. Co., 246 Fed. 687, 158 C. C. A. 643,
L. R. A. 1918C, 90.

⁸ *United States. Ohio, etc., Ry. Co.*
v. McCarthy, 96 U. S. 258, 24 L. ed.
693.

California. Union Water Co. v.
Fluming Co., 22 Cal. 621.

when it will work a "legal wrong or an injustice."⁹ A generality of this sort, however, is of little practical help. If an ultra vires contract has been entered into by the officers of a corporation or by a majority of its stockholders, in order to defraud the remaining stockholders, it is clear that such contract is invalid.¹⁰ If, however, the contract is entered into by both parties in good faith, the application of the doctrine will deprive one or the other of them of some advantage which he had expected to gain by such transaction; and, accordingly, an injustice will be done unless we resort to the technical explanation that the parties to the transaction must be presumed conclusively to have known of the invalidity of the transaction, whatever their actual state of knowledge upon the subject. This is a better statement of ethics than a practical rule of law. It has been repudiated as a mere dictum by some of the courts that have enunciated it.¹¹

Idaho. *Burke, etc., Co. v. Wells Fargo & Co.*, 7 Ida. 42, 60 Pac. 87.

Illinois. *Kadish v. Building Association*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236.

Massachusetts. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

Michigan. *Carson City, etc., Bank v. Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641.

New York. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Linkauf v. Lombard*, 137 N. Y. 417, 33 Am. St. Rep. 743, 20 L. R. A. 48, 33 N. E. 472; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 37, 36 L. R. A. 664, 45 N. E. 390.

Oregon. *Portland, etc., Co. v. East Portland*, 18 Or. 21, 6 L. R. A. 290, 22 Pac. 536.

Utah. *Bear, etc., Co. v. Hanley*, 15 Utah 506, 50 Pac. 611.

Wisconsin. *Lewis v. American, etc., Association*, 98 Wis. 203, 39 L. R. A. 559, 73 N. W. 793.

⁹ **Michigan.** *Carson City Savings Bank v. Carson City Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; *Citizens' Savings Bank v. Globe Brass Works*, 155 Mich. 3, 118 N. W. 507; *Timm v. Grand Rapids Brew-*

ing Co., 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357.

Minnesota. *Bell v. Kirkland*, 102 Minn. 213, 13 L. R. A. (N.S.) 793, 113 N. W. 271.

New Jersey. *U. S. Industrial Alcohol Co. v. Distilling Co.*, 89 N. J. Eq. 177, 104 Atl. 216.

Tennessee. *Dillard & Coffin Co. v. Richmond Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

Washington. *United States Fidelity & Guaranty Co. v. Cascade Construction Co.*, — Wash. —, 180 Pac. 463.

"The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." *Ohio & Mississippi Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693 [quoted in *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, L. R. A. 1917A, 737, 142 Pac. 670].

¹⁰ See §§ 410 et seq.

¹¹ It is called "a mere passing remark" in *Central, etc., Co. v. Car Co.*, 139 U. S. 24, 55, 35 L. ed. 55. So, *Buckeye, etc., Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71, 18 L. R. A. 252, 20 S. W. 427.

§ 1998. Who can take advantage of ultra vires. To have the question of the validity of ultra vires contracts raised at all, there must be some one in a position to raise such question. The first point in any proceeding to determine the validity of an ultra vires transaction is to determine whether the party attacking the contract can be allowed to raise the question.¹ While this principle does not, any more than any other that has been suggested, solve all difficulties or reconcile all cases, it is a very material help in determining the validity of any given contract.

First, the state can attack the validity of any ultra vires transaction by a direct proceeding in *quo warranto*,² although it may decline through its courts to revoke a charter because of isolated ultra vires acts, since the essential purpose and object of such a suit is the determination of a private right.³

Second, persons not parties to the contract and whose interests are affected by the ultra vires contracts of the corporation only indirectly, can not attack it, where not directly prejudiced thereby.⁴ The fact that the prosecution of the ultra vires transactions will be financially beneficial to the corporation, and that accordingly the corporation will injure third persons by its competition, does not authorize such third persons to attack the validity of such ultra vires transaction.⁵ The owner of a newspaper can not attack the right of a street railway company to carry on advertising in

¹ *Benton v. Elizabeth*, 61 N. J. L. 693, 40 Atl. 1132 [affirming, 61 N. J. L. 411, 39 Atl. 683, 906].

² *State v. Oil Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 L. R. A. 413, 53 N. E. 1089; *State v. Standard Oil Co.*, 49 O. S. 137, 34 Am. St. Rep. 541, 15 L. R. A. 145, 30 N. E. 279; *State v. Dairy Co.*, 62 O. S. 350, 57 L. R. A. 181, 57 N. E. 62; *State v. Water Co.*, 107 Wis. 441, 83 N. W. 697.

See §§ 2005 and 2010.

³ *People v. Cooper*, 139 Ill. 461, 29 N. E. 872; *Cupit v. Bank*, 20 Utah 292, 58 Pac. 839.

⁴ "None but a person directly interested in the corporation, or the state, can question such authority." *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 14, 65 Am. St. Rep. 22, 37 L. R. A. 138, 70 N. W. 289, 71 N. W. 109

[citing *National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Fritts v. Palmér*, 132 U. S. 282, 33 L. ed. 317; *Natoma, etc., Co. v. Clarkin*, 14 Cal. 544; *Alexander v. Tolleston Club*, 110 Ill. 65; *Shewalter v. Pirner*, 55 Mo. 218; *Ragan v. McElroy*, 98 Mo. 349, 11 S. W. 735].

To the same effect see, *Springer v. Trust Co.*, 202 Ill. 17, 66 N. E. 850 [affirming, 102 Ill. App. 294]; *Beach v. Wakefield*, 107 Ia. 567, 591, 76 N. W. 688, 78 N. W. 197.

Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; *Read v. Ry.*, 110 Tenn. 316, 75 S. W. 1056; *Burns v. St. Paul City Ry. Co.*, 101 Minn. 363, 112 N. W. 412.

⁵ *Burns v. St. Paul City Ry. Co.*, 101 Minn. 363, 112 N. W. 412.

its street cars.⁶ An individual can not raise the question of the right of a corporation to act as trustee or to administer a trust.⁷ If a statute provides specifically that individuals may raise the question of the authority of a corporation to do a specific act, the right of the court to hear such question ends when it finds that the corporation possesses the power to do such act.⁸ Where a corporation laid oil pipes in a street, claiming under a transfer of property rights,⁹ or had obtained leave of the city to cross the streets,¹⁰ third persons can not question its power to do so. Where a bank bought notes,¹¹ or a judgment and a certificate of sale,¹² or land,¹³ as where a foreign corporation acquired land and then conveyed it without complying with the local statutes,¹⁴ persons not parties to the transfer can not resist the enforcement of rights thus acquired. Thus even if a corporation bought property in an ultra vires transaction, a lessee from such corporation can not attack the validity of such conveyance, nor can a guarantor of such rent.¹⁵ So the right of a corporation to acquire realty can not be inquired into in an action brought by it to enforce payment of a debt.¹⁶ A creditor of a corporation can not attack a transaction as ultra vires unless the effect of such transaction is to divert corporate assets from the payment of his debt.¹⁷ The judgment creditor of the president of a corporation can not attack the title of such corporation to property bought by it on an execution sale of such president's property.¹⁸ So a third person,¹⁹ such as a sub-

⁶ Burns v. St. Paul City Ry. Co., 101 Minn. 363, 112 N. W. 412.

⁷ Gibson v. Frye Institute, 137 Tenn. 452, L. R. A. 1917D, 1062, 193 S. W. 1059.

⁸ Blauch v. Johnstown Water Co., 247 Pa. St. 71, 93 Atl. 169; Alexander v. Wilkes-Barre Anthracite Coal Co., 254 Pa. St. 1, L. R. A. 1917B, 310, 98 Atl. 794.

⁹ Benton v. Elizabeth, 61 N. J. L. 693, 40 Atl. 1132 [affirming, 61 N. J. L. 411, 39 Atl. 683, 906].

¹⁰ Pennsylvania, etc., R. R. Co. v. R. Co., 160 Pa. St. 277, 28 Atl. 784.

¹¹ Prescott National Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

¹² Hennessy v. St. Paul, 54 Minn. 219, 65 N. W. 1123 [citing, National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; National Bank v. Whitney, 103

U. S. 99, 26 L. ed. 443; Fortier v. Bank, 112 U. S. 439, 28 L. ed. 764; Merchants' National Bank v. Hanson, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849].

¹³ Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188.

¹⁴ Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317.

¹⁵ Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147, 65 N. E. 57.

¹⁶ Advance Thresher Co. v. Rockefeller, 16 S. D. 462, 93 N. W. 652.

¹⁷ Force v. Age-Herald Co., 136 Ala. 271, 33 So. 866.

¹⁸ Scott v. Bank, — Tex. —, 75 S. W. 7 [reversing (Tex. Civ. App.), 67 S. W. 343, which denied rehearing of 66 S. W. 485].

¹⁹ Collins v. Rea, 127 Mich. 273, 86 N. W. 811; Smith v. Bank, 45 Neb. 444, 63 N. W. 796.

sequent judgment creditor,²⁰ can not attack a mortgage given by a corporation as *ultra vires*. One liable on a claim for damages can not attack the purchase of such claim by a corporation if it is assignable,²¹ and one liable to a lessee of a railroad can not attack the validity of the lease in a suit by lessee.²² So one liable on a note can not attack the transfer of it by the payee corporation incident to a genuine sale of its business, as *ultra vires*.²³ One who with full knowledge of the material facts has accepted an assignment of a chattel mortgage given by a corporation, can not subsequently avoid the assignment on the ground that the mortgage was *ultra vires*.²⁴ So if a stockyards corporation has erected a railroad and used it for an *ultra vires* purpose, it can resist its unauthorized removal by a city.²⁵ A trustee created in a trust deed given by a corporation can not attack a conveyance to the corporation as *ultra vires*.²⁶

Up to this point the courts are practically unanimous in their decisions as to who can plead *ultra vires*. These holdings show absolutely that an *ultra vires* contract is not, properly speaking, void, since a void contract or transaction may be attacked by any one whose interests are adverse to the validity of the transaction. In all these cases, it will be noticed that the person who seeks to invoke the doctrine of *ultra vires* is not in any way prejudiced by the *ultra vires* transaction, as it makes no difference to him whether the corporation or the other party to the transaction asserts the rights in question. This rule, therefore, extends no farther than its reason. A third person who is prejudiced by an *ultra vires* contract may attack it, as creditors whose rights are endangered by the *ultra vires* contract.²⁷ It is held that if a bank

²⁰ *Beeks v. Park Association*, 54 Neb. 226, 74 N. W. 581.

²¹ *Central Ohio, etc., Co. v. Dairy Co.*, 60 O. S. 96, 53 N. E. 711; *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 65 Am. St. Rep. 22, 37 L. R. A. 138, 70 N. W. 289 [rehearing denied, 37 L. R. A. 142, 71 N. W. 109 (this claim was held not assignable)].

Contra, where a corporation bought certain lots and thereafter the grantor assigned to the corporation his claim against the city for damages to such lots due to the construction of a viaduct, and these facts appeared on the

petition, it was held that demurrer would lie. *Pueblo v. Investment Co.*, 28 Colo. 524, 89 Am. St. Rep. 221, 67 Pac. 162.

²² *Southern Pacific Co. v. United States*, 28 Ct. Cl. 77.

²³ *Ehrman v. Ins. Co.*, 35 O. S. 324.

²⁴ *Woodcock v. Bank*, 113 Mich. 236, 71 N. W. 477.

²⁵ *Chicago v. Transit Co.*, 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430.

²⁶ *Hagerstown, etc., Co. v. Keedy*, 91 Md. 430, 46 Atl. 965.

²⁷ *Wiley Fertilizer Co. v. Carroll*, — Ala. —, 80 So. 417; *Washington Mill*

has purchased fertilizer, no claim therefor can be asserted after the insolvency of such bank,²⁸ since such claim, if asserted, will operate to the prejudice of the creditors of the corporation upon transactions within the power of such corporation.²⁹ Where a corporation has borrowed money in excess of its limit of borrowing, a subsequent creditor who did not know of such excessive debt may attack the transaction as far as his claim is thereby diminished.³⁰ Thus a policyholder in a corporation may raise the question of ultra vires, where such corporation has acquired his notes to use them as a set-off.³¹ Stockholders who act promptly may restrain the officers of the company from entering into ultra vires contracts,³² though they can not compel the directors to avoid the contract while retaining the benefits,³³ and they must act promptly.³⁴ It is said that as between the stockholders themselves, the transactions of a corporation are valid, whether within its grant of power or without its grant of power, until the corporation is restrained in a proceeding brought for that purpose, either by the stockholder or by the state.³⁵ This principle has been applied so as to uphold the right of a brewery company to engage in the business of manufacturing soft drinks, after state-wide prohibition has taken effect, and to uphold its contract in the latter business until it is restrained by a dissenting stockholder.³⁶

This leaves the question of the validity of the contract as far as the corporation itself is concerned, and as between the parties to such contract, as the only remaining question to consider under ultra vires. In discussing the right of a corporation to avoid an ultra vires contract in order to protect non-assenting stockholders,

Co. v. Lumber Co., 19 Wash. 165, 52 Pac. 1067.

²⁸ Wiley Fertilizer Co. v. Carroll, — Ala. —, 80 So. 417.

²⁹ Wiley Fertilizer Co. v. Carroll, — Ala. —, 80 So. 417.

³⁰ See § 1981.

³¹ Hart v. Insurance Co., 21 Mo. 91; Straus v. Insurance Co., 5 O. S. 59, though it will not be presumed that the notes were so acquired. Hart v. Insurance Co., 21 Mo. 91.

³² Pratt v. Pratt, etc., 33 Conn. 446; Harding v. Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; Teachout v. Ry., 75 Ia. 722, 38 N. W. 145.

Thus where the contract is ultra vires and also illegal, as creating a monopoly, a stockholder may enjoin execution and performance. Harding v. Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577.

³³ Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

³⁴ Boyce v. Coal Co., 37 W. Va. 73, 16 S. E. 501.

³⁵ Clark v. Groger, 102 Wash. 188, 172 Pac. 1164.

³⁶ Clark v. Groger, 102 Wash. 188, 172 Pac. 1164.

it must first be determined whether the contract is purely ultra vires or whether it is also subject to attack because beyond the power of the agents who made it on behalf of the corporation. Insofar as it is free from questions of agency and illegality, the legal effect of the contract depends upon how far it has been performed—whether it is wholly executory, wholly executed, or partly executed.

§ 1999. Executory contracts. If a contract is executory on both sides, it is subject to the defense of ultra vires by the corporation.¹ If the doctrine of ultra vires has any force at all, it applies to cases like this where the adversary party has as yet parted with nothing of value in reliance on the contract. Thus notes given by an insurance company under a contract whereby it was to purchase another insurance company, are void.²

The adversary party, as well as the corporation, may treat the contract as invalid, since, while the contract remains executory, the only consideration for the promise of the adversary party, is the promise of the corporation; and if the latter is without legal effect, the former is without consideration.³ A contract to convey

¹ *United States. Thomas v. R. R.*, 101 U. S. 71, 25 L. ed. 950.

Alabama. Simmons v. Iron Works, 92 Ala. 427, 9 So. 160; *First National Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351.

California. Coleman v. Turnpike Co., 49 Cal. 517.

Illinois. McNulta v. Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954 [affirming, 63 Ill. App. 593].

Indiana. Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

Kansas. Sherman, etc., Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

Missouri. Garrett v. Mining Co., 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

New York. Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; *Jemison v. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482, 9 L. R. A. 708, 25 N. E. 264.

Ohio. Coppin v. Greenlees, etc., Co., 38 O. S. 275, 43 Am. Rep. 426; *Simpson v. Association*, 38 O. S. 349.

See, Executory Ultra Vires Transactions, by Edward H. Warren, 24 *Harvard Law Review*, 534.

² *Governor, etc., v. Fox*, 16 Q. B. 229, 71 E. C. L. 227.

³ *Alabama. First National Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351.

Georgia. Screven Hose Co. v. Philpot, 53 Ga. 625; *Kohlruss v. Zachery*, 139 Ga. 625, 46 L. R. A. (N.S.) 72, 77 S. E. 812.

New Jersey. East Ridgelawn Cemetery Co. v. Frank, 77 N. J. Eq. 36, 75 Atl. 1006.

New York. McClure v. Levy, 147 N. Y. 215, 41 N. E. 492.

Oregon. Portland v. Paving Co., 33 Or. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28.

Pennsylvania. Bosshardt, etc., Co. v. Oil Co., 171 Pa. St. 109, 32 Atl. 1120.

Thus the court held that "an executory contract, the enforcement of which by the plaintiff could be success-

land to a cemetery company, in consideration of the issue of certain stock, is unenforceable if the cemetery company has no power to issue such stock.⁴ The foregoing principles are necessarily based on the proposition that an ultra vires contract, while executory on both sides, is more than merely voidable. For many purposes it may be treated as absolutely void.

§ 2000. Contracts performed by one party—Performance by the corporation. If a contract is fully performed by the corporation, so that whatever was to be done in excess of corporate power has been done, the corporation can recover on the contract and the adversary party can not defend on the ground that the contract was ultra vires.¹ If a lease, together with an option to purchase, has been given to a corporation, and the corporation has taken possession of the leased premises, and has made valuable improvements, the lessor can not refuse to convey in accordance with the terms of his option, on the ground that the corporation has no power to purchase such property.² Although a national bank may have no power to own or rent an office building, a tenant who has

fully resisted by the defendant on the ground that the former was not authorized by its charter to enter into it," was formed by the acceptance by a corporation of a proposition to enter into an ultra vires contract and bound neither while executory. *Bosshardt, etc., Co. v. Oil Co.*, 171 Pa. St. 109, 120, 32 Atl. 1120. See § 567.

⁴ *East Ridgelawn Cemetery Co. v. Frank*, 77 N. J. Eq. 36, 75 Atl. 1006.

¹ *United States. Union Gold Mining Co. v. Bank*, 96 U. S. 640, 24 L. ed. 648; *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

California. Union Water Co. v. Fluming Co., 22 Cal. 620.

Illinois. Eckman v. R. R., 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496; *Lurton v. Building Association*, 187 Ill. 141, 58 N. E. 218 [affirming, 87 Ill. App. 395].

Indiana. Pooch v. Association, 71 Ind. 357; *Chicago, etc., R. R. v. Derkes*, 103 Ind. 520, 3 N. E. 239.

Kansas. Elmo State Bank v. Hildebrand, 103 Kan. 705, 3 A. L. R. 54, 177 Pac. 6.

Massachusetts. Bowditch v. Ins. Co., 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798.

Missouri. McIndoe v. St. Louis, 10 Mo. 575; *Ashenbroel Club v. Finlay*, 53 Mo. App. 256.

Nebraska. Equitable, etc., Association v. Bidwell, 60 Neb. 169, 82 N. W. 384; *Equitable, etc., Association v. Baird*, 60 Neb. 173, 82 N. W. 385.

New York. Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390; *Mutual Life Insurance Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

Pennsylvania. Oil Creek, etc., R. R. Co. v. Transportation Co., 83 Pa. St. 160; *Farmers' Deposit National Bank v. Western Fuel Co.*, 215 Pa. St. 115, 114 Am. St. Rep. 949, 64 Atl. 374.

See, *Executed Ultra Vires Transactions*, by Edward H. Warren, 23 *Harvard Law Review*, 495.

² *Mutual Life Insurance Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

occupied a part of such building under a lease from the bank, can not set up such want of power as to a defense to an action upon his lease to recover rent.³ A lessee of gas works from a corporation was held liable for rent on the lease during the time for which the lessee used it.⁴ This was a contract between two corporations; and many authorities hold that part performance of such contract can give it no validity.⁵ The opposite result from that reached in *Bath Gaslight Co. v. Claffy*, was reached in *Brunswick, etc., Co. v. Light Co.*⁶ The court said: "We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works, but do not think the amount can be measured by the ultra vires agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the ultra vires agreement may be used as evidence, in the nature of an admission of what is a reasonable rent, it can not be allowed to govern or control the amount."⁷ A subcontract was assigned to a national bank, which was obliged to complete the performance of such contract. In an action by the bank on such contract neither the owner nor the original contractor can set up ultra vires.⁸ A corporation which has issued accommodation paper may recover on an indemnity mortgage given to protect it in becoming surety.⁹ An ultra vires loan, made by a corporation,¹⁰ as a loan to an officer of the corporation;¹¹ a loan for a period of two years made by a corporation authorized to loan money for one year only;¹² or a discount by a safe deposit company of a note,¹³ may be recovered. A loan to an individual in excess of a limit imposed by law, is enforceable in spite of such limit.¹⁴ Thus

³ *Farmers' Deposit National Bank v. Western Fuel Co.*, 215 Pa. St. 115, 114 Am. St. Rep. 949, 64 Atl. 374.

⁴ *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

⁵ *Oregon, etc., R. R. v. Oregonian, etc.*, R. R., 130 U. S. 1, 32 L. ed. 837; *Brunswick Gaslight Co. v. Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

⁶ *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

⁷ *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532.

⁸ *Security National Bank v. Power Co.*, 117 Wis. 211, 94 N. W. 74.

⁹ *Butterworth v. Milling Co.*, 115 Mich. 1, 72 N. W. 990.

¹⁰ *Union Water Co. v. Fluming Co.*, 22 Cal. 620.

¹¹ *Bowditch v. Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798. (Enforcing a pledge by a third person, of bonds to secure such debt.)

¹² *Germantown, etc., Co. v. Dhein*, 43 Wis. 420, 28 Am. Rep. 549.

¹³ *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

¹⁴ *Union Gold Mining Co. v. Rocky Mountain National Bank*, 96 U. S. 640, 24 L. ed. 648; *Elmo State Bank v. Hildebrand*, 103 Kan. 705, 3 A. L. R. 54, 177 Pac. 6.

where a national bank made an ultra vires loan on real estate mortgage security, the party receiving the money can not use ultra vires as a defense.¹⁵ A corporation which has sold and delivered goods in which it is not authorized by its charter to deal, can recover the contract price;¹⁶ and where a corporation made an ultra vires contract to construct a railroad in reliance upon subscriptions, and did so construct it, it can enforce such subscriptions.¹⁷ It seems to be held in some jurisdictions that no liability exists by reason of the contract, although the corporation has performed on its part, and that the only liability is in quasi-contract.¹⁸ If a corporation exceeds its authority, in taking a pledge of contracts belonging to one to whom it has lent money as a lien to secure such loan, it may not have a lien under the contract, but it may recover the amount of the loan with interest.¹⁹ If a corporation has sold goods under a contract which was beyond its powers, the purchaser may return the goods when the corporation brings an action for the purchase price, and he may avoid liability under the contract.²⁰ If he has consumed part of such goods, he must pay reasonable compensation therefor.²¹ If a corporation has made a loan and in return therefor has taken an assignment of a land contract subject to the provision that such sale shall become absolute if the loan is not paid at maturity, the assignor may set up as against such corporation the fact that it is unauthorized to acquire land for the purpose for which it is about to acquire it.²²

Where a corporation bought stock in another corporation, paid for it and had it transferred, the vendor agreeing to indemnify the vendee against such judgments as might be rendered in suits then pending against the corporation whose stock was sold, it was held that the vendee corporation could not enforce the contract of indemnity.²³ If a corporation has lent money under a contract

Such loan is undoubtedly valid up to such limit. *McClintock v. Bank*, 120 Mo. 127, 24 S. W. 1052.

¹⁵ *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

¹⁶ *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

¹⁷ *Chicago, etc., R. R. v. Derkes*, 103 Ind. 520, 3 N. E. 239.

¹⁸ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

¹⁹ *Barker Piano Co. v. Commercial Security Co.*, — Conn. —, 105 Atl. 328.

²⁰ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

²¹ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

²² *Kohlruess v. Zachery*, 139 Ga. 625, 46 L. R. A. (N.S.) 72, 77 S. E. 812.

²³ *Buckeye, etc., Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71, 13 L. R.

which is beyond its powers, the receiver of the borrower may set up ultra vires as a defense in an action to recover such loan,²⁴ for the purpose of giving to the creditors a priority over such ultra vires loan.²⁵ A corporation which is organized for the purpose of operating a summer hotel, and developing mineral springs, has no authority to give its property away; and its attempted dedication of its property to the public use is a nullity.²⁶

At any rate the corporation may recover on quantum meruit for the property received under such contract by the adversary party.²⁷ If a corporation has taken possession of realty as lessee under a lease which was beyond its power to make, and it has erected improvements in reliance upon a clause in the lease, to the effect that in case the use of the leased premises for saloon purposes became unlawful, the lessor would pay the cost of such improvements, the lessee corporation may recover reasonable compensation for the value of such improvements.²⁸ Under a statute which provides that a corporation shall not make any contract or purchase or hold property of any kind, except such as is necessary in legitimately carrying into effect the purposes for which it was created, one who has borrowed money from such corporation under an agreement by which he gives to the corporation a contract to convey certain realty in case he does not pay such debt at maturity, may set up the lack of power on the part of the corporation to enter into such contract as against the attempt of such corporation to compel him to convey such property.²⁹ If a corporation which is formed for the purpose of selling goods, agrees to furnish material for a voting contest and guarantees an increase in sales as a result of such contest, or failing such increase it agrees to pay a certain amount of the deficiency in cash, such contract is beyond the power of such corporation, and while it can not enforce such

A. 252, 20 S. W. 427. The cases here cited and followed are many of them cases arising on contracts between two corporations, ultra vires as to each, so that nothing but full performance on each side could eliminate the ultra vires feature of the contract, and on principle are different from this case.

²⁴ Calumet & Chicago Canal & Dock Co. v. Conkling, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982.

²⁵ Calumet & Chicago Canal & Dock Co. v. Conkling, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982.

²⁶ Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 8 L. R. A. (N.S.) 966, 79 N. E. 133.

²⁷ Even if such contract is forbidden by statute, as long as it is not illegal. Philadelphia Loan Co. v. Towner, 13 Conn. 249; Vanatta v. State Bank, 9 O. S. 27.

²⁸ United States Brewing Co. v. Dolese & Shepard Co., 259 Ill. 274, 47 L. R. A. (N.S.) 898, 102 N. E. 753.

²⁹ Kohlruss v. Zachery, 139 Ga. 625, 46 L. R. A. (N.S.) 72, 77 S. E. 812.

contract if it has not performed on its part,³⁰ the defendant can avoid liability only by paying a reasonable amount for the goods which it has received under such contract.³¹

§ 2001. Performance by adversary party—Liability on contract. If the adversary party to the contract has performed his part thereof, and by such performance the corporation has received something of value, some liability exists,¹ though the courts are divided as to its nature. In many jurisdictions it is held that such liability is on the contract.² The corporation can not receive the

³⁰ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

³¹ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

¹ *United States. Graysonia-Nashville Lumber Co. v. Goldman*, 247 Fed. 423, 159 C. C. A. 477 [certiorari denied, 246 U. S. 663, 62 L. ed. 928]; *In re Prospect Leasing Co.*, 250 Fed. 707.

Arkansas. *Minneapolis Fire and Marine Insurance Co. v. Norman*, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229.

Idaho. *Darknell v. Coeur D'Alene & St. Joe Transportation Co.*, 18 Ida. 61, 108 Pac. 536.

Illinois. *Kadish v. Association*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236.

Iowa. *Wisconsin Lumber Co. v. Greene & Western Telephone Co.*, 127 Ia. 350, 109 Am. St. Rep. 387, 101 N. W. 742.

Kansas. *Kelly v. Central Union Fire Ins. Co.*, 101 Kan. 91, L. R. A. 1918C, 1170, 165 Pac. 806.

Michigan. *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357.

Mississippi. *Williams v. Bank*, 71 Miss. 858, 42 Am. St. Rep. 503, 16 So. 238.

New Jersey. *U. S. Industrial Alcohol Co. v. Distilling Co.*, 89 N. J. Eq. 177, 104 Atl. 216.

North Carolina. *Johnston County Savings Bank v. Scoggin Drug Co.*, 152 N. Car. 142 [sub nomine, *Johnson County Savings Bank v. Scoggin Drug*

Co., 50 L. R. A. (N.S.) 581, 67 S. E. 253].

Oklahoma. *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

Tennessee. *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

Contra, White v. Commercial & Farmers' Bank, 66 S. Car. 491, 97 Am. St. Rep. 803, 45 S. E. 94.

See, *Consequences of Illegal or Ultra Vires Acquisition of Real Estate by a Corporation*, by Arthur M. Alger, 8 *Harvard Law Review*, 15.

² *United States. Poole v. Association*, 30 Fed. 513; *Wood v. Corry, etc., Works*, 44 Fed. 146, 12 L. R. A. 168; *Bowman v. Hardware Co.*, 94 Fed. 592; *Graysonia-Nashville Lumber Co. v. Goldman*, 247 Fed. 423, 159 C. C. A. 477 [certiorari denied, 246 U. S. 663, 62 L. ed. 928]; *In re Prospect Leasing Co.*, 250 Fed. 707.

Arkansas. *Minneapolis Fire and Marine Insurance Co. v. Norman*, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229.

California. *Illinois, etc., Bank v. Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

Idaho. *Darknell v. Coeur D'Alene & St. Joe Transportation Co.*, 18 Ida. 61, 108 Pac. 536.

Illinois. *Peoria, etc., R. R. Co. v. Thompson*, 103 Ill. 187; *Thomas v. Ry. Co.*, 104 Ill. 462; *Kadish v. Association*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *People v. R. R. Co.*, 178 Ill. 594, 49 L. R. A. 650, 53 N. E. 349.

benefits of a transaction and repudiate liability arising out of the same transaction.³ It is said to be "a general rule that under-

Indiana. *R. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

Iowa. *Humphrey v. Association*, 50 Ia. 607; *Twiss v. Association*, 87 Ia. 733, 43 Am. St. Rep. 418, 55 N. W. 8; *White v. Marquardt*, 105 Ia. 145, 74 N. W. 930; *Wisconsin Lumber Co. v. Greene & Western Telephone Co.*, 127 Ia. 350, 109 Am. St. Rep. 387, 101 N. W. 742; *Iowa Drug Co. v. Souers*, 139 Ia. 72, 19 L. R. A. (N.S.) 115, 117 N. W. 300.

Kansas. *Sherman, etc., Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569; *Alexandria, etc., R. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847; *Kelly v. Central Union Fire Ins. Co.*, 101 Kan. 91, L. R. A. 1918C, 1170, 165 Pac. 806.

Kentucky. *Louisville Tobacco Warehouse Co. v. Stewart (Ky.)*, 70 S. W. 285.

Michigan. *Carson City, etc., Bank v. Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 126 N. W. 357.

Minnesota. *Auerbach v. Mill Co.*, 28 Minn. 291, 41 Am. Rep. 265, 9 N. W. 799.

Missouri. *Winscott v. Investment Co.*, 63 Mo. App. 367.

New Hampshire. *Manchester, etc., R. R. v. R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582.

New Jersey. *Camden, etc., R. R. Co. v. R. R.*, 48 N. J. L. 530, 7 Atl. 523; *Chapman v. Rheostat Co.*, 62 N. J. L. 497, 41 Atl. 690; *U. S. Industrial Alcohol Co. v. Distilling Co.*, 89 N. J. Eq. 177, 104 Atl. 216.

New York. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Duncomb v. R. R.*, 84 N. Y. 190; *Lin-*

kauf v. Lombard, 137 N. Y. 417, 33 Am. St. Rep. 743, 20 L. R. A. 48, 33 N. E. 472; *Seymour v. Cemetery Association*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365.

North Carolina. *Johnston County Savings Bank v. Scoggin Drug Co.*, 152 N. Car. 142 [sub nomine, *Johnson County Savings Bank v. Scoggin Drug Co.*, 50 L. R. A. (N.S.) 581, 67 S. E. 253].

Oklahoma. *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

Oregon. *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

Pennsylvania. *Jones v. Building Association*, 94 Pa. St. 215; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Pittsburgh, etc., R. R. Co. v. R. R. Co.*, 196 Pa. St. 452, 46 Atl. 431; *Lemmon v. East Palestine Rubber Co.*, 260 Pa. St. 28, 103 Atl. 510.

Texas. *Texas, etc., R. R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98; *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

Washington. *Horton v. Long*, 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271; *Spokane v. Amsterdamsch Trustees, etc.*, 22 Wash. 172, 60 Pac. 141; *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, L. R. A. 1917A, 737, 142 Pac. 670; *United States Fidelity & Guaranty Co. v. Cascade Const. Co.*, — Wash. —, 180 Pac. 463.

Wisconsin. *North Hudson, etc., Association v. Bank*, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300; *McElroy v. Horse Co.*, 96 Wis. 317, 71 N. W. 652; *Bullen v. Trading Co.*, 109 Wis. 41, 85 N. W. 115.

³**United States.** *Graysonia-Nashville Lumber Co. v. Goldman*, 247 Fed.

takings, though they be ultra vires, will be enforced against quasi-public corporations, if said corporations retain and enjoy the benefits of concessions granted on condition such undertakings should be performed."⁴ It is properly said that this rule "may not be strictly logical, but it prevents a great deal of injustice."⁵ Even if purchase of an overissue of its own stock by a corporation should

423, 159 C. C. A. 477 [certiorari denied, 246 U. S. 663, 62 L. ed. 928].

Arkansas. Minneapolis Fire and Marine Insurance Co. v. Norman, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229.

California. Main v. Casserly, 67 Cal. 127, 7 Pac. 426.

Idaho. Darknell v. Coeur D'Alene & St. Joe Transportation Co., 18 Ida. 61, 108 Pac. 536.

Indiana. Marion Trust Co. v. Investment Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

Iowa. Wisconsin Lumber Co. v. Greene & Western Telephone Co., 127 Ia. 350, 109 Am. St. Rep. 387, 101 N. W. 742.

Kansas. Cooper v. First National Bank, 40 Kan. 5, 18 Pac. 937; Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569; Sherman Center Town Co. v. Russell, 46 Kan. 382, 26 Pac. 715; Arkansas Valley Town & Land Co. v. Lincoln, 56 Kan. 145, 42 Pac. 706; Alexandria, A. & Ft. S. R. Co. v. Johnson, 58 Kan. 175, 48 Pac. 847; Harris v. Independence Gas Co., 76 Kan. 750, 13 L. R. A. (N.S.) 1171, 92 Pac. 1123; Saylor v. State Bank, 99 Kan. 515, 163 Pac. 454; First National Bank v. Wilson, 101 Kan. 72, 165 Pac. 859; Blue Rapids Opera House Co. v. Mercantile Bldg. & Loan Assn., 101 Kan. 76, 53 Pac. 761; Kelly v. Central Union Fire Ins. Co., 101 Kan. 91, L. R. A. 1918C, 1170, 165 Pac. 806.

Montana. Porter v. Plymouth Gold Mining Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 936.

North Carolina. Johnston County Savings Bank v. Scoggin Drug Co., 152 N. Car. 142 [sub nomine, Johnson County Savings Bank v. Scoggin Drug Co., 50 L. R. A. (N.S.) 581, 67 S. E. 253].

Pennsylvania. Lemmon v. East Palestine Rubber Co., 260 Pa. St. 28, 103 Atl. 510.

"That kind of plunder which holds onto the property, but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the laws of this state." Seymour v. Cemetery Association, 144 N. Y. 333, 341, 26 L. R. A. 859; 39 N. E. 365 [citing, Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Duncomb v. R. R. Co., 84 N. Y. 190; Woodruff v. R. R. Co., 93 N. Y. 609, 619].

"Where an ultra vires contract is made and performed on one side, the other party can not be permitted to enjoy the benefits received, but will be required in a proper action to account." Twiss v. Association, 87 Ia. 733, 737, 43 Am. St. Rep. 418, 55 N. W. 8 [quoted in Beach v. Wakefield, 107 Ia. 567, 585, 76 N. W. 688, 78 N. W. 197].

This result is sometimes reached by the application of principles of estoppel. See § 2006.

⁴ People v. R. R. Co., 178 Ill. 594, 607, 49 L. R. A. 650, 53 N. E. 349 [citing, Heims Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. 286; Kadiash v. Association, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; Eckman v. R. R. Co., 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496].

⁵ Seymour v. Society, 54 Minn. 147, 149, 55 N. W. 907.

be held to be ultra vires, it can not avoid payment of the purchase price thereof, on the ground that such contract was in excess of its powers.⁶ If a corporation has entered into a contract to guarantee the bonds of another corporation, it can not avoid such liability on the ground that such contract was beyond its powers, if the same persons are stockholders in the two corporations, and if the corporation which guaranteed such bonds has received most of the proceeds thereof.⁷ Where a corporation borrows money,⁸ as by selling bonds,⁹ and such money has come into the possession of the corporation, it can not retain the money and plead ultra vires. If a corporation buys property and retains it,¹⁰ or sells it to another person and retains the proceeds of such sale,¹¹ it can not invoke the doctrine of ultra vires to avoid liability on the contract for the purchase price. If a manager of a drug corporation buys a piano and some jewelry, and such corporation with full knowledge of the facts retains such articles, such acts amount to a ratification of such contract.¹² Where a corporation bought certain mining claims under a contract to pay the owner thereof a certain per cent. of the sales as payment for such claims, it can not keep the claim and refuse to make such payments.¹³ An agreement to repay money borrowed by the corporation can not be avoided as being ultra vires, even if the money borrowed was to be used for an unauthorized purpose,¹⁴ if not known to the lender,¹⁵ or even, it has been held, if such intention is known to the lender,¹⁶ as long

⁶ Kelly v. Central Union Fire Ins. Co., 101 Kan. 91, L. R. A. 1918C, 1170, 165 Pac. 806.

⁷ Graysonia-Nashville Lumber Co. v. Goldman, 247 Fed. 423, 159 C. C. A. 477 [certiorari denied, 248 U. S. 663, 62 L. ed. 928].

⁸ Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

⁹ International Trust Co. v. Mfg.-Co., 70 N. H. 118, 46 Atl. 1054.

¹⁰ Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

¹¹ Johnston County Savings Bank v. Scoggin Drug Co., 152 N. Car. 142 [sub nomine, Johnson County Savings Bank v. Scoggin Drug Co., 50 L. R. A. (N.S.) 581, 67 S. E. 253]; Rutland, etc., Co. v. Proctor, 29 Vt. 93.

¹² Johnston County Savings Bank v.

Scoggin Drug Co., 152 N. Car. 142 [sub nomine, Johnson County Savings Bank v. Scoggin Drug Co., 50 L. R. A. (N.S.) 581, 67 S. E. 253].

¹³ Wall v. Smelting Co., 20 Utah 474, 59 Pac. 399.

¹⁴ Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656. (A corporation formed to mine in Illinois borrowed money and used it to mine in Colorado.)

¹⁵ As where money was borrowed by a loan association to pay off retiring shareholders. North Hudson, etc., Association v. Bank, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300.

¹⁶ Money borrowed by a loan association to pay off retiring shareholders. Marion Trust Co. v. Investment Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

as the contract of loan does not require such use. Even in cases of this sort the corporation can not retain the benefits of the transaction and avoid liability thereon. A corporation can not contest its liability on mortgage security bonds, though given to raise money with which to aid a street car line.¹⁷ Where a church sold land and the vendee paid the church therefor, and then paid off pre-existing liens on such realty, the church can not recover such realty, even if the contract was ultra vires, unless it restores the money thus paid.¹⁸ A corporation which has accepted the full benefit of the contract with a stockholder under which he became a member, can not repudiate liability to him under such contract on the ground that it was ultra vires.¹⁹ In such a case the corporation "can not be excused from payment upon the plea that the contract was beyond its power."²⁰ Where A bought stock under an agreement with the corporation that he should be given employment and that at the end of such employment the corporation would purchase his stock, it can not avoid liability on such contract after A has fully performed his part.²¹ Where one has rendered services to a corporation under a contract,²² ultra vires is no defense. Where an insurance company insured against a risk, not authorized by its charter and received the premium therefor, it was held liable on the policy.²³ If the board of directors of a corporation, organized to carry on a wholesale business, purchases a

¹⁷ Illinois, etc., Bank v. Ry. Co., 117 Cal. 332, 49 Pac. 197.

¹⁸ Madison, etc., Church v. Church, 73 N. Y. 82.

¹⁹ Vought v. Loan Association, 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; Porter v. Plymouth Gold Mining Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938. This case was followed in Eastern, etc., Association v. Williamson, 189 U. S. 122, 47 L. ed. 735 [affirming, Williamson v. Loan Association, 62 S. Car. 390, 38 S. E. 616, which involved a construction of the same statute].

²⁰ Vought v. Loan Association, 172 N. Y. 508, 518, 92 Am. St. Rep. 761, 65 N. E. 496 [quoted in Eastern, etc., Association v. Williamson, 189 U. S. 122, 47 L. ed. 735].

²¹ Chapman v. Rheostat Co., 62 N. J. L. 497, 41 Atl. 690.

The same result is reached under a sale of stock by a corporation under an agreement to repurchase it at the option of the buyer. Porter v. Plymouth Gold Mining Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

²² Darknell v. Coeur D'Alene & St. Joe Transportation Co., 18 Ida. 61, 108 Pac. 536; Tyler v. Academy, etc., 14 Or. 485, 13 Pac. 329.

²³ Minneapolis Fire & Marine Insurance Co. v. Norman, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229; Denver, etc., Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

Contra, where such policy was forbidden by statute. In re Assignment Mutual, etc., Ins. Co., 107 Ia. 143, 70 Am. St. Rep. 149.

retail business as a means of securing the owner of such business as its manager, and the stockholders acquiesce until the value of the retail business has been destroyed, they can not then attack such contract as unauthorized.²⁴ If a corporation has entered into a contract of guaranty or suretyship, in excess of its powers, but the principal debtor has protected such corporation against loss upon such contract, it is said that such corporation can not avoid liability upon such contract on the ground that it was beyond its powers.²⁵ A mutual insurance company which is authorized to issue mutual policies only, can not avoid liability upon a standard policy which it has issued and for which it has received premiums.²⁶

If the benefits are not received from the adversary party directly, the receipt of incidental benefits does not prevent the corporation from avoiding liability on its ultra vires contract.²⁷ If a railway company has entered into an ultra vires contract to guarantee interest on the bonds of a summer hotel company, and a future dividend upon its stock in order to secure an increase in traffic, the fact that it has received an incidental benefit by reason of such increase in traffic does not prevent it from avoiding liability upon such contract.²⁸

If a bank has made an ultra vires contract to pledge its assets to its security upon its bond to secure deposits of public funds, such contract can not be enforced, at least as against the depositors and other creditors;²⁹ and if such bank is closed by the banking commissioner, a mandatory order will not issue requiring the banking commissioner to turn over such assets to such surety.³⁰

§ 2002. Liability independent of contract. Other jurisdictions, led by the supreme court of the United States, hold that no liability exists on the contract, since it is a contract executory as to

²⁴ *Iowa Drug Co. v. Souers*, 139 Ia. 72, 19 L. R. A. (N.S.) 115, 117 N. W. 300.

²⁵ *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, L. R. A. 1917A, 737, 142 Pac. 670; *United States Fidelity & Guaranty Co. v. Cascade Construction Co.*, — Wash. —, 180 Pac. 463.

²⁶ *Minneapolis Fire and Marine Insurance Co. v. Norman*, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229.

²⁷ *West Maryland R. R. Co. v. Blue*

Ridge Hotel Co., 102 Md. 307, 111 Am. St. Rep. 362, 62 Atl. 351.

²⁸ *West Maryland R. R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 111 Am. St. Rep. 362, 62 Atl. 351.

²⁹ *Commercial Bank & Trust Co. v. Citizens' Trust & Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (N.S.) 950, 156 S. W. 160.

³⁰ *Commercial Bank & Trust Co. v. Citizens' Trust & Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (N.S.) 950, 156 S. W. 160.

the unauthorized act; but that an action in quantum meruit will lie, to recover a reasonable compensation for the benefits received by the corporation under the contract.¹ It is well settled that the corporation can not retain what it has received under the contract without incurring any liability therefor.² So if a corporation sues in equity to have an ultra vires mortgage canceled, it must offer to restore to the mortgagee the amount received by the corporation

¹United States. *Citizens' Central National Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443 [affirming, *Appleton v. Citizens' Central National Bank*, 190 N. Y. 417, 32 L. R. A. (N.S.) 543, 83 N. E. 470]; *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128].

Arkansas. *Whitney v. Peay*, 24 Ark. 22.

Connecticut. *Barker Piano Co. v. Commercial Security Co.*, — Conn. —, 105 Atl. 328.

Iowa. In re Assignment Mutual, etc., Ins. Co., 107 Ia. 143, 70 Am. St. Rep. 149, 77 N. W. 868. (Prohibition by statute.)

Kentucky. *Commercial Bank & Trust Co. v. Guaranty Co.*, 153 Ky. 566, 45 L. R. A. (N.S.) 950, 156 S. W. 160.

Maine. *Brunswick Gaslight Co. v. Gas, etc., Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Oklahoma. *Gilbert v. Citizens' National Bank*, — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635.

Oregon. *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

Tennessee. *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758; *Leonhardt v. Small*, 117 Tenn. 153, 119 Am. St. Rep. 994, 6 L. R. A. (N.S.) 887, 96 S. W. 1051 (obiter).

Vermont. *Moore v. Tanning Co.*, 60 Vt. 459, 15 Atl. 114.

Wisconsin. *Northwestern, etc., Co.*

v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

"Whatever doubts may have been once entertained as to the power of corporations to set up the defense of ultra vires to defeat a recovery upon an executed contract, the rule is now well settled at least in this court, that where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a quantum meruit it may be compelled to respond for the benefit actually received." *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40, 58, 44 L. ed. 65 [citing, *Pearce v. R. R.*, 62 U. S. (21 How.) 441, 16 L. ed. 184; *Buckeye Marble Co. v. Harvey*, 92 Tenn. 115, 38 Am. St. Rep. 71, 18 L. R. A. 252, 20 S. W. 427].

See also on this point, *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Dickerman v. Trust Co.*, 176 U. S. 181, 44 L. ed. 423; *Emmerling v. Bank*, 97 Fed. 739, 38 C. C. A. 399.

See as to leases ultra vires of a corporation. *Thomas v. R. R. Co.*, 101 U. S. 71, 25 L. ed. 950; *Pittsburgh, etc., Ry. v. Bridge Co.*, 131 U. S. 371, 33 L. ed. 157; *McCormick v. Bank*, 165 U. S. 538, 41 L. ed. 817; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198; *Central, etc., Co. v. Car Co.*, 171 U. S. 138, 43 L. ed. 108.

²*Great North West Ry. v. Charlebois* [1899], A. C. 114; *Louisiana, etc., Ry. v. Levee District*, 87 Fed. 594, 31 C. C. A. 121; *Citizens' Central National*

and remaining unpaid.³ The same rule applies if it seeks to avoid its contract.⁴ The liability is said to exist, "irrespective of the invalid agreement."⁵ If a bank, in order to induce A to lend money to B so that B may pay a debt which is due to such bank, guarantees to A that B will pay such loan, such bank is liable, at least to the amount of the debt due to it from B, which B has paid out of the loan thus made by A.⁶ If a creamery business has been turned over to a national bank, to which the creamery company is indebted, and the bank carries on such business as a means of protecting itself against loss, the bank must account to the creditors of the creamery company for the value of the property which it thus acquires,⁷ even if the transaction ultimately results in loss to the bank.⁸ Where a land company and a street railway company issued bonds together and divided the money thus obtained, each company was held liable to pay the proportion of the bonds equal to the proportion of the money received by it.⁹ The theory of liability in quasi-contract has been invoked where no liability

Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443 [affirming, *Appleton v. Citizens' Central National Bank*, 190 N. Y. 417, 32 L. R. A. (N.S.) 543, 83 N. E. 470]; *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128]; *Gilbert v. Citizens' National Bank*, — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635; *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 756.

³ *Southern, etc., Association v. Stable Co.*, 128 Ala. 624, 29 So. 654.

⁴ *Louisiana, etc., Ry. v. Board, etc., of Levee District*, 87 Fed. 504, 31 C. C. A. 121; *Gilbert v. Citizens' National Bank*, — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635.

⁵ *Massachusetts. White v. Bank*, 39 Mass. (22 Pick.) 181; *Dill v. Wareham*, 48 Mass. (7 Met.) 438; *Morville v. Tract Society*, 123 Mass. 129, 25 Am. Rep. 40; see *Davis v. R. R.*, 131 Mass. 258, 41 Am. St. Rep. 221.

Mississippi. Greenville, etc., Co. v. Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681.

New Hampshire. Manchester, etc., R. R. Co. v. R. R. Co., 66 N. H. 100, 132, 49 Am. St. Rep. 582, 9 L. R. A. 689, 20 Atl. 383.

New Jersey. National Trust Co. v. Miller, 33 N. J. Eq. 155.

Tennessee. Miller v. Ins. Co., 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29.

⁶ *Citizens' Central National Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443 [affirming, *Appleton v. Citizens' Central National Bank*, 190 N. Y. 417, 32 L. R. A. (N.S.) 543, 83 N. E. 470].

⁷ *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128].

⁸ *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915 [affirming, *Emigh v. Earling*, 134 Wis. 565, 27 L. R. A. (N.S.) 243, 115 N. W. 128].

⁹ *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

would exist but for the terms of the express contract.¹⁰ If a corporation has leased property for a purpose, in excess of its authority, and such lease contains a provision that in case prohibition should take effect the lessor should pay to the lessee corporation the value of the buildings erected by the lessee upon such realty, the corporation may recover reasonable compensation for the value of such buildings, on the happening of such event.¹¹

This view has been carried in some jurisdictions to the logical conclusion that even if the corporation does not seek to avoid the transaction, the party who has performed may ignore the contract and recover a reasonable value for what he has parted with. Thus a corporation, in consideration of a loan of twenty thousand dollars, agreed to repay it in preferred stock. When the contract was entered into it was ultra vires, as the corporation had no power to issue preferred stock. Subsequently the legislature gave to such corporation the power to issue preferred stock, and it was willing to deliver the proper amount to the creditor. It was held that such contract had no consideration, and that the creditor might ignore the contract and recover the amount of the loan.¹² An ultra vires contract for the purchase of certain goods for speculation had been made by a manufacturing company. The vendor delivered part of the goods, repudiated the contract and sued for the value of the goods delivered, and recovery was allowed.¹³

Liability in quasi-contract without regard to the validity of the contract itself, has been enforced where the benefits did not enure to the corporation directly, but if at all, only indirectly.¹⁴ If one corporation has taken possession of the property of another under a contract by which it is to pay the operating expenses and a certain percentage of the agreed valuation as rental, and by which it is to retain money which is due to the original owner in order to determine whether it will eventually purchase such property, such corporation is liable for money advanced for operating expenses to a corporation which was formed in order to operate such prop-

¹⁰ *United States Brewing Co. v. Dolese & Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N.S.) 898, 102 N. E. 753.

¹¹ *United States Brewing Co. v. Dolese & Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N.S.) 898, 102 N. E. 753.

¹² *Anthony v. Sewing Machine Co.*, 16 R. I. 571, 5 L. R. A. 575, 18 Atl. 176.

¹³ *Day v. Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

¹⁴ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392; *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758.

erty for the prospective purchaser.¹⁵ A corporation has been held liable in quasi-contract upon its contract of guaranty, if it entered into such contract as a means of saving itself from loss on a prior debt due to it from the principal debtor.¹⁶

It is said in some cases that no legal rights of any kind can arise under a contract which is beyond the powers of the corporation.¹⁷ An ultra vires contract is said to be void and of no legal effect.¹⁸ In some cases it is held that the corporation is not liable on the contract, but no opinion is given as to its liability in any other theory.¹⁹ Thus a manufacturing corporation which had been exceeding its authority in operating a store for its employes, was allowed to use ultra vires as a defense in an action for goods sold and delivered.²⁰ Thus it has been held that a corporation to manufacture and sell cotton-seed products, including fertilizers made therefrom, is not liable on a note given by it for another kind of fertilizer which it intends to resell at a profit.²¹ A contract by a bank to pledge all its assets to secure a single depositor, can not be enforced after the bank has become insolvent, so as to exclude the other depositors from a share in its assets.²² In some jurisdictions the liability of a corporation on an ultra vires contract which the other party has fully performed, is said to be in the nature of a liability in tort.²³

¹⁵ Dillard & Coffin Co. v. Richmond Cotton Oil Co., 140 Tenn. 290, 204 S. W. 758.

¹⁶ Crowder State Bank v. Aetna Powder Co., 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁷ Smith v. Alabama Life Insurance & Trust Co., 4 Ala. 558; Grand Lodge v. Waddill, 36 Ala. 313; Chambers v. Falkner, 65 Ala. 448; Wiley Fertilizer Co. v. Carroll, — Ala. —, 80 So. 417; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 8 L. R. A. (N.S.) 966, 79 N. E. 133; White v. Commercial & Farmers' Bank, 66 S. Car. 491, 97 Am. St. Rep. 803, 45 S. E. 94.

¹⁸ Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; White v. Commercial & Farmers'

Bank, 66 S. Car. 491, 97 Am. St. Rep. 803, 45 S. E. 94.

¹⁹ Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307.

²⁰ Chewacla, etc., Works v. Dismukes, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122.

²¹ Richmond Guano Co. v. Oil Mill & Ginnery, 119 Fed. 709.

²² Commercial Banking & Trust Co. v. Citizens' Trust & Guaranty Co., 153 Ky. 566, 45 L. R. A. (N.S.) 950, 156 S. W. 160.

²³ "If the agreement was ultra vires and the association entered into it knowing it could not perform its part thereof, and thereby induced plaintiff to part with its money in the purchase of stock, then it was a tort, and the defendant would be liable therefor." Williamson v. Association, 54 S. Car. 582, 596, 71 Am. St. Rep. 822, 32 S. E. 765.

§ 2003. Partial performance by one party. If one party to an ultra vires contract has performed it in part, it is held in some jurisdictions that the executory part of such contract may, nevertheless, be avoided.¹ If a corporation has sold goods as a part of a contract which is in excess of its authority, the purchaser may avoid liability upon the contract by returning such goods,² but he is liable for the value of the goods which he has consumed.³ If a corporation has issued notes in excess of its authority, the fact that it has paid such notes in part does not render them valid obligations.⁴ An ultra vires lease made by one railroad to another, on which rent had been paid for several years, can be repudiated as to the executory part thereof.⁵ An ultra vires lease had been made, and installments paid for years. Suit was brought for an overdue installment of rent, the defendant still retaining the property. No recovery was allowed on the lease.⁶

If the corporation has partially performed the contract and it remains entirely executory on the other side, some authorities hold that no action can be maintained on the contract, but only to recover back what has been parted with under it.⁷ If a contract is partially performed by the adversary party, the corporation is liable to the extent, at least, of benefits received. Here, again, there is a conflict of opinion, some authorities holding that although the contract may be repudiated by the corporation as to the part not performed, the corporation is liable on the contract as to that part which is performed.⁸ Thus where a corporation formed a

See also, *Miller v. Insurance Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

See also, *Lawler v. Burt*, 7 O. S. 341; *Gilbert v. Citizens' National Bank*, — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635.

¹ *Thomas v. R. R.*, 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. R. Co. v. R. R. Co.*, 118 U. S. 290, 30 L. ed. 83; *Bassick v. Aetna Explosives Co.*, 246 Fed. 974; *McNulta v. Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055; *Mallory v. Oil Works*, 86 Tenn. 598, 8 S. W. 398.

² *National Sales Co. v. Manciet*, 83

Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

³ *National Sales Co. v. Manciet*, 83 Or. 34, L. R. A. 1917D, 485, 162 Pac. 1055.

⁴ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974.

⁵ *Oregon, etc., Ry. v. Oregonian, etc., Ry.*, 130 U. S. 1, 32 L. ed. 837.

⁶ *Central, etc., Co. v. Car Co.*, 139 U. S. 24, 35 L. ed. 55.

⁷ *Northwestern, etc., Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781 (where a packet company bought grain for speculation, and the corporation was not allowed to recover damages for non-performance).

⁸ *Macon, etc., Co. v. R. R. Co.*, 63 Ga. 103.

partnership with a stockholder, and he performed the contract, the corporation must account to him for the proceeds of the partnership received by it.⁹ Other authorities hold that in such case the liability is on quantum meruit for the benefits received, and not on the contract.¹⁰

If a contract has been performed to such an extent that serious injury will be done by refusing performance, it is held in some jurisdictions that such contract can not be avoided on the theory that it is in excess of the power of the corporation,¹¹ whether performance has been made by the corporation,¹² or by the adversary party.¹³ If a corporation has made a lease in excess of its authority,¹⁴ or has taken a lease in excess of its authority,¹⁵ and in each case the lessee has constructed improvements and made expenditures in reliance upon such lease, the lessor can not set up the ultra vires character of such lease.

§ 2004. Performance not conferring benefit on corporation.

Where performance does not pass anything of value to the corporation, it is held in many jurisdictions that performance by the adversary party does not impose any liability on the corporation. This is the case where the corporation has issued accommodation paper,¹ or has ultra vires acted as surety.² Thus a brewing

⁹ *Boyd v. Carbon-Black Co.*, 182 Pa. St. 206, 37 Atl. 937. "While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life in fact for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed." *Boyd v. Carbon-Black Co.*, 182 Pa. St. 206, 211, 37 Atl. 937.

¹⁰ *Pittsburgh, etc., Co. v. Bridge Co.*, 131 U. S. 371, 33 L. ed. 157; *McCormick v. Bank*, 165 U. S. 538, 41 L. ed. 817; *California, etc., Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198; *Nashua, etc., R. R. Co. v. R. R. Co.*, 164 Mass. 222, 49 Am. St. Rep. 454, 41 N. E. 268; *Greenville, etc., Planters', etc., Co.*, 70 Miss. 669, 35 Am. St. Rep. 68, 13 So. 879.

¹¹ *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108

N. E. 856; *Hill v. Atlantic & North Carolina R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

¹² *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

¹³ *Hill v. Atlantic & North Carolina R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

¹⁴ *Hill v. Atlantic & North Carolina R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

¹⁵ *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

¹ *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 N. W. 1055.

See also, to the same effect, *M. V. Monarch Co. v. Bank*, 105 Ky. 430, 88 Am. St. Rep. 310, 49 S. W. 317. See § 1982.

² See § 1983. See to the same effect *First National Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351.

company was allowed to plead *ultra vires* to an appeal bond on which it had become surety to enable the appellee to continue in the saloon business and to buy beer of the company;³ and a railroad could thus defend against its guaranty of the expenses of a festival.⁴ Where a building association bought land and assumed a mortgage, and subsequently repudiated the transaction and tendered a deed to the grantor, it was held that, as the contract to assume the debt was *ultra vires*, and the holder of the debt and mortgage had parted with nothing in reliance on such assuming the debt, he could not enforce the debt against the corporation.⁵ If a corporation by an *ultra vires* contract buys stock in another corporation, it can not be compelled to pay a stock liability.⁶

This doctrine may properly be extended to cases where the corporation has no choice in receiving or retaining benefits. Thus where work was done under a contract, with an unauthorized (and, possibly *ultra vires*) change made by the authority of the superintendent of the company, the contractor could not recover extra compensation for the change.⁷

The correctness of this principle depends in part on whether the corporation received the benefits of the transaction indirectly or not. If a corporation has not received the benefits of an *ultra vires* contract either directly or indirectly, it can not be held liable thereon.⁸ If a bank agrees to guarantee the sale of certain securities in case the owner thereof would enter into a syndicate agreement, and such securities are not delivered to the bank, and the only performance by the owner thereof is to refrain from selling them to others, the bank can not be held liable upon such contract, especially if the syndicate agreement is never carried out.⁹

A different rule has been applied in some jurisdictions where the corporation has received an indirect benefit under the transaction.

³ *Best Brewing Co. v. Klassen*, 185 Ill. 37, 76 Am. St. Rep. 26, 50 L. R. A. 765, 57 N. E. 20.

⁴ *Davis v. R. R.*, 131 Mass. 258, 41 Am. Rep. 221.

Contra, a street railroad was not allowed to plead *ultra vires* to a subscription to a fair, in order to increase traffic. *State Board v. R. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702.

⁵ *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

⁶ *Chemical National Bank v. Havermale*, 120 Cal. 601, 85 Am. St. Rep. 206, 52 Pac. 1071; *White v. Bank*, 66 S. Car. 491, 97 Am. St. Rep. 803, 45 S. E. 94.

⁷ *Boynton v. Gaslight Co.*, 124 Mass. 197.

⁸ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N.S.) 967, 89 N. E. 476.

⁹ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N.S.) 967, 89 N. E. 476.

The theory that a corporation is liable upon its contract has been applied to cases in which the benefit which it received under the transaction was an indirect benefit.¹⁰ If a brewing company has agreed to indemnify a surety for the rent of a saloon, where the product of such brewing company is sold, and the brewing company receives the benefit of the transaction, it can not deny its liability upon its contract of indemnity, on the theory that it was beyond its powers.¹¹

If a bank attempts to secure a debt which is due to it, by assisting its debtor to perform his contract with a third person so that it may receive the money which will be due from such third person to the debtor of the bank, on the performance of such contract, it is said in some jurisdictions that such transaction is ultra vires, but that the bank is liable for expenses incurred in the performance of such contract.¹² This liability has been enforced even if the transaction ultimately results in a loss to the bank.¹³ The liability of the corporation in cases of this sort has been said to rest on the implied contract of the corporation to place the adversary party in statu quo,¹⁴ assuming that the liability can not be enforced upon the contract itself.¹⁵ There is a serious difficulty in explaining cases of this sort in this way. The benefits which the corporation receives, are benefits which do not pass directly from the adversary party to the corporation, but they come indirectly from another person,¹⁶ or it may be the corporation does not ultimately receive any benefits from the transaction at all.¹⁷ Cases of this sort should be justified either on the theory that the con-

¹⁰ *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357; *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392. See § 2001.

¹¹ *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357.

¹² *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder*

Co., 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹³ *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

¹⁴ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁵ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁶ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁷ *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

tract was either within the powers of the corporation,¹⁸ or else the corporation must be held liable upon the contract itself, in spite of the fact that its promise is ultra vires.¹⁹

§ 2005. Contracts fully performed. If a contract has been fully performed on both sides, neither party can take advantage of the fact that it was ultra vires.¹ The right of attacking a transaction ultra vires, but fully executed, belongs to the state alone.² Thus the right of a corporation to hold land can be questioned only by the state, not by a private individual.³ This is especially true if the statute provides an exclusive penalty in case of the unauthorized acquisition of land by the corporation which is to

¹⁸ See § 1992.

¹⁹ See §§ 1089, 2001.

¹ **United States.** *Pennsylvania R. R. Co. v. R. R.*, 118 U. S. 290, 30 L. ed. 83; *Brown v. Schleier*, 194 U. S. 18, 48 L. ed. 857; *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418]; *Re-organized Church, etc., v. Church, etc.*, 60 Fed. 937; *Cincinnati, etc., Co. v. McKeen*, 64 Fed. 36, 12 C. C. A. 14.

Alabama. *Long v. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

Indiana. *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

Kentucky. *Miller v. Turnpike Co.*, 109 Ky. 475, 59 S. W. 512.

Minnesota. *Hennessy v. St. Paul*, 54 Minn. 219, 55 N. W. 1123.

Mississippi. *Middleton v. Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

New Hampshire. *Manchester, etc., R. R. v. R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582, 9 L. R. A. 689, 20 Atl. 383.

New Jersey. *Camden, etc., R. R. Co. v. R. R.*, 48 N. J. L. 530, 7 Atl. 523.

New York. *Parish v. Wheeler*, 22 N. Y. 494; *Holmes, etc., Co. v. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

Oklahoma. *Union Trust Co. v. Hendrickson*, — Okla. —, 172 Pac. 440.

² **United States.** *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418].

Mississippi. *Middleton v. Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

New Jersey. *Benton v. Elizabeth*, 61 N. J. L. 693, 40 Atl. 1132 [affirming, 61 N. J. L. 411, 39 Atl. 683, 906].

Oklahoma. *Union Trust Co. v. Hendrickson*, — Okla. —, 172 Pac. 440.

Tennessee. *Barrow v. Turnpike Co.*, 28 Tenn. (9 Humph.) 304; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825.

Wisconsin. *Zinc Carbonate Co. v. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229. See § 1998.

³ **United States.** *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418].

Arizona. *Tidwell v. Cattle Co.* (Ariz.), 53 Pac. 192.

Colorado. *Water, etc., Co. v. Tenney*, 24 Colo. 344, 51 Pac. 505.

Illinois. *Cooney v. Packing Co.*, 169 Ill. 370, 48 N. E. 406; *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70, 56 N. E.

consist in a proceeding brought by the state for dissolution.⁴ An illustration of several of these propositions is found in a case⁵ in which A, who had subscribed for stock, defended a suit for his subscription on the ground that some of the stock was subscribed for by corporations; that such subscriptions were *ultra vires*; and that accordingly he could not be held, since the corporation had organized without a complete list of subscribers. The court held that as long as the subscriptions were executory, they were "illegal in the sense that they were *ultra vires*, and such corporations could make that defense or not at their pleasure";⁶ yet when fully performed they were absolutely binding. If A conveys realty to a bank to take in trust for B, and such bank conveys to B, in accordance with A's directions, A's heir can not maintain a suit to set such deed aside on the theory that the bank had no authority to act as such trustee.⁷ A national bank erected an office building upon realty on which it held a ninety-nine-year lease at an annual rental, under a contract whereby the bank was to pay all taxes. Subsequently the bank became insolvent; rent and taxes were in arrears and the income from the building did not pay fixed charges. Under these circumstances the bank agreed with the lessor to surrender the lease and to turn over the building to him, in consideration of his releasing the bank from all liability under the lease. Thereafter a receiver was appointed for the bank and he sued the lessor in equity to set aside the lease and the surrender thereof. It was held that he had no such right.⁸ If A sells to the X company his stock in the Y company, and the X company sells such stock to the Y company, A can not maintain an action against the Y company

1088; *Henderson v. Coal Co.*, 78 Ill. App. 437.

Mississippi. *Middleton v. Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

Oklahoma. *Union Trust Co. v. Hendrickson*, — Okla. —, 172 Pac. 440.

Nebraska. *Watts v. Gantt*, 42 Neb. 869, 61 N. W. 104.

Texas. *Ray v. Foster* (Tex. Civ. App.), 53 S. W. 54. This rule is applied in some jurisdictions to devise to a corporation. *Farrington v. Putnam*, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652; *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308, 35 L. R. A. 693, 36 Atl. 654; *Hanson v. Little Sisters*,

etc., 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825.

⁴ *Middleton v. Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

⁵ *McCoy v. Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043 [affirming, 87 Ill. App. 605].

⁶ *McCoy v. Columbian Exposition*, 186 Ill. 356.

⁷ *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418].

⁸ *Brown v. Schleier*, 194 U. S. 18, 48 L. ed. 857.

to recover the value of such stock either on the theory that the X company had no power to buy it from him,⁹ or on the theory that the Y company had no power to buy it from the X company.¹⁰

§ 2006. Estoppel. The fact that an ultra vires contract, which is so often said to be void, does in many jurisdictions give rise to liability on the contract, has caused many authorities to explain this apparent anomaly by invoking the doctrine of estoppel.¹ If

⁹ *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168.

¹⁰ *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168.

¹ *United States. Eastern, etc., Association v. Williamson*, 189 U. S. 122, 47 L. ed. 735; *Wood v. Corry, etc., Waterworks*, 44 Fed. 146, 12 L. R. A. 168; *American National Bank v. Paper Co.*, 77 Fed. 85.

Arizona. Leon v. Citizens' Building & Loan Association, 14 Ariz. 294, Ann. Cas. 1914D, 1151, 127 Pac. 721.

California. Kennedy v. Savings Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

Idaho. Meholin v. Carlson, 17 Ida. 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. McCarthy v. Lavasche, 89 Ill. 270, 27 N. E. 286, 31 Am. Rep. 83; *Heims Brewing Co. v. Flannery*, 137 Ill. 309; *Eckman v. R. R.*, 169 Ill. 312, 48 N. E. 496; *People v. R. R.*, 178 Ill. 594, 63 N. E. 349.

Indiana. State Board v. Ry., 47 Ind. 407, 17 Am. Rep. 702; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

Iowa. White v. Marquardt, 105 Ia. 145, 74 N. W. 930; *Bankers' Mutual Casualty Co. v. First National Bank*, 131 Ia. 456, 108 N. W. 1046.

Kansas. Sherman Center Town Co. v. Fletcher, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

Massachusetts. Nims v. School, 160 Mass. 177, 39 Am. St. Rep. 467, 22 L. R. A. 364, 35 N. E. 776. (A tort grow-

ing out of contract to carry as a ferryman.)

Michigan. Carson, etc., Bank v. Carson, etc., Co., 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; *Dewey v. Ry.*, 91 Mich. 351, 51 N. W. 1063; *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357.

Missouri. St. Louis v. St. Louis, Iron Mountain & Southern Ry., 248 Mo. 10, 154 S. W. 55.

New Hampshire. Manchester, etc., R. R. Co. v. R. R., 66 N. H. 100, 49 Am. St. Rep. 582, 9 L. R. A. 689, 20 Atl. 383.

New York. Bissell v. R. R., 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Kent v. Mining Co.*, 78 N. Y. 159; *Linkauf v. Lombard*, 137 N. Y. 417, 33 Am. St. Rep. 743, 20 L. R. A. 48, 33 N. E. 472; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 52 L. R. A. 429, 50 N. E. 597; *Vought v. Loan Association*, 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496.

Oregon. Tyler v. Academy, 14 Or. 485, 13 Pac. 329.

Virginia. News-Register Co. v. Rockingham Publishing Co., 118 Va. 140, 86 S. E. 874.

Washington. Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co., 81 Wash. 247, L. R. A. 1917A, 737, 142 Pac. 670.

"We also concur with the trial court that the defendant is estopped to plead ultra vires as a defense in this action.

a corporation which has no power to enter into contracts of indemnity, enters into a contract of indemnity, and takes adequate security from its principal to protect itself, it can not avoid its liability upon such contract of indemnity.² Whether a deposit of securities with state officers in compliance with the statutes thereof prescribing the terms on which foreign corporations may do business in such state is *ultra vires* of such foreign corporation or not, it can not take advantage of its lack of power.³ Where a corporation bought bank stock as an investment and received dividends thereon for years, with the acquiescence of its own stockholders, it was held to be estopped to deny that it was a stockholder, in a suit to enforce a stock liability.⁴ A corporation which has guaranteed payment of the bonds of another corporation, the stockholders of which were substantially the same as the stockholders of the first corporation, and which has received the bulk of the proceeds of such bonds, is estopped from setting up *ultra vires* as a defense.⁵ So where a cor-

As observed above, it is not alleged that the treasurer did not have authority to contract in behalf of the corporation for the sale of the stock and receive payment therefor, and the only denial of his authority is that he could not bind the corporation to furnish a purchaser for the plaintiff's stock, but, as already pointed out, he entered into a contract which is entire and indivisible for the sale of the stock and to procure a purchaser therefor for the plaintiff within a specified time. He received the five thousand dollars, the full consideration for the stock, and it went into and is still retained in the treasury of the company without any offer by the company to return it to the plaintiff although the defendant has refused to perform the other part of its contract. There has been complete and perfect performance of the contract by the plaintiff, of which the defendant company has received and still retains the benefit. It is, therefore, not in a position and will not be permitted to deny either the authority of its agent in negotiating the contract or its liability to comply with its terms. Such is the settled

doctrine of this court as announced in a long line of decisions, one of the more recent of which is *Presbyterian Board v. Gilbee*, 212 Pa. 310, where it is said (p. 314): "It is repugnant to every sense of justice and fair dealing that a principal shall avail himself of the benefits of an agent's act, and at the same time repudiate his authority. A corporation may not avail itself even of *ultra vires* as a defense where a contract has been entered into and executed in good faith by the other party and the corporation has received the benefit of the performance." *Lemon v. East Palestine Rubber Co.*, 260 Pa. St. 28, 103 Atl. 510.

² *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, L. R. A. 1917A, 737, 142 Pac. 670; *United States Fidelity & Guaranty Co. v. Cascade Construction Co.*, 104 Wash. 357, 180 Pac. 463.

³ *Lewis v. American, etc., Loan Association*, 98 Wis. 203, 39 L. R. A. 559, 73 N. W. 793.

⁴ *Hunt v. Malting Co.*, 90 Minn. 232, 96 N. W. 85.

⁵ *Graysonia-Nashville Lumber Co. v. Goldman*, 247 Fed. 423, 159 C. C. A.

poration made a conveyance to one who agreed to pay the debts of the corporation, it was held that after a delay of five years and after third persons have acquired an interest in such property, the corporation can not have such conveyance set aside.⁶ So one who has agreed to sell realty to a corporation is said to be estopped to avoid the contract after the corporation has taken possession of such realty and made valuable improvements thereon.⁷ However, it was held that no estoppel existed where a stockholder who had not assented to an ultra vires sale by the corporation of corporate property, received some of the bonds issued in payment for such property, as long as he did not assert any rights thereunder.⁸ Conversely, no estoppel exists if nothing of value is received by virtue of the transaction in question.⁹ Estoppel is said to exist, however, where the benefit which the corporation receives is an indirect benefit.¹⁰ If a brewing company has agreed to indemnify a surety for the rent of a saloon in which the product of such brewing company is sold, it is said that the brewing company is estopped to set up the defense of ultra vires after it has received the benefits of the transaction.¹¹

An examination of these cases will show, however, that no technical estoppel is meant; and they may be explained by saying that such contracts were originally voidable, and that those who have elected by receiving and retaining benefits thereunder, to treat them as valid, are bound by such election. Estoppel in pais exists only where one party by false representations of fact has induced the other to act so that he would be prejudiced were the first party

477 [certiorari denied, 246 U. S. 663, 62 L. ed. 928].

⁶ *Bear Valley, etc., Co. v. Trust Co.*, 117 Fed. 941.

⁷ *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123.

⁸ *Morris v. Land Co.*, 125 Ala. 263, 28 So. 513.

⁹ *West Maryland R. R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 111 Am. St. Rep. 362, 62 Atl. 351; *Nebraska Shirt Co. v. Horton (Neb.)*, 93 N. W. 225. "No fruits of the transaction were received by the company and its mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers can not give rise to an estoppel." *Wheeler v. Bank*,

188 Ill. 34, 38, 80 Am. St. Rep. 161, 58 N. E. 598.

Estoppel is said not to be the benefits come directly to the adversary party. *Wes R. Co. v. Blue Ridge*, Md. 307, 111 Am. St. 351.

¹⁰ *Timm v. Gar*, Co., 160 Mich. 371, 186, 125 N. W. 37; *Bank v. Purcell*, 34 Okla. 34, 4; 124 Pac. 603.

¹¹ *Timm v. Co.*, 160 Mich. 186, 125 N.

allowed to deny the truth of the facts as represented by him. If the power is one which might under proper circumstances be exercised by the corporation, there may be a true estoppel,¹² though the contract is much oftener, in such case, entered into in ignorance of the law. Where the power is one which the corporation can not exercise under any circumstances, there can never be a technical estoppel if all are bound to take notice of the charter.¹³ In some jurisdictions, however, one who has induced another to act in reliance upon the apparent validity of an ultra vires contract, is estopped from denying the validity of such contract, although the fraud or misrepresentation may be one of law.¹⁴ If one street railway company enters into a contract to transfer its property to another corporation, and by the terms of such contract the stockholders of the first corporation are to have the privilege of subscribing to a certain portion of the stock in the second corporation at par, a stockholder in the first corporation who has sold his right to subscribe to such stock is estopped from maintaining a suit to enjoin such corporation from carrying out such contract.¹⁵

Since the greater number of cases of so-called estoppel present none of the elements of true estoppel, the doctrine has been repudiated in some jurisdictions.¹⁶ If a corporation has lent money under a contract which it had no authority to make, it is held that in case of the insolvency of its debtor, his trustee in bankruptcy may set up the ultra vires character of the contract of the loan as

¹² Estoppel applies only where the "making of the contract is within the scope of the franchise and the contract is sought to be avoided because there was a failure to comply with some regulation, or the power was improperly exercised." *National, etc., Association v. Bank*, 181 Ill. 35, 46, 72 Am. St. Rep. 245, 54 N. E. 619; *Davis v. R. R.*, 131 Mass. 258, 41 Am. Rep. 221.

¹³ *Steele v. Fraternal Tribunes*, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121. See § 1977.

¹⁴ *Wormser v. Metropolitan Street Ry. Co.*, 184 N. Y. 83, 112 Am. St. Rep. 596, 77 N. E. 1198.

¹⁵ *Wormser v. Metropolitan Street Ry. Co.*, 184 N. Y. 83, 112 Am. St. Rep. 596, 77 N. E. 1198.

¹⁶ *Steele v. Fraternal Tribunes*, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; *Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982; *Stone-Ordean-Wells Co. v. New England Pie Co.*, 201 Mich. 407, 167 N. W. 943.

See also, *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 76 Am. St. Rep. 26, 50 L. R. A. 765, 57 N. E. 20; *Franklin National Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 39 L. R. A. 725, 49 N. E. 592. An ultra vires contract "can not be enforced or rendered enforceable by the application of the doctrine of estoppel." *Union Pacific Ry. v. Ry.*, 163 U. S. 564, 581, 41 L. ed. 265 [quoted in *California*,

a defense to a mortgage given as security therefor, for the benefit of the other creditors.¹⁷ For the most part, however, these same courts say that such contracts are void.¹⁸

If the contract is invalid as against policy, or as forbidden by statute, estoppel has no application.¹⁹ If a contract by a railway company agrees to give advance information as to the future location of depots, and to divide the profits arising from purchase of land in reliance upon such information, the fact that the adversary party has acted upon such information and has earned profits, does not estop him from setting up the illegality of such contract in an action by the railway company.²⁰

etc., *Bank v. Kennedy*, 167 U. S. 362, 371, 42 L. ed. 198].

"Contracts made by a corporation which are beyond the scope of its powers are unlawful and void, and can not be enforced, and in such cases the doctrine of estoppel can not be applied on the ground that the party against whom it is sought to enforce the contract, having received the benefits of it, can not be heard to interpose the defense of ultra vires. 'The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.' *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. That case was quoted with approval in *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, where it was also said: 'No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it can not be done by affirming or enforcing the contract, but in some other manner.'" *Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982.

¹⁷ *Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318, L. R. A. 1917B, 814, 112 N. E. 982. (It was said in obiter that the debtor himself would not be estopped from pleading such invalidity.)

Estoppel does not operate in favor of dishonest officials and against innocent stockholders. *Stone-Ordean-Wells Co. v. New England Pie Co.*, 201 Mich. 407, 167 N. W. 943.

¹⁸ See § 2002.

¹⁹ *Minnesota, Dakota & Pacific Ry. Co. v. Way*, 34 S. D. 435, L. R. A. 1915B, 925, 148 N. W. 858; *Franklin National Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, 39 L. R. A. 725, 49 N. E. 592; *In re Assignment Mutual, etc., Ins. Co.*, 107 Ia. 143, 70 Am. St. Rep. 149, 77 N. W. 868; *Kent v. Mining Co.*, 78 N. Y. 159; *Miller v. Ins. Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

"His position is not such as appeals very strongly to a court of equity. He paid his money knowing that the company had no right to accept it, and ought not to be allowed to base an estoppel thereon. Again, the company was expressly prohibited from issuing such a policy as the one in suit." *In re Assignment Mutual, etc., Ins. Co.*, 107 Ia. 143, 149, 70 Am. St. Rep. 149, 77 N. W. 868.

²⁰ *Minnesota, Dakota & Pacific Ry. Co. v. Way*, 34 S. D. 435, L. R. A. 1915B, 925, 148 N. W. 858.

partnership with a stockholder, and he performed the contract, the corporation must account to him for the proceeds of the partnership received by it.⁹ Other authorities hold that in such case the liability is on quantum meruit for the benefits received, and not on the contract.¹⁰

If a contract has been performed to such an extent that serious injury will be done by refusing performance, it is held in some jurisdictions that such contract can not be avoided on the theory that it is in excess of the power of the corporation,¹¹ whether performance has been made by the corporation,¹² or by the adversary party.¹³ If a corporation has made a lease in excess of its authority,¹⁴ or has taken a lease in excess of its authority,¹⁵ and in each case the lessee has constructed improvements and made expenditures in reliance upon such lease, the lessor can not set up the ultra vires character of such lease.

§ 2004. Performance not conferring benefit on corporation. Where performance does not pass anything of value to the corporation, it is held in many jurisdictions that performance by the adversary party does not impose any liability on the corporation. This is the case where the corporation has issued accommodation paper,¹ or has ultra vires acted as surety.² Thus a brewing

⁹ *Boyd v. Carbon-Black Co.*, 182 Pa. St. 206, 37 Atl. 937. "While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life in fact for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed." *Boyd v. Carbon-Black Co.*, 182 Pa. St. 206, 211, 37 Atl. 937.

¹⁰ *Pittsburgh, etc., Co. v. Bridge Co.*, 131 U. S. 371, 33 L. ed. 157; *McCormick v. Bank*, 165 U. S. 538, 41 L. ed. 817; *California, etc., Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198; *Nashua, etc., R. R. Co. v. R. R. Co.*, 164 Mass. 222, 49 Am. St. Rep. 454, 41 N. E. 268; *Greenville, etc., Planters', etc., Co.*, 70 Miss. 669, 35 Am. St. Rep. 68, 13 So. 879.

¹¹ *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108

N. E. 856; *Hill v. Atlantic & North Carolina R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

¹² *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

¹³ *Hill v. Atlantic & North Carolina R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

¹⁴ *Hill v. Atlantic & North Carolina R. Co.*, 143 N. Car. 539, 9 L. R. A. (N.S.) 606, 55 S. E. 854.

¹⁵ *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

¹ *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 N. W. 1055.

See also, to the same effect, *M. V. Monarch Co. v. Bank*, 105 Ky. 430, 88 Am. St. Rep. 310, 49 S. W. 317. See § 1982.

² See § 1983. See to the same effect *First National Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351.

company was allowed to plead *ultra vires* to an appeal bond on which it had become surety to enable the appellee to continue in the saloon business and to buy beer of the company;³ and a railroad could thus defend against its guaranty of the expenses of a festival.⁴ Where a building association bought land and assumed a mortgage, and subsequently repudiated the transaction and tendered a deed to the grantor, it was held that, as the contract to assume the debt was *ultra vires*, and the holder of the debt and mortgage had parted with nothing in reliance on such assuming the debt, he could not enforce the debt against the corporation.⁵ If a corporation by an *ultra vires* contract buys stock in another corporation, it can not be compelled to pay a stock liability.⁶

This doctrine may properly be extended to cases where the corporation has no choice in receiving or retaining benefits. Thus where work was done under a contract, with an unauthorized (and, possibly *ultra vires*) change made by the authority of the superintendent of the company, the contractor could not recover extra compensation for the change.⁷

The correctness of this principle depends in part on whether the corporation received the benefits of the transaction indirectly or not. If a corporation has not received the benefits of an *ultra vires* contract either directly or indirectly, it can not be held liable thereon.⁸ If a bank agrees to guarantee the sale of certain securities in case the owner thereof would enter into a syndicate agreement, and such securities are not delivered to the bank, and the only performance by the owner thereof is to refrain from selling them to others, the bank can not be held liable upon such contract, especially if the syndicate agreement is never carried out.⁹

A different rule has been applied in some jurisdictions where the corporation has received an indirect benefit under the transaction.

³ *Best Brewing Co. v. Klassen*, 185 Ill. 37, 76 Am. St. Rep. 26, 50 L. R. A. 765, 57 N. E. 20.

⁴ *Davis v. R. R.*, 131 Mass. 258, 41 Am. Rep. 221.

Contra, a street railroad was not allowed to plead *ultra vires* to a subscription to a fair, in order to increase traffic. *State Board v. R. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702.

⁵ *National, etc., Association v. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619.

⁶ *Chemical National Bank v. Havermale*, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071; *White v. Bank*, 66 S. Car. 491, 97 Am. St. Rep. 803, 45 S. E. 94.

⁷ *Boynton v. Gaslight Co.*, 124 Mass. 197.

⁸ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N.S.) 967, 89 N. E. 476.

⁹ *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 24 L. R. A. (N.S.) 967, 89 N. E. 476.

The theory that a corporation is liable upon its contract has been applied to cases in which the benefit which it received under the transaction was an indirect benefit.¹⁰ If a brewing company has agreed to indemnify a surety for the rent of a saloon, where the product of such brewing company is sold, and the brewing company receives the benefit of the transaction, it can not deny its liability upon its contract of indemnity, on the theory that it was beyond its powers.¹¹

If a bank attempts to secure a debt which is due to it, by assisting its debtor to perform his contract with a third person so that it may receive the money which will be due from such third person to the debtor of the bank, on the performance of such contract, it is said in some jurisdictions that such transaction is ultra vires, but that the bank is liable for expenses incurred in the performance of such contract.¹² This liability has been enforced even if the transaction ultimately results in a loss to the bank.¹³ The liability of the corporation in cases of this sort has been said to rest on the implied contract of the corporation to place the adversary party in statu quo,¹⁴ assuming that the liability can not be enforced upon the contract itself.¹⁵ There is a serious difficulty in explaining cases of this sort in this way. The benefits which the corporation receives, are benefits which do not pass directly from the adversary party to the corporation, but they come indirectly from another person,¹⁶ or it may be the corporation does not ultimately receive any benefits from the transaction at all.¹⁷ Cases of this sort should be justified either on the theory that the con-

¹⁰ *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357; *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392. See § 2001.

¹¹ *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 27 L. R. A. (N.S.) 186, 125 N. W. 357.

¹² *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder*

Co., 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹³ *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

¹⁴ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁵ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁶ *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917A, 1021, 138 Pac. 392.

¹⁷ *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okla. 34, 41 L. R. A. (N.S.) 494, 124 Pac. 603.

tract was either within the powers of the corporation,¹⁸ or else the corporation must be held liable upon the contract itself, in spite of the fact that its promise is ultra vires.¹⁹

§ 2005. Contracts fully performed. If a contract has been fully performed on both sides, neither party can take advantage of the fact that it was ultra vires.¹ The right of attacking a transaction ultra vires, but fully executed, belongs to the state alone.² Thus the right of a corporation to hold land can be questioned only by the state, not by a private individual.³ This is especially true if the statute provides an exclusive penalty in case of the unauthorized acquisition of land by the corporation which is to

¹⁸ See § 1992.

¹⁹ See §§ 1089, 2001.

¹ *United States. Pennsylvania R. R. Co. v. R. R.*, 118 U. S. 290, 30 L. ed. 83; *Brown v. Schleier*, 194 U. S. 18, 48 L. ed. 857; *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418]; *Re-organized Church, etc., v. Church, etc.*, 60 Fed. 937; *Cincinnati, etc., Co. v. McKeen*, 64 Fed. 36, 12 C. C. A. 14.

Alabama. Long v. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

Indiana. Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

Kentucky. Miller v. Turnpike Co., 109 Ky. 475, 59 S. W. 512.

Minnesota. Hennessy v. St. Paul, 54 Minn. 219, 55 N. W. 1123.

Mississippi. Middleton v. Georgetown Mercantile Co., 117 Miss. 134, 77 So. 956.

New Hampshire. Manchester, etc., R. R. v. R. R., 66 N. H. 100, 49 Am. St. Rep. 582, 9 L. R. A. 689, 20 Atl. 383.

New Jersey. Camden, etc., R. R. Co. v. R. R., 48 N. J. L. 530, 7 Atl. 523.

New York. Parish v. Wheeler, 22 N. Y. 494; *Holmes, etc., Co. v. Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

Oklahoma. Union Trust Co. v. Hendrickson, — Okla. —, 172 Pac. 440.

² *United States. Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418].

Mississippi. Middleton v. Georgetown Mercantile Co., 117 Miss. 134, 77 So. 956.

New Jersey. Benton v. Elizabeth, 61 N. J. L. 693, 40 Atl. 1132 [affirming, 61 N. J. L. 411, 39 Atl. 683, 906].

Oklahoma. Union Trust Co. v. Hendrickson, — Okla. —, 172 Pac. 440.

Tennessee. Barrow v. Turnpike Co., 28 Tenn. (9 Humph.) 304; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825.

Wisconsin. Zinc Carbonate Co. v. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229. See § 1998.

³ *United States. Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 54 L. ed. 1042 [affirming, *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418].

Arizona. Tidwell v. Cattle Co. (Ariz.), 53 Pac. 192.

Colorado. Water, etc., Co. v. Tenney, 24 Colo. 344, 51 Pac. 505.

Illinois. Cooney v. Packing Co., 169 Ill. 370, 48 N. E. 406; *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70, 56 N. E.

§ 2010. "Modern doctrine" of ultra vires. The proposition has been advanced in a number of recent cases, that only the state can take advantage of the fact that a contract is ultra vires, by a direct attack in quo warranto to oust the corporation from exercising such franchises; and that private persons can not attack the validity of the corporation's contracts on the ground of ultra vires.¹ The reason underlying this rule is that in its inception and true place in law, ultra vires was a doctrine for restraining the action

engaging in such a business, nevertheless, it did engage in it, and a contract liability arising thereout could not be avoided by any plea of having exceeded its powers. That was a question which concerned its stockholders or the state, and not the plaintiffs. If the defendants could not have been deemed liable, had it been shown that the business of the steamship line was the subject of the official action of the board of trustees and was within the corporate management of Lombard, Ayres & Co., it does not follow, because of the loose, defective, or irregular way in which that corporation's interests were evidenced and managed in that undertaking into which it had been launched by its managers, that the liability had shifted from it upon the individuals who were its officers or managers." *Leinkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48.

¹ *Harris v. Independence Gas Co.*, 76 Kan. 750, 13 L. R. A. (N.S.) 1171, 92 Pac. 1123; *Gigoux v. Moore*, — Kan. —, 184 Pac. 636.

"That such doctrine can not be resorted to as a weapon for attack and defense in the hands of mere private persons and used as a ready means of embarrassing business operations by and with corporate bodies, which directly or indirectly touch and administer to human desires at every turn of the individual in modern life, while its effectiveness for all essential purposes of restraint and punishment is fully preserved, furnishes no cause for regret, but rather cause for gratifica-

tion at the evidence of how certainly principles by natural growth and development adapt the law and its administration to the ever-changing needs of advancing civilization, so as best to promote justice and the common welfare." *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 16, 65 Am. St. Rep. 22, 37 L. R. A. 138, 70 N. W. 289, 71 N. W. 109.

"When a contract has been so far executed that to allow the corporation to repudiate it would work injustice to the other party thereto who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation regardless of whether the corporation had a right to make it or not, unless its act in that regard was in violation of some written law of the state or sound public policy; (that) in such circumstances, if the corporation exceeds its power it commits a punishable offense against the sovereignty of the people, but can not itself invoke the doctrine of ultra vires to avoid its act, at the same time inflicting a grievous wrong upon the one who has in good faith relied upon the assumption that it possessed in fact the power which it pretended to have authority to exercise." *Wuerfler v. Trustees Grand Grove*, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

"This court, by a series of decisions, has held that when a corporation enters into business relations not authorized by its corporate grant of power, the doctrine of ultra vires can

of a corporation, not intended for the benefit of either party to the transaction, but applicable only to public corporations or to ques-

not be used by it, or by the person with whom it assumes to deal, as a means of defeating the obligations assumed. The state alone can take advantage of the abuse * * *. The fact that this court has adopted the principle that the question can not be litigated by private parties—a principle with which we are entirely satisfied—relieves us from further consideration of the question.” *Security National Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74 [quoted in *Harris v. Independence Gas Co.*, 76 Kan. 750, 13 L. R. A. (N.S.) 1171, 92 Pac. 1123].

“It might seem reasonable that a system which attempts not only to protect a party to an ultra vires contract from actual loss, but, where equity requires it, to insure to him the actual fruits of his bargain, ought, for the sake of completeness and symmetry, to enable him to insist upon the performance even of a purely executory contract. It certainly seems against conscience that one who has entered into a contract in the expectation of deriving a profit from it may, upon discovering the probability of a loss, repudiate it, and escape responsibility by raising the question of want of corporate capacity. Parties to a contract, who deal with each other upon the assumption that one of them is a corporation, are ordinarily precluded from questioning the validity of its organization. * * *. The principle referred to, if sound, is manifestly sufficient in itself to defeat the defense of ultra vires, even when interposed against the enforcement of an executory contract; but it must be admitted that in practice, it seems to have been applied only where the agreements had been at least partially performed. It

seems often to have been invoked, however, in aid of the ordinary doctrine of estoppel, in cases where the contract upon one side or the other had already been performed. The best and most complete expression of it is found in the decisions of the Wisconsin court.” *Harris v. Independence Gas Co.*, 76 Kan. 750, 13 L. R. A. (N.S.) 1171, 92 Pac. 1123.

“No Kansas statute declares that a contract made by a corporation in excess of its legitimate powers shall be void; or in terms permits the question of corporate capacity to be raised by one of the parties. Where, it is held that no recovery can ever be had upon an ultra vires contract as such, whatever relief is afforded is logically made to turn upon whether and how far the agreement has been acted upon. Where a recovery is sometimes permitted under the contract itself, upon the principle of estoppel, the question whether it has been carried out is likewise of manifest importance, there being a difference in degree, at least, between the attitude of one who has merely entered into an engagement in expectation of obtaining an advantage from it, and that of one who has actually reaped its benefits in whole or in part. But the doctrine that only the state can challenge the validity of acts done under color of a corporate charter, if accepted, must necessarily protect an executory contract from collateral attack, equally with one that has been executed. The court is convinced of the soundness of the view that, in the absence of special circumstances affecting the matter, neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires. The doctrine is logical in theory, sim-

tions between private corporations and the state.² An analysis of the cases in which this doctrine has been advanced will show that it has not in fact the radical and sweeping effect that it at first seems to have.³ It is applied chiefly to cases where one not a party to the ultra vires transaction seeks to avoid it,⁴ or to cases where the contract has been performed fully on one or both sides, and is therefore treated as valid and binding, whatever it may have been at its inception.⁵

ple in application, and just in result. It, of course, does not apply to contracts which are immoral, or which are illegal (as distinguished from merely unauthorized), or to those made by public corporations. Nor does it forbid interference by a stockholder to protect his rights as such." *Harris v. Independence Gas Co.*, 76 Kan. 750, 13 L. R. A. (N.S.) 1171, 92 Pac. 1123.

²*Harris v. Independence Gas Co.*, 76 Kan. 750, 13 L. R. A. (N.S.) 1171, 92 Pac. 1123.

"The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often; but to place that power in the hands of the corporation itself, or a private individual, to be used by it or him as a means of obtaining or retaining something of value which belongs to another, would turn an instrument intended to effect justice between the

state and corporations into one of fraud as between the latter and innocent parties." *Zinc Carbonate Co. v. Bank*, 103 Wis. 125, 131, 74 Am. St. Rep. 845, 79 N. W. 229.

Expressing somewhat similar views are *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Wood v. Waterworks Co.*, 44 Fed. 146, 12 L. R. A. 168; *Prescott National Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *State v. Thresher, etc., Co.*, 40 Minn. 213, 3 L. R. A. 610, 41 N. W. 1020; *Barrow v. Turnpike Co.*, 28 Tenn. (9 Humph.) 304.

³*Wuerfler v. Trustees Grand Grove*, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

⁴*John V. Farwell Co. v. Wolf*, 96 Wis. 10, 65 Am. St. Rep. 22, 37 L. R. A. 138, 70 N. W. 289, 71 N. W. 109.

⁵*Henderson v. Coal Co.*, 78 Ill. App. 437; *Bank of Missouri v. Bank*, 10 Mo. 123; *Zinc Carbonate Co. v. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229.

CHAPTER LXII

IRREGULAR ORGANIZATIONS AND DE FACTO CORPORATIONS

- § 2011. Nature of de facto private corporations.
- § 2012. Elements of de facto corporation.
- § 2013. Illustrations of specific defects in organization of corporation.
- § 2014. Estoppel to deny corporate existence—Estoppel of persons dealing with corporation.
- § 2015. Estoppel of corporation to deny its own existence.
- § 2016. Contracts of de facto corporation—Organization treated as corporation.
- § 2017. Organization treated as group of natural persons.
- § 2018. Effect of special contract as to nature of liability.
- § 2019. De facto public corporations.

§ 2011. Nature of de facto private corporations. If the incorporators comply literally with the statute under which they are assuming to act, a de jure corporation is created. If they comply with the provisions of the statute substantially but not literally, it is generally held that a de jure corporation is formed. A de jure corporation is a corporation created in such compliance with the statutes under which it is formed, that it will be held to be valid as against the state in a proceeding such as quo warranto, which is brought for the purpose of attacking its existence directly.¹ In many cases the law has been required to solve the problem of the rights of groups of persons who have attempted to form a corporation, who have failed to comply substantially with the statutes under which they were attempting to form such corporation, but who have, nevertheless, supposed that they were a corporation, and who have dealt with other persons on the theory that they formed a corporation. As between the necessity of holding on the one hand that they were to be treated for some purposes as a corporation, and of holding on the other hand that the members of such organization had incurred a personal liability, in defiance of the mutual expectations of all the parties to the transac-

¹ *Mackay v. New York, New Haven and Hartford Ry.*, 82 Conn. 73, 24 L. R. A. (N.S.) 768, 72 Atl. 583; *Capps v. Hastings Prospecting Co.*, 40 Neb. 470, 42 Am. St. Rep. 677, 24 L. R. A. 259, 58 N. W. 956.

tion, the law has preferred the former alternative, and it has recognized the existence of the so-called de facto corporation. A de facto corporation is an organization whose members are in fact exercising and enjoying the franchise of being a corporation, and who are accordingly regarded by the law as being a corporation for some purposes, although they may be ousted of their right to act as a corporation in a proceeding in quo warranto, instituted by the state, because of omissions or defects in the incorporation.²

2 Arkansas. *Jones v. Dodge*, 97 Ark. 248, 133 S. W. 828.

Connecticut. *Mackay v. New York, New Haven and Hartford Ry.*, 82 Conn. 73, 24 L. R. A. (N.S.) 678, 72 Atl. 583.

Florida. *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232, 31 L. R. A. 484, 19 So. 172.

Indiana. *Crowder v. Sullivan*, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. 94; *Williams v. Ry.*, 130 Ind. 71, 30 Am. St. Rep. 201, 15 L. R. A. 64, 29 N. E. 408; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668.

Minnesota. *Healey v. Steele Center Creamery Association*, 115 Minn. 451, 133 N. W. 69.

Ohio. *Callender v. Painesville and Hudson R. R. Co.*, 11 O. S. 516.

Oklahoma. *Swofford Brothers Dry Goods Co. v. Owen*, 37 Okla. 616, L. R. A. 1916C, 189, 133 Pac. 193.

Utah. *Marsh v. Mathias*, 19 Utah 350, 56 Pac. 1074.

Tennessee. *Tennessee, etc., Co. v. Massey* (Tenn. Ch. App.), 56 S. W. 35.

Texas. *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743, 15 S. W. 1038.

Wisconsin. *Franke v. Mann*, 106 Wis. 118, 48 L. R. A. 856, 81 N. W. 1014.

"A corporation de facto is, in plain English, a corporation in fact." *Lamkin v. Mfg. Co.*, 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042.

"A corporation de facto exists when, from irregularity or defect in the organization or constitution, or from

some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might lawfully be incorporated; * * * when there is an organization with color of law, and the exercise of corporate franchises and functions." *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 228, 24 Am. St. Rep. 887, 11 L. R. A. 515, 8 So. 656.

"A private corporation may be defined as an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued; and who have either accepted the offer and effected an organization in substantial conformity with its terms (in which case a corporation de jure has been constituted), or have done acts indicating a purpose to accept such offer and effected an organization designed to be, but in fact not, in substantial conformity with its terms (in which case a corporation de facto has been constituted)." *Mackay v. New York, New Haven and Hartford Ry.*, 82 Conn. 73, 24 L. R. A. (N.S.) 768, 72 Atl. 583.

See, *De Facto Corporations*, by Charles E. Carpenter, 25 *Harvard Law Review*, 623; *Collateral Attack on Incorporation: A. De Facto Corporations*, by Edward H. Warren, 20 *Harvard Law Review*, 456; *Collateral Attack on Incorporation: B. In General*, by Edward H. Warren, 21 *Harvard Law Review*, 305; *Irregular Associations*, by George

The status of a de facto corporation is not limited to those dealing with it in such capacity, but exists as to the world at large,³ except in cases where the state is suing in quo warranto to oust the de facto corporation of its franchises. In an action between a de facto corporation and the state other than quo warranto, the de facto corporation is to be treated as a corporation.⁴ If, however, a number of corporations have attempted to form a new corporation under a statute which requires the incorporators to be natural persons, such organization has no legal effect, and the state can not recover the fee for the formation of such new corporation.⁵ The existence of a de facto corporation can not be attacked by a competitor in an action to restrain such corporation from doing business.⁶

§ 2012. Elements of de facto corporation. Since the creation of corporations is a matter which is generally governed by elaborate and detailed statutory provisions, while the notion of a de facto corporation is built up by the courts to give in part the immunity of corporate action on the one hand, or the rights arising by reason of corporate action on the other, to the members of an organization which is not a corporation de jure, and since the effect of failing to comply with the requirements of the statute depends to a large extent upon the terms of the statutes themselves, it is impossible to state in abstract terms general principles for determining whether defective attempts to create corporations result in de facto corporations or not; and it is impossible to lay down detailed rules as to the effect of specific irregularities or defects in creating corporations. The great difficulty in dealing with the entire subject of the de facto corporation, arises from the fact that the statutes have prescribed affirmatively the method by which a corporation may be formed, but they have rarely prescribed the effect of a failure to comply with each of the requirements of the statute, and they have rarely been framed in negative language so as to provide that no corporation of any sort shall exist unless certain requirements have been complied with. It is said that a de

Wharton Pepper, 43 American Law Register (N.S.), 409, 504, 576, and The Incidents of Irregular Incorporation, by George Wharton Pepper, 36 American Law Register (N.S.), 18, 161.

³ People v. Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; Improvement Co. v. Small, 150 Ind. 427, 431, 47 N. E. 11, 50 N. E. 476; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Taylor v. Ry., 91 Me. 193, 64 Am. St.

Rep. 216, 39 Atl. 560; Society Perun v. Cleveland, 43 O. S. 491, 3 N. E. 357.

⁴ Coxe v. State, 144 N. Y. 396, 39 N. E. 400 (where the receiver of such corporation sues the state).

⁵ State v. Rutland Ry. Light & Power Co., 85 Vt. 91, 81 Atl. 252.

⁶ Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 176 N. Car. 608, 96 S. E. 99.

facto corporation can exist only where there is a law under which a de jure corporation may be formed, an apparent attempt to perfect an organization under such law, and an actual user of corporate authority and rights under such attempted organization.¹ In some jurisdictions the elements of a de facto corporation have been stated in substantially the same manner except that it is said that there must be a bona fide attempt to incorporate under the

¹Colorado. *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 29 L. R. A. 143, 40 Pac. 457.

Illinois. *People v. New York Central R. Co.*, 263 Ill. 334, 119 N. E. 299.

Indiana. *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 112 Am. St. Rep. 217, 73 N. E. 1083.

Michigan. *Newcomb-Endicott Co. v. Fee*, 167 Mich. 574, 133 N. W. 540.

Minnesota. *Healey v. Steele Center Creamery Association*, 115 Minn. 451, 133 N. W. 69.

"It is unnecessary to consider whether this was a de jure corporation, so that it could defend against a quo warranto, or an action in the nature of quo warranto in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be and act as a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation de facto—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a de facto corporation is stated by Selden, J., in *Methodist Episcopal U. Church v. Pickett*, 19 N. Y. 482, as: '(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be confirmed by such charter or law.' This statement was apparently adopted by this court in *East Norway Lake*

Norwegian Evangelical Lutheran Church Trustees v. Froislie, 37 Minn. 447, but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in *Taylor on Private Corporations* (page 145), is more nearly accurate: 'When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation can not be questioned collaterally.' To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a de facto corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson v. Corser*, 34 Minn. 355, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a de facto corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required. 'Color of apparent organization under some charter or enabling act,' does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance.

statute.² In many jurisdictions it is said that "where there can not lawfully be a corporation de jure, there can not be one de facto."³ Where such theory exists, and is applied logically, a de facto corporation can not be formed under an unconstitutional statute, even though the requirements of such statute are complied with literally.⁴ If a corporation which is formed under a valid law tries to reorganize under an unconstitutional statute, such reorganization is a nullity and the organization thus formed is not even a de facto corporation;⁵ but it must account for the property of the original corporation which was turned over to it in such reorganization.⁶ If there are general laws under which a corporation can be formed, it has been said that an attempt to revive a defunct

A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization; the failure as to some substantial requirement will prevent the body being a corporation de jure; but if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto." *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, 18 L. R. A. 778, 53 N. W. 1150.

²*Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778.

³*United States. Davis v. Stevens*, 104 Fed. 235.

California. People v. Toll Road Co., 100 Cal. 87, 34 Pac. 522.

Colorado. Jones v. Hardware Co., 21 Colo. 263, 52 Am. St. Rep. 220, 29 L. R. A. 143, 40 Pac. 457.

Georgia. McTighe v. Construction Co., 94 Ga. 306, 315, 47 Am. St. Rep. 153, 32 L. R. A. 208, 21 S. E. 701 [cited also as *Georgia R. R. Co. v. Mercantile, etc., Co.*].

Illinois. American, etc., Co. v. R. R., 157 Ill. 641, 42 N. E. 153; *Cozzens v. Brick Co.*, 166 Ill. 213, 46 N. E. 788; *People v. New York Central R. Co.*, 283 Ill. 334, 119 N. E. 299.

Indiana. Heaston v. Ry. Co., 16 Ind. 275, 79 Am. Dec. 430; *Snyder v. Stude-*

baker, 19 Ind. 462, 81 Am. Dec. 415; *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 72 Am. St. Rep. 326, 54 N. E. 407.

Kansas. Pape v. Bank, 20 Kan. 440, 27 Am. Rep. 183.

Michigan. Detroit, etc., Bund v. Verein, 44 Mich. 313, 38 Am. Rep. 270, 6 N. W. 675; *Eaton v. Walker*, 76 Mich. 579, 6 L. R. A. 102, 43 N. W. 638.

Minnesota. Johnson v. Okerstrom 70 Minn. 303 [sub nomine, *Johnson v. Schulin*, 73 N. W. 147].

Missouri. St. Louis, etc., Association v. Hennessy, 11 Mo. App. 556.

New Jersey. Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53.

Pennsylvania. Gibb's Estate, 157 Pa. St. 59, 22 L. R. A. 276, 27 Atl. 383.

Texas. McLeary v. Dawson, 87 Tex. 524, 29 S. W. 1044.

Wisconsin. Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342; *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N.S.) 653, 105 N. W. 1031.

⁴*Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N.S.) 653, 105 N. W. 1031.

⁵*Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N.S.) 653, 105 N. W. 1031.

⁶*Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N.S.) 653, 105 N. W. 1031.

special statute creating a private corporation may create a corporation *de facto*.⁷

In other jurisdictions it is said that a *de facto* corporation may exist even where a *de jure* corporation is impossible,⁸ as where the corporation is formed under an unconstitutional law, or where the purpose of the corporation is one which is not authorized by law.⁹ It has been said that a colorable compliance with the statutes which regulate the creation of corporations is sufficient.¹⁰ It is not necessary that the compliance with the statute should be substantial, for such compliance creates a *de jure* corporation.¹¹

§ 2013. Illustrations of specific defects in organization of corporation. How far the parties may fall short of a substantial compliance with the provisions of the statute under which they seek to form a corporation, and yet succeed in creating a *de facto* corporation, is a question upon some phases of which there is a great divergence of judicial authority due in part to a difference in phraseology of the different statutes, and in part to difference in judicial opinion as to the scope and effect of the statutes and as to the extent to which effect should be given to the intention of the parties, in spite of their failure to comply with the requirements of law.

If, through a mistake in the boundary lines of a state, a corporation is created by one state to do business in territory over which such state claims jurisdiction, such corporation does not become a corporation of the other state, when the true location of the boundary line is discovered.¹

If a corporation is formed under the laws of one state to transact business in another state in fraud of the laws of such other state, such organization is said not to be a corporation *de facto*.²

⁷ *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778.

⁸ *Goff v. Flesher*, 33 O. S. 107.

⁹ *Goff v. Flesher*, 33 O. S. 107.

¹⁰ *Central, etc., Association v. Insurance Co.*, 70 Ala. 120; *Bibb v. Hall*, 101 Ala. 79, 14 So. 98; *Jones v. Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 29 L. R. A. 143, 40 Pac. 457; *Johnson v. Okerstrom*, 70 Minn. 303 [sub nomine, *Johnson v. Schulin*, 73 N. W. 147; distinguishing, *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; and disapproving *Pott v. Schmucker*, 84 Md.

535, 57 Am. St. Rep. 415, 35 L. R. A. 392, 36 Atl. 592; *Bergeron v. Hobbs*, 96 Wis. 641, 65 Am. St. Rep. 85, 71 N. W. 1056].

¹¹ *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, 18 L. R. A. 778, 63 N. W. 1150.

¹ *Myers v. Manhattan Bank*, 20 Ohio 283.

² *Lynch v. Perryman*, 29 Okla. 615, 119 Pac. 229. (Those who deal with it as a corporation, may, however, be estopped to deny its existence as a corporation.) See § 2014.

If the statutes which regulate incorporation provide for the execution of articles of incorporation by natural persons, a corporation whose articles are signed by corporations,³ or by persons who act on behalf of the corporations,⁴ is not a de facto corporation.

Defects in the contents of the articles of incorporation, which are apparent upon the face of such articles, may affect the validity of a corporation. If the articles show that the corporation is formed under a general law to improve a navigable stream, which does not exist, it is said that such organization is not a de facto corporation.⁵ If the articles of incorporation of a railway company leave its termini indefinite, such defect may prevent it from being a corporation de jure,⁶ but it does not prevent it from being a corporation de facto.⁷ If the articles of incorporation do not fix the amount of capital stock, although the statute requires the insertion of such a provision, it is said that the organization may, nevertheless, be a de facto corporation.⁸ The fact that the name of a corporation which appears in its articles of incorporation, so closely resembles an existing corporation as to mislead the public, in defiance of the provisions of statute, does not prevent it from being a de facto corporation.⁹ If the purpose for which a corporation is formed as set forth in the articles of incorporation, is one which is permitted by law, the fact that it is formed for an unlawful purpose,¹⁰ as where it is formed for the purpose of creating a monopoly,¹¹ does not prevent it from being at least a de facto corporation.

Failure to comply with statutory requirements, as to the execution of the articles of incorporation, does not necessarily prevent the corporation from being a de facto corporation.¹² A defective acknowledgment does not prevent the organization from being at

³ *American Ball Bearing Co. v. Adams*, 222 Fed. 967; *State v. Rutland Ry., Light & Power Co.*, 85 Vt. 91, 81 Atl. 252.

⁴ *American Ball Bearing Co. v. Adams*, 222 Fed. 967.

⁵ *Raccoon River Navigation Co. v. Eagle*, 29 O. S. 238.

⁶ *Atlantic & Ohio R. R. v. Sullivan*, 5 O. S. 276.

⁷ *Callender v. Painesville & Hudson R. R.*, 11 O. S. 516.

⁸ *Healey v. Steele Center Creamery*

Association, 115 Minn. 451, 133 N. W. 69.

⁹ *Vallejo & Northern Ry. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

¹⁰ *International Harvester Co. v. Eaton Circuit Judge*, 163 Mich. 55, 127 N. W. 695.

¹¹ *International Harvester Co. v. Eaton Circuit Judge*, 163 Mich. 55, 127 N. W. 695.

¹² *Lucas v. Greenville Building & Saving Association*, 22 O. S. 339; *Hagerman v. Ohio Building & Savings Association*, 25 O. S. 186.

least a *de facto* corporation.¹³ If the statute requires the articles of incorporation to be acknowledged before a justice of the peace, the fact that such articles are acknowledged before some other officer, who has general power to take acknowledgments, does not prevent the organization from being a corporation *de facto*.¹⁴

Under most statutes, failure to file articles of incorporation in the place which is provided by statute, or in all the places provided by statute, does not prevent the organization from amounting to a *de facto* corporation.¹⁵ Failure to file articles of incorporation with the secretary of state;¹⁶ or to file duplicates of the articles of incorporation with a clerk of the court,¹⁷ or with the county clerk;¹⁸ or failure to record such articles in the office of the chancery clerk;¹⁹ or failure to execute articles of incorporation in triplicate and to keep one copy in the office of the corporation,²⁰ does not prevent the organization from amounting to a *de facto* corporation. On the other hand, it is held that if the statute provides that the charter should be filed within a certain time after it is issued, failure to file such charter causes the existence of the corporation to cease.²¹ If the statutes provide expressly that a charter of a corporation shall be null and void, and the members thereof shall be partners in case a report of organization is not filed within a certain time, an organization which fails to comply with such requirements is not a *de facto* corporation.²² Such statutory provision may, however, be dispensed with by a subsequent statute,²³ even if

¹³ *Franke v. Mann*, 106 Wis. 118, 48 L. R. A. 856, 81 N. W. 1014.

¹⁴ *Lucas v. Greenville Building & Saving Association*, 22 O. S. 339; *Hagerman v. Ohio Building & Savings Association*, 25 O. S. 186.

¹⁵ *Arkansas. Wesco Supply Co. v. Smith*, — Ark. —, 203 S. W. 6.

Illinois. The Joliet v. Frances, 85 Ill. App. 243; *Edwards v. Dryer Co.*, 83 Ill. App. 643.

Mississippi. Diamond Rubber Co. v. Fohey, 111 Miss. 654, 71 So. 906.

Oklahoma. Swofford Brothers Dry Goods Co. v. Owen, 37 Okla. 616, L. R. A. 1916C, 189, 133 Pac. 193.

Washington. Kwapil v. Bell Tower Co., 55 Wash. 583, 104 Pac. 824.

Contra, Harrill v. Davis, 168 Fed. 187, 22 L. R. A. (N.S.) 1153.

¹⁶ *Wesco Supply Co. v. Smith*, — Ark. —, 203 S. W. 6.

¹⁷ *Swofford Brothers Dry Goods Co. v. Owen*, 37 Okla. 616, L. R. A. 1916C, 189, 133 Pac. 193.

¹⁸ *Newcomb-Endicott Co. v. Fee*, 167 Mich. 574, 133 N. W. 540.

¹⁹ *Diamond Rubber Co. v. Fohey*, 111 Miss. 654, 71 So. 906.

²⁰ *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824.

²¹ *Africani Home Purchase & Loan Association v. Carroll*, 267 Ill. 380, 108 N. E. 322 [citing, *People v. Mackey*, 255 Ill. 144, 99 N. E. 370 (which was a proceeding in quo warranto)].

²² *Ragland v. Doolittle*, 100 Miss. 498, 56 So. 445.

²³ *Southern Coal Co. v. Yazoo Ice & Coal Co.*, 118 Miss. 860, 80 So. 334.

such statute is passed after the corporation has permitted the requisite time to elapse without filing such report.²⁴ As to transactions which are entered into before there is any attempt to form a corporation, an association of persons is not even a de facto corporation,²⁵ especially if they have not perfected their corporate organization by filing the articles of incorporation with the clerk of the court as required by statute.²⁶ Recording the original articles of incorporation instead of a verified copy thereof, does not prevent the organization from amounting to a de facto corporation.²⁷

If the requisite amount of capital stock has been subscribed but has not been paid in, in compliance with statute, the organization is at least a de facto corporation.²⁸ If the statute, which provides for the creation of a corporation, is so drawn that it is possible for a corporation to come into existence before its capital stock is all subscribed, or before the amount which, by statute, must be subscribed before the corporation engages in business has been subscribed, a corporation which engages in business before such amount has been subscribed is at least a de facto corporation.²⁹ If some of the stockholders with the consent of all, advance money toward the corporate enterprise, and the creditors of such organization are paid, the members who advanced money may be reimbursed out of the general treasury.³⁰ If stock has actually been taken in a corporation, irregularities in taking it and the omission to subscribe for it formally, do not prevent it from being at least a de facto corporation.³¹

²⁴ *Southern Coal Co. v. Yazoo Ice & Coal Co.*, 118 Miss. 860, 80 So. 334.

²⁵ *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N.S.) 1153. See §§ 2011 and 2012.

²⁶ *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N.S.) 1153.

²⁷ *Slocum v. Head*, 105 Wis. 431, 81 N. W. 673.

²⁸ *In re Jackson Brick and Tile Co.*, 189 Fed. 636; *Jones v. Dodge*, 97 Ark. 248, 133 S. W. 828.

²⁹ *Trumbull County Mutual Fire Ins. Co. v. Horner*, 17 Ohio 407; *Second National Bank v. Hall*, 35 O. S. 158; *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N.S.) 453, 105 Pac. 630.

²⁸ *Peyton v. Minong Lbr. & Lath Co.*, 149 Wis. 66, 135 N. W. 518.

³¹ *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

"The evidence shows, and it is undisputed, that the defendant corporation, at the time of the execution of the several notes and mortgages in controversy, was, and had been for a long time prior thereto, acting as a corporation in pursuance of articles regularly filed. It had a board of directors and other corporate officers, and was exercising the functions of a corporation. The legality of its organization can not, therefore, be inquired into in this action. It was at least a

If no stock has been subscribed or taken in the corporation, it is ordinarily held that the organization is not a corporation *de facto*,³² since a corporation for profit can not exist without members.

Under a statute which provides that no corporation shall do business until it has filed certificates showing that a certain amount of its capital stock has been subscribed and paid, and that if it does business without complying with such requirements its members shall be liable as partners, the contractual obligations of those who enter into such contracts are continued in spite of subsequent incorporation, as though they had never intended to do business under their charter.³³ Failure to comply with such statute leaves the members liable personally upon their contracts,³⁴ even though credit is given to the organization as a corporation.³⁵

If a statute requires the consent of some specific executive officer of the state, as a condition precedent to the corporation's engaging in business, members of the corporation can not take advantage of the failure to obtain such consent;³⁶ and it has been said that the same principle applies to third persons who deal with such organization.³⁷ In some cases the liability of the officers and stockholders of the corporation, who engage in such transactions, is explained on the theory that a corporation exists but that it has no power to engage in such transactions and that such officers and

de facto corporation, and the rightfulness of its existence can be questioned by the state only." *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

³² *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172; *Central National Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340; *Central National Bank v. Sheldon*, 96 Kan. 492, 152 Pac. 765.

³³ *Winfield v. Truitt*, 71 Fla. 38, 70 So. 775.

³⁴ *Winfield v. Truitt*, 71 Fla. 38, 70 So. 775; *Heinberg Bros. v. Thompson*, 47 Fla. 163, 37 So. 71.

"The statute forbids a corporation to transact any business until the conditions named therein are complied with, and although the failure to comply with the conditions, which are precedent to the corporation's lawful right to transact any business, does

not destroy the corporate existence, the liability of the incorporators and stockholders is that of a general partnership for all the corporation's debts.

"The statute is neither remedial nor penal, but simply continues the contractual obligations of persons who, acting through their agents, the officers of a corporation not yet authorized to transact business, were liable on their contracts as if they had not intended to do business under the charter. See *Flash, Lewis & Co. v. Conn*, 16 Fla. 423, 26 Am. Rep. 721." *Winfield v. Truitt*, 71 Fla. 38, 70 So. 775.

³⁵ *Heinberg Bros. v. Thompson*, 47 Fla. 163, 37 So. 71.

³⁶ *Voorhees v. Bank*, 19 Ohio 463.

³⁷ *Receivers v. Renick*, 15 Ohio 322; see, however, *obiter* in *Voorhees v. Bank*, 19 Ohio 463,

members are liable personally as engaging in ultra vires transactions.³⁹

A corporation whose charter limits a certain length of time for its existence, is not a de facto corporation after the time thus limited has elapsed, but has no legal existence of any kind.⁴⁰ If the corporate existence is continued by statute for certain purposes, it is a valid corporation for those purposes, after the limitation of its existence has expired.⁴¹

§ 2014. Estoppel to deny corporate existence—Estoppel of persons dealing with corporation. Persons who deal with a corporation, or with an organization purporting to be a corporation, as if it were a corporation, are said to be estopped to deny that it is a corporation.¹

³⁹ *Hood v. New York & New Haven Ry.*, 22 Conn. 502; *Lawler v. Walker*, 18 Ohio 151; *Kearny v. Buttles*, 1 O. S. 362; *Medill v. Collier*, 16 O. S. 599.

⁴⁰ *Wilson v. Tessen*, 12 Ind. 235; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 565; *Bradley v. Reppell*, 133 Mo. 545, 64 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841; *Sturges v. Vanderbilt*, 73 N. Y. 384.

⁴¹ *Miller v. Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, 8 S. E. 600.

¹ *United States. Close v. Cemetery*, 107 U. S. 466, 27 L. ed. 408; *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996; *North-west Auto Co. v. Harmon*, 250 Fed. 832.

Alabama. *Cahall v. Building Association*, 61 Ala. 232; *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 6 So. 360; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907, 31 So. 81.

Arkansas. *Jones v. Dodge*, 97 Ark. 248, 133 S. W. 828; *Wesco Supply Co. v. Smith*, — Ark. —, 203 S. W. 6.

California. *Fresno Canal & Irrigation Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Raphael Weill, etc., Co. v. Crittenden*, 139 Cal. 488, 73 Pac. 238.

Colorado. *Jones v. Hardware Co.*, 21

Colo. 263, 52 Am. St. Rep. 220, 40 Pac. 457.

Idaho. *Henry Gold Mining Co. v. Henry*, 25 Ida. 333, 137 Pac. 523.

Illinois. *Winget v. Association*, 128 Ill. 67, 21 N. E. 12.

Indiana. *Hasselman v. Mtge. Co.*, 97 Ind. 365; *Cravens v. Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778.

Kansas. *Lowell-Woodward Hardware Co. v. Woods*, — Kan. —, 180 Pac. 734.

Louisiana. *Tulane Improvement Co. v. Chapman*, 129 La. 562, 66 So. 509.

Massachusetts. *Butchers, etc., Bank v. McDonald*, 130 Mass. 264.

Michigan. *Stafflet v. Strome*, 101 Mich. 197, 59 N. W. 411.

Nebraska. *Crete, etc., Association v. Patz*, 1 Neb. Rep. (unoff.) 768, 95 N. W. 793 [following, *Livingston, etc., Association v. Drummond*, 49 Neb. 200, 68 N. W. 375]; *Otoe, etc., Association v. Doman*, 1 Neb. Rep. (unoff.) 179, 95 N. W. 327; *Nebraska National Bank v. Ferguson*, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370.

New Hampshire. *Larned v. Beal*, 65 N. H. 184, 23 Atl. 149.

One who has subscribed to stock in a corporation is estopped to set up irregularities in its organization prior to his subscription as a defense to an action against him, to recover such subscription in the absence of fraud or misrepresentation.²

If, however, the avowed purpose for which the corporation is formed is legally impossible,³ as where the corporation is formed for improving an alleged navigable stream which does not exist,⁴ the subscriber may set up such defect, since if he were compelled to pay his subscription it would be the duty of the promoters of the corporation to pay it back to him again. Stockholders are said to be estopped to deny the existence of the corporation.⁵ A member of an organization who has borrowed money from it, is estopped from denying its corporate existence, both on the ground of such membership and on the ground of such dealing with it.⁶ In like manner, those who assume to be members of a mutual corporation and carry on business as a corporation for a long period of time, are estopped, as among themselves, to deny corporate existence.⁷

One who has engaged in business with a de facto corporation, and who has dealt with it as a corporation,⁸ such as one who has acted as its agent,⁹ or one who has granted a lease to it,¹⁰ or who

Ohio. *Receivers v. Renick*, 15 Ohio 322; *Voorhees v. Receivers*, 19 Ohio 463; *Hagerman v. Ohio Building & Savings Association*, 25 O. S. 186; *Peckham Iron Co. v. Harper*, 41 O. S. 100.

Oklahoma. *Swofford Brothers Dry Goods Co. v. Owen*, 37 Okla. 616, L. R. A. 1916C, 189, 133 Pac. 193; *Watton v. Cruce*, 44 Okla. 186, 143 Pac. 1152 (under statute providing that "due incorporation * * * shall not be inquired into collaterally").

Oregon. *Washington, etc., Association v. Stanley*, 38 Or. 319, 58 L. R. A. 816, 63 Pac. 489.

Pennsylvania. *Hamilton v. R. R.*, 144 Pa. St. 34, 23 Atl. 53 [sub nomine, *Hamilton v. Jackson*, 13 L. R. A. 779]; *Hooven Mercantile Co. v. Mining Co.*, 193 Pa. St. 28, 44 Atl. 277.

Washington. *Carroll v. Pacific National Bank*, 19 Wash. 639, 54 Pac. 32; *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N.S.) 453, 105 Pac. 630.

² *Mullen v. Driving Park*, 64 Ind. 202; *Voorhees v. Receivers*, 19 Ohio 463.

³ *Raccoon River Navigation Co. v. Eagle*, 29 O. S. 238.

⁴ *Raccoon River Navigation Co. v. Eagle*, 29 O. S. 238.

⁵ *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901; *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711; *Voorhees v. Receivers*, 19 Ohio 463; *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

⁶ *Hagerman v. Ohio Building & Savings Association*, 25 O. S. 186.

⁷ *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901.

⁸ *Wesco Supply Co. v. Smith*, — Ark. —, 203 S. W. 6; *Tulane Improvement Co. v. Chapman*, 129 La. 562, 56 So. 509; *Peckham Iron Co. v. Harper*, 41 O. S. 100.

⁹ *Peckham Iron Co. v. Harper*, 41 O. S. 100.

¹⁰ *Tulane Improvement Co. v. Chapman*, 129 La. 562, 56 So. 509.

has made a note payable to it," is estopped to deny its existence as a corporation, whether for the purpose of evading liability on the one hand, or for the purpose of holding its members as partners on the other. One who has dealt with a corporation in its corporate capacity, is estopped from claiming that the contract is a personal contract in which the personality of the president of such corporation is material, and that the contract is therefore not assignable.¹² One to whom an insurance policy has been issued by a de facto corporation, is estopped from holding the members liable individually.¹³ One who has borrowed money from a de facto corporation can not set up irregularities in its formation as a defense to an action by the corporation to recover such loan.¹⁴ A judgment creditor of an irregular corporation is estopped to deny corporate liability.¹⁵ If one who has sold goods to the corporation has brought an action against it as a corporation, and obtained a judgment against it, the application of the doctrine of estoppel to prevent him from bringing an action against the members as partners, is clear.¹⁶ Persons who contract with a corporation after the time limited for its existence has expired, are estopped to deny that it is a corporation.¹⁷

In some cases, one who has dealt with an organization which purports to be a corporation, can not avoid the transaction, although the organization is not a de facto corporation, and although no elements of true estoppel exist.¹⁸ One who has become a member of a life insurance company and has paid an assessment in consideration of insurance, can not recover such payment even if the organization is not even a de facto corporation, since the promise of the members to insure such other member is a consideration for such payment.¹⁹

The doctrine of estoppel is properly distinguished from the doctrine of corporations de facto. The former applies only to those dealing with the corporation; the latter to the world at large. In

¹¹ *Lowell-Woodward Hardware Co. v. Woods*, — Kan. —, 180 Pac. 734.

¹² *Northwest Auto Co. v. Harmon*, 250 Fed. 832.

¹³ *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778.

¹⁴ *Lucas v. Greenville Building & Saving Association*, 22 O. S. 339.

¹⁵ *Shoun v. Armstrong* (Tenn. Ch. App.), 59 S. W. 790.

¹⁶ *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N.S.) 453, 105 Pac. 630.

¹⁷ *Citizens' Bank v. Jones*, 117 Wis. 446, 94 N. W. 329.

¹⁸ *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901.

¹⁹ *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901.

contracts of de facto corporations the two doctrines frequently exist together. The doctrine of estoppel may, however, apply to organizations which are not even de facto corporations.²⁰

The doctrine of estoppel may operate so as to prevent a party who has dealt with an organization from alleging that it is a valid corporation.²¹ If A and B have undertaken to form a corporation, and have attempted to do so, and A, on being advised that such corporation is defective, forms a new corporation, B takes stock in the new corporation and acquiesces in the transaction, B is estopped from claiming that the first corporation was valid.²²

§ 2015. Estoppel of corporation to deny its own existence. The irregular organization which has entered into a contract as a corporation, is estopped to deny its corporate existence.¹ In cases of this sort, in which the adversary party is actually misled by the assumption of corporate capacity, the use of the term "estoppel" is more exact than in cases in which estoppel is invoked against the party other than the corporation, who is frequently misled, and in favor of the corporation, which has frequently misled him.²

If parties deal with an organization, knowing that it is not incorporated, the doctrine of estoppel does not apply,³ and the organization may deny its corporation existence.⁴

§ 2016. Contracts of de facto corporation—Organization treated as corporation. A de facto corporation is as liable on its contracts as a corporation de jure. It can not deny its own corporate exist-

²⁰ *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778; *Lynch v. Perryman*, 29 Okla. 615, 119 Pac. 229.

²¹ *Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439.

²² *Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439.

¹ *United States. In re Halsey W. Kelley & Co.*, 215 Fed. 165.

Illinois. Crystal, etc., Co. v. Roseboom, 91 Ill. App. 551.

Michigan. Ten Eyck v. Pontiac, Oxford & Port Austin R. R. Co., 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378, 41 N. W. 905.

New York. Castle v. Lewis, 78 N. Y. 131.

Georgia. Georgia, Southern & Flor-

ida Ry. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 47 Am. St. Rep. 153, 32 L. R. A. 208, 21 S. E. 701.

Pennsylvania. Hamilton v. Clarion, etc., R. Co., 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

Contra, Boyce v. Methodist Episcopal Church, 46 Md. 359; *Carroll v. Bank*, 19 Wash. 639, 54 Pac. 32; *Williams v. Lumber Co.*, 72 Wis. 487, 40 N. W. 154.

² See § 2014.

³ *Simpson v. Grand International Brotherhood*, — W. Va. —, 98 S. E. 580.

⁴ *Simpson v. Grand International Brotherhood*, — W. Va. —, 98 S. E. 580.

ence in order to evade liability.¹ Its mortgage of its property is valid.²

On the other hand, those who have dealt with such an organization on the theory that it is a corporation, can not deny its corporate existence in an action based upon such dealings, and treat such corporation as a partnership, so as to hold the members liable personally;³ nor can they plead lack of incorporation as a defense

¹ *Lamkin v. Mfg. Co.*, 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042; *Cravens v. Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Larned v. Beal*, 65 N. H. 184, 23 Atl. 149; *Callender v. Painsville & Hudson R. R.*, 11 O. S. 516.

² *McTighe v. Construction Co.*, 94 Ga. 306, 47 Am. St. Rep. 153, 32 L. R. A. 208, 21 S. E. 701 [also cited as *Georgia, etc., R. R. v. Mercantile, etc., Co.*].

³ *United States. Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Gartside Coal Co. v. Maxwell*, 22 Fed. 197.

Alabama. *Louis Snider's Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, 11 L. R. A. 515, 8 So. 656; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907, 31 So. 81.

Arkansas. *Wesco Supply Co. v. Smith*, — Ark. —, 203 S. W. 6.

Colorado. *Humphreys v. Mooney*, 5 Colo. 282.

Connecticut. *Stafford National Bank v. Palmer*, 47 Conn. 443.

Georgia. *Planters & M. Bank v. Padgett*, 69 Ga. 159.

Idaho. *Henry Gold Mining Co. v. Henry*, 25 Ida. 333, 137 Pac. 523.

Illinois. *Arnold v. Conklin*, 96 Ill. App. 373.

Massachusetts. *Fay v. Noble*, 61 Mass. (7 Cush.) 188; *Salem First National Bank v. Almy*, 117 Mass. 476; *Ward v. Brigham*, 127 Mass. 24.

Michigan. *Merchants', etc., Bank v. Stone*, 38 Mich. 779; *Newcomb-Endi-*

cott Co. v. Fee, 167 Mich. 574, 133 N. W. 540.

Minnesota. *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 522, 18 L. R. A. 778, 53 N. W. 1150.

Mississippi. *Diamond Rubber Co. v. Fohey*, 111 Miss. 634, 71 So. 906.

New Jersey. *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362.

New York. *Central City Savings Bank v. Walker*, 66 N. Y. 424; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643.

North Carolina. *Gainesville & Alachua County Hospital Association v. Atlantic Coast Line Ry.*, 157 N. Car. 460, 73 N. E. 242; *Wood v. Staton*, 174 N. Car. 245 [sub nomine, *Pocahontas Fuel Co. v. Tarboro Cotton Factory*, 93 S. E. 794].

Ohio. *Trumbull County Mutual Fire Ins. Co. v. Horner*, 17 Ohio 407; *Second National Bank v. Hall*, 35 O. S. 158; *Rowland v. Furniture Co.*, 38 O. S. 269.

Oklahoma. *Swofford Brothers Dry Goods Co. v. Owen*, 37 Okla. 616, L. R. A. 1916C, 189, 133 Pac. 193; *Watton v. Cruce*, 44 Okla. 186, 143 Pac. 1152.

Oregon. *Rutherford v. Hill*, 22 Or. 218, 29 Am. St. Rep. 596, 17 L. R. A. 549, 29 Pac. 546; *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

Washington. *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824; *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N.S.) 453, 105 Pac. 630.

"It is not every irregularity in the proceedings that will render the in-

to an action brought by the corporation in its corporate capacity.⁴ A creditor of a de facto corporation,⁵ such as one who has sold goods to it,⁶ or one who has lent money to it,⁷ can not hold the members personally liable as partners. If the incorporators have not acquiesced in doing business as a corporation before the incorporation is completed, they are not liable for the unauthorized acts of one of their number.⁸ Creditors of a debtor can not attack the corporate existence of another creditor for the purpose of defeating his claim.⁹ A railway corporation which has agreed to pay a hospital bill, can not deny the corporate existence of the hospital in an action brought by it upon such contract.¹⁰ A member of a mutual insurance company, who has acquiesced in its doing business as a corporation, can not attack its corporate existence in an action by it to recover an assessment upon a deposit note given by such member.¹¹ One who has bought goods from a corporation

corporation ineffectual or cast upon the individuals the burden of liability for debts incurred in the name of the company. Where the incorporators have acted in entire good faith, supposing that they are legally incorporated, and there has been a substantial compliance with the provisions of the law respecting the formation of such corporation, and especially where business has been carried on in the name of the corporation for a considerable time, the individuals can not be held liable." *Central National Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340.

On the question of the personal liability of the members of a de facto corporation, see *Partnership Liability of Stockholders in De Facto Corporations*, by Francis E. Baldwin, 8 Illinois Law Review, 246; *The Bona Fide Incorporators' Case*, by Charles Sweet, 7 Juridical Review, 314; *Liability to Third Persons of Associates in Defectively Incorporated Associations*, by Joseph L. Lewisohn, 13 Michigan Law Review, 271, and *The Liability of the Associates in a Defective Corporation*, by Thos. H. Breeze, 16 Yale Law Journal, 1.

⁴ *United States. In re Jackson Brick and Tile Co.*, 189 Fed. 636.

Arkansas. Jones v. Dodge, 97 Ark. 248, 133 S. W. 828.

Michigan. International Harvester Co. v. Eaton Circuit Judge, 163 Mich. 55, 127 N. W. 695.

Ohio. Receivers v. Renick, 15 Ohio 322; *Lucas v. Greenville Building & Saving Association*, 22 O. S. 339.

Washington. American Radiator Co. v. Kinnear, 56 Wash. 210, 35 L. R. A. (N.S.) 453, 105 Pac. 630.

⁵ *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 12 L. R. A. (N.S.) 825, 90 Pac. 151.

See also, *Rainwater v. Childress*, 121 Ark. 541, 182 S. W. 280.

⁶ *Newcomb-Endicott Co. v. Fee*, 167 Mich. 574, 133 N. W. 540.

⁷ *Second National Bank v. Hall*, 35 O. S. 158.

⁸ *Rainwater v. Childress*, 121 Ark. 541, 182 S. W. 280; *Breitsake v. Tucker*, 129 Ark. 401, 196 S. W. 462.

⁹ *In re Jackson Brick and Tile Co.*, 189 Fed. 636.

¹⁰ *Gainesville & Alachua County Hospital Association v. Atlantic Coast Line Ry.*, 157 N. Car. 460, 73 S. E. 242.

¹¹ *Trumbull County Mutual Fire Ins. Co. v. Horner*, 17 Ohio 407.

can not attack its corporate existence on the ground that it was formed to operate as a monopoly.¹² A member of an irregular corporation who has unlawfully withdrawn its funds can not attack its corporate existence in an action brought by it to recover the amount thus withdrawn, nor can he insist that a suit in equity must first be had on the theory that the organization is a partnership.¹³ If a conveyance has been made to a corporation, and such corporation has conveyed such property thereafter, irregularities in the laws of such corporation do not amount to a defect in the title of such land.¹⁴ A wrongdoer who has injured property which belongs to an irregular corporation, can not set up defects in the organization of such corporation as a defense to an action by such corporation against such wrongdoer for damages.¹⁵ The right of the purchaser of stock to a certificate therefor, depends upon the provisions of the statute under which the de facto corporation was organized.¹⁶

This rule rests in part upon the theory of the nature of the de facto corporation, and in part upon the rule that persons who deal with an organization as if it were a corporation, are estopped to deny its corporate existence.¹⁷

Since one who enters into a contract under a mistake as to the identity of the adversary party, may avoid the contract for such mistake,¹⁸ and since he may avoid a contract for fraud as to the identity of the adversary party,¹⁹ one who has entered into a contract with an organization which he supposes to be a corporation, may avoid the contract on learning that no corporation exists.²⁰ If A enters into a contract with B, who is in business under a corporate name, and A believes that he is dealing with a corporation, A may refuse to perform on learning that B is not incorporated.²¹

§ 2017. Organization treated as group of natural persons.
There is a lack of harmony in the judicial utterances upon this

¹² *International Harvester Co. v. Eaton Circuit Judge*, 163 Mich. 55, 127 N. W. 695.

¹³ *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824.

¹⁴ *Claremont College v. Riddle*, 165 N. Car. 211, 81 S. E. 283; *Daniels v. Roanoke R. R. & Lumber Co.*, 158 N. Car. 418, 74 S. E. 331; *Society Perun v. Cleveland*, 43 O. S. 481.

¹⁵ *Receivers v. Renick*, 15 Ohio 322.

¹⁶ *Healey v. Steele Center Creamery Association*, 115 Minn. 451, 133 N. W. 69.

¹⁷ See § 2014.

¹⁸ See § 260.

¹⁹ See § 225.

²⁰ *Fifer v. Clearfield and Cambria Coal and Coke Co.*, 103 Md. 1, 62 Atl. 1122.

²¹ *Fifer v. Coal Co.*, 103 Md. 1, 62 Atl. 1122.

question however. In many cases a defective corporation, which has contracted as a corporation, has been treated as a partnership when it comes to enforcing liability against the members of such organization, who have taken part in transacting its business, or who have acquiesced therein.¹ The divergence in result often turns on a different wording of the incorporation statutes. There is, further, a real difference in opinion as to what constitutes a de facto corporation. Further, in many of these cases there was no attempt to comply with the incorporation statutes.² Thus if the articles of incorporation are filed for record, but no stock is subscribed, nor is any attempt made to organize, the organization is a partnership, where the statute requires such subscription as essential to corporate existence.³ If the organization is not so far per-

¹ **United States.** *Wechselberg v. Bank*, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470.

Arkansas. *Garnett v. Richardson*, 35 Ark. 144; *Railwater v. Childress*, 121 Ark. 541, 182 S. W. 280.

Colorado. *Jones v. Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 29 L. R. A. 143, 40 Pac. 457.

Florida. *Winfield v. Truitt*, 71 Fla. 38, 70 So. 775.

Illinois. *Bigelow v. Gregory*, 73 Ill. 197.

Indiana. *Coleman v. Coleman*, 78 Ind. 344.

Iowa. *Kaiser v. Lawrence Sav. Bank*, 56 Ia. 104, 41 Am. Rep. 85, 8 N. W. 772; *Lyons v. Van Oel*, — Ia. —, 165 N. W. 376 (obiter).

Kansas. *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172; *Central National Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340; *Central National Bank v. Sheldon*, 96 Kan. 492, 152 Pac. 765; *Hall Lithographing Co. v. Crist*, 98 Kan. 723, 160 Pac. 198.

Michigan. *Whipple v. Parker*, 29 Mich. 369.

Minnesota. *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799.

Mississippi. *Ragland v. Doolittle*, 100 Miss. 498, 56 So. 445.

Missouri. *Richardson v. Pitts*, 71 Mo. 128; *Smith v. Warden*, 86 Mo. 382; *Ferris v. Thaw*, 72 Mo. 446.

Nebraska. *Abbott v. Refining Co.*, 4 Neb. 416.

New Jersey. *Hill v. Beach*, 12 N. J. Eq. 31.

New York. *Jessup v. Carnegie*, 12 Jones & S. (N. Y.) 260; *Fuller v. Rowe*, 57 N. Y. 23.

Ohio. *Medill v. Collier*, 16 O. S. 599; *Ridenour v. Mayo*, 40 O. S. 9.

Oklahoma. *Lynch v. Perryman*, 29 Okla. 615, 119 Pac. 229 (obiter, as the doctrine of a corporation by estoppel applied).

² *Leibold v. Green*, 69 Ill. App. 527; *Sebastian v. Academy Co. (Ky.)* 56 S. W. 810; *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172; *Central National Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340; *Central National Bank v. Sheldon*, 96 Kan. 492, 152 Pac. 765; *Hall Lithographing Co. v. Crist*, 98 Kan. 723, 160 Pac. 198.

³ **United States.** *Wechselberg v. Bank*, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470.

Arkansas. *Railwater v. Childress*, 121 Ark. 541, 182 S. W. 280.

Colorado. *Jones v. Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220, 29 L. R. A. 143, 40 Pac. 457.

fectured as to amount to a de facto corporation, the principle which governs the liability of promoters applies,⁴ and the persons who engaged in such enterprise will be liable personally, even though intending ultimately to form a corporation which should take over their personal liabilities.⁵ Since promoters who have incurred obligations before a corporation has been formed, are liable personally in the absence of express contractual provisions to the contrary,⁶ and the fact that such corporation is formed ultimately, does not relieve them from liability.⁷

A change in the corporate name without complying with the statute makes the new organization a partnership,⁸ and an unincorporated bank owned by one person is not a de facto corporation.⁹ So a joint stock partnership organized as a corporation is not a corporation de facto.¹⁰ "Tramp" corporations, or corporations formed in one state for the purpose of doing business in another, are held liable as partnerships in some jurisdictions.¹¹ If the members of an irregular corporation or a de facto corporation hold themselves out to the world as partners, they are held liable as such.¹²

Under some statutes it is provided specifically that members shall be liable as partners if the corporate organization is not completed.¹³ If the organization to which credit is extended is neither a corporation de facto nor de jure, the members thereof are said to

Kansas. *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172; *Central National Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340; *Central National Bank v. Sheldon*, 96 Kan. 492, 152 Pac. 765; *Hall Lithographing Co. v. Crist*, 98 Kan. 723, 160 Pac. 198.

Wisconsin. *Bergeron v. Hobbs*, 96 Wis. 641, 65 Am. St. Rep. 85, 71 N. W. 1056.

⁴ See §§ 1828 et seq.

⁵ *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172; *Central National Bank v. Sheldon*, 96 Kan. 492, 152 Pac. 765; *Hall Lithographing Co. v. Crist*, 98 Kan. 723, 160 Pac. 198.

⁶ See § 1834.

⁷ *Harrill v. Davis*, 168 Fed. 187, 94 C. A. 47, 22 L. R. A. (N.S.) 1153. See § 1834.

⁸ *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538.

⁹ *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255 [affirmed on rehearing, 59 Neb. 455, 81 N. W. 307] (though it has officers like a corporation).

¹⁰ *Allen v. Long*, 80 Tex. 261, 26 Am. St. Rep. 735, 16 S. W. 43.

¹¹ *Taylor v. Branham*, 35 Fla. 297, 48 Am. St. Rep. 249, 39 L. R. A. 362, 17 So. 552; *Hill v. Beach*, 12 N. J. Eq. 31.

¹² *Simmons v. Ingram*, 78 Mo. App. 603; *Slocum v. Head*, 105 Wis. 431, 50 L. R. A. 324, 81 N. W. 673.

¹³ *Winfield v. Truitt*, 71 Fla. 38, 70 So. 775; *Ragland v. Doolittle*, 100 Miss. 498, 56 So. 445.

be liable as partners.¹⁴ Members of an organization who do not take part in its transaction of business, and who do not acquiesce therein, can not be held liable as partners.¹⁵ Members who acquiesce in certain transactions, but protest against others, are not liable as partners upon the transactions upon which they protest.¹⁶

Since the relation of partnership is a contract relation as between the members, and since no estoppel can arise as between them if they know all the facts, members of a defective organization can not be treated as partners as between themselves,¹⁷ and one of such members may enjoin the others from acting in such corporation.¹⁸ If a foreign corporation attempts to do business in the state in which it has no legal authority to do business, those who represent the corporation,¹⁹ or its stockholders,²⁰ may be held liable personally upon its contracts.

If the organization is not regarded as even a *de facto* corporation, it may be denied the right of enforcing its obligations,²¹ at least if it brings an action as a corporation.²² If a loan association which has failed to file its charter within two years from the time at which such charter issued, as was required by statute, takes an assignment of a land contract, it is held that such association has ceased to be a corporation, that it can not take such assignment, and that it can not have specific performance of such contract.²³

§ 2018. Effect of special contract as to nature of liability. One who has contracted for the personal liability of the person with whom he deals, may enforce such personal liability, although such person is really the representative of a corporation.¹ If a promoter

¹⁴ *Pocahontas Fuel Co. v. Tarboro Cotton Factory*, 174 N. Car. 245, 93 S. E. 790.

¹⁵ *Rainwater v. Childress*, 121 Ark. 541, 182 S. W. 280; *Medill v. Collier*, 16 O. S. 599.

¹⁶ *Rainwater v. Childress*, 121 Ark. 541, 182 S. W. 280.

¹⁷ *Lyons v. Van Oel*, — Ia. —, 165 N. W. 376.

¹⁸ *Lyons v. Van Oel*, — Ia. —, 165 N. W. 376.

¹⁹ *Booth v. Scott*, — Mo. —, 205 S. W. 633.

²⁰ *Cunyngham v. Shelby*, 136 Tenn. 176, L. R. A. 1917B, 572, 188 S. W. 1147.

²¹ *Africani Loan Association v. Car-*

roll, 267 Ill. 380, 108 N. E. 322 [citing, *People v. Mackey*, 255 Ill. 144, 99 N. E. 370 (which was a proceeding in quo warranto)].

²² *Africani Loan Association v. Carroll*, 267 Ill. 380, 108 N. E. 322 [citing *People v. Mackey*, 255 Ill. 144, 99 N. E. 370 (which was a proceeding in quo warranto)].

²³ *Africani Loan Association v. Carroll*, 267 Ill. 380, 108 N. E. 322 [citing, *People v. Mackey*, 255 Ill. 144, 99 N. E. 370 (which was a proceeding in quo warranto)].

¹ *Haines v. Starkey*, 82 Minn. 230, 84 N. W. 910; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163.

buys goods on his personal credit, and does not disclose the fact that he is acting for a corporation, he is personally liable therefor.² A had dealt with a firm of which B was agent. Such firm incorporated without A's knowledge. B continued to act as agent for such corporation and did not disclose the fact of the incorporation to A. It was held that A could hold the former members of the firm, who were now members of the corporation, as partners.³ One who contracts for the liability of a corporation may enforce such contract,⁴ and conversely he is bound thereby.⁵ Whether an organization is a de facto corporation or not, its promoters who have advanced money may compel the remaining members to reimburse them in compliance with the terms of the original agreement.⁶

§ 2019. De facto public corporations. Contracts of a de facto public corporation are as valid as those of a corporation de jure,¹ though the corporation is dissolved by a decree of court as including more territory than it should.² So where a municipal corporation, organized under special act, tried to reorganize under general law, and issued bonds, and the new officers were removed, the bonds were valid.³ This rule applies only to de facto corporations, however, and not to aggregations of individuals who may assume to act as a public corporation. Accordingly, bonds issued by an unincorporated body, claiming to act as a town or city, are invalid.⁴

² Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356, 36 S. W. 163.

³ Haines v. Starkey, 82 Minn. 230, 84 N. W. 910.

⁴ Chicago Bldg. & Mfg. Co. v. Talbotbottom Creamery & Mfg. Co., 106 Ga. 84, 31 S. E. 809.

⁵ Peyton v. Minong Lbr. & Lath Co., 149 Wis. 66, 135 N. W. 518.

⁶ Peyton v. Minong Lbr. & Lath Co., 149 Wis. 66, 135 N. W. 518.

¹ Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310; Miller v. Irrigation District, 99 Fed. 143; Arapahoe v. Albee, 24 Neb. 242, 8 Am. St. Rep. 202,

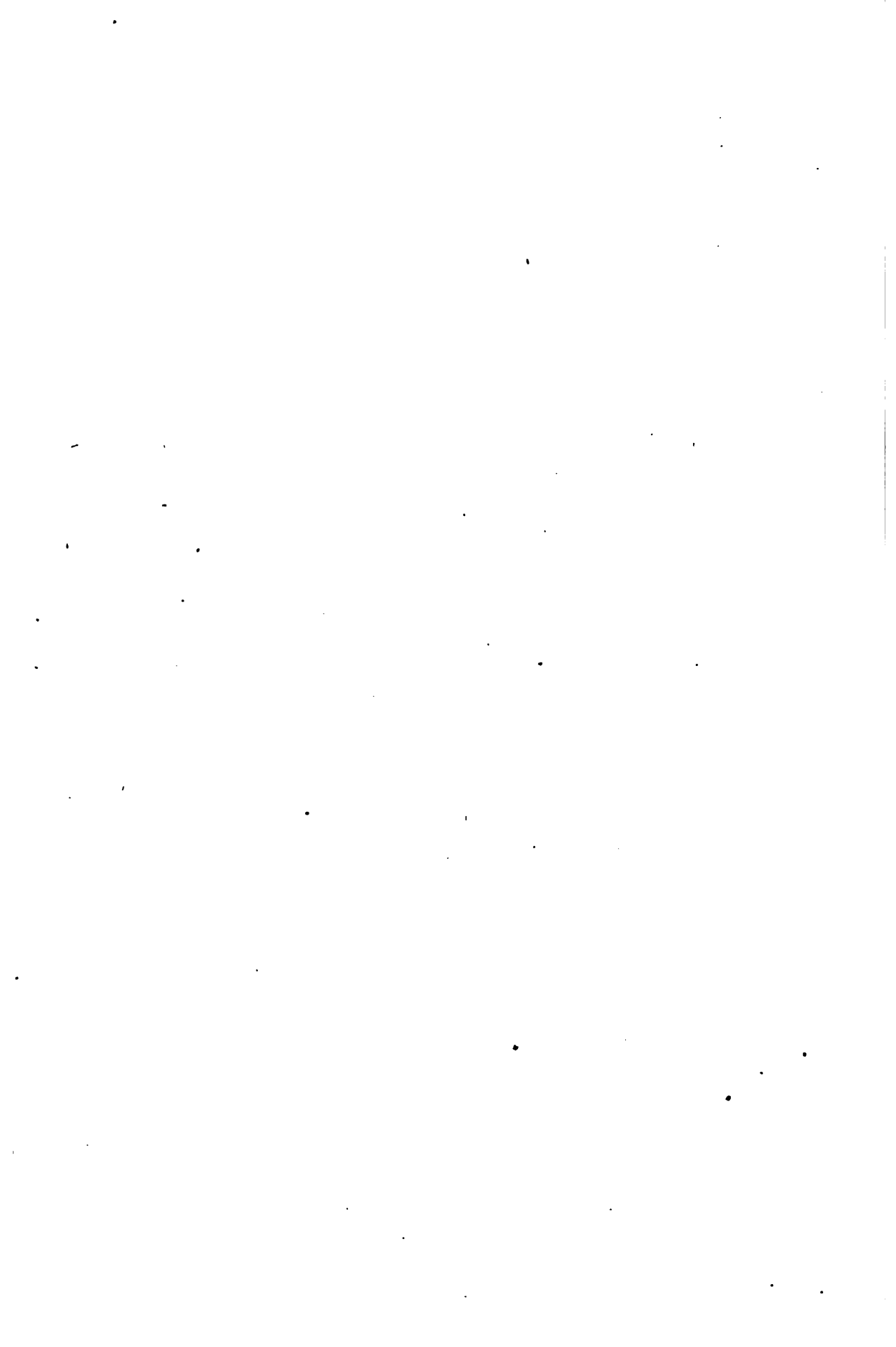
38 N. W. 737; Coast v. Spring Lake, 56 N. J. Eq. 615, 51 L. R. A. 657, 36 Atl. 21; Coler v. School Township, 3 N. D. 246, 28 L. R. A. 649, 55 N. W. 587.

² Uvalde v. Spier, 91 Fed. 594, 33 C. C. A. 501.

³ Lampasas v. Talcott, 94 Fed. 547, 36 C. C. A. 318.

⁴ Guthrie v. Lumber Co., 9 Okla. 464, 60 Pac. 247; Ruohs v. Athens, 91 Tenn. 20, 30 Am. St. Rep. 858, 18 S. W. 400.

See also, Cleveland v. School District, 51 Okla. 69, 151 Pac. 577.



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